

CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy 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 Financial Memorandum (SP Bill 14–FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 14–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The principal policy objective of this Bill is to increase access to justice by creating a more accessible, affordable and equitable civil justice system. The Scottish Government aims to make the costs of court action more predictable, increase the funding options for pursuers of civil actions and introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.
5. The policy objectives of the Bill will contribute to the realisation of the Scottish Government's Purpose by contributing to the following national outcomes:
 - **National Outcome 1** on living in a Scotland that is the most attractive place for doing business in Europe.
 - **National Outcome 11** on resilient communities by increasing public confidence in justice institutions and processes.
 - **National Outcome 16** on high quality, continually improving public services that are efficient and responsive to local people's needs.

BACKGROUND

Scottish Civil Courts Review

6. The Rt Hon Lord Gill's Report of the Scottish Civil Courts Review¹ ("the SCCR"), published in September 2009, set out the most comprehensive programme of reform of the civil courts in generations. The remit of the SCCR was to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to:

- the cost of litigation to parties and to the public purse;
- the role of mediation and other methods of dispute resolution in relation to court process;
- the development of modern methods of communication and case management; and
- the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts.

7. The Scottish Government accepted the vision provided by Lord Gill and broadly accepted the detail of his recommendations. A range of work was taken forward to implement the recommendations. First of all, the Scottish Civil Justice Council was established with the remit of preparing draft rules of procedure for the civil courts and advising the Lord President of the Court of Session on the development of the civil justice system in Scotland. Since then, the Courts Reform (Scotland) Act 2014 has been enacted which has, amongst other things, enhanced the role of the sheriff courts and introduced a new Sheriff Appeal Court.

8. During the course of Lord Gill's deliberations, Lord Justice Jackson was appointed to undertake a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales. Lord Gill took the view that recommendations from this review in England and Wales could have considerable implications for the conduct of litigation in Scotland. Accordingly, it was decided that the SCCR would not address the issue of litigation expenses in Scotland in detail and Lord Gill recommended that a separate review should be undertaken.

Review of Expenses and Funding of Civil Litigation

9. On 4 March 2011, the then Minister for Community Safety, Fergus Ewing MSP, asked Sheriff Principal James A. Taylor to chair a Review of the Expenses and Funding of Civil Litigation in Scotland. The remit of the review was to review the costs and funding of civil litigation in the Court of Session and sheriff court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review. In undertaking the review, Sheriff Principal Taylor was to consult widely, gather

¹ <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

evidence, compare the expenses regime in Scotland with those of other jurisdictions and have regard to research and previous enquiries into costs and funding, including the Civil Litigation Costs Review of Lord Justice Jackson. In so doing he was;

- to consider issues in relation to the affordability of litigation; the recoverability and assessment of expenses; and different models of funding litigation (including contingency, speculative and conditional fees, before the event (“BTE”) and after the event (“ATE”) insurance, referral fees and claims management);
- to consider the extent to which alternatives to public funding may secure appropriate access to justice, and pay particular attention to the potential impact of any recommendations on publicly funded legal assistance;
- to have regard to the principles of civil justice outlined in Chapter 1, paragraph 5 of the SCCR;
- to consider other factors and reasons why parties may not litigate in Scotland; and
- to report with recommendations to the Scottish Ministers, together with supporting evidence within 18 months of the work commencing.

10. The resulting report by Sheriff Principal Taylor is therefore interlinked with the SCCR and can be viewed as a continuation of that work; indeed the review was carried out on the assumption that Lord Gill’s recommendations, which form the basis of the 2014 Act, would be in place. These structural changes create the framework to enable the recommendations from Sheriff Principal Taylor’s review to be implemented.

11. Sheriff Principal Taylor presented his Review of Expenses and Funding of Civil Litigation in Scotland report² to the then Cabinet Secretary for Justice, Kenny MacAskill MSP, in September 2013. The report contained 85 recommendations aimed at delivering greater predictability and certainty in relation to the cost of litigation, thereby increasing access to justice. Approximately half the recommendations do not require primary legislation and will be mostly implemented by rules of court drafted by the Scottish Civil Justice Council. The recommendations regarding sanction for counsel were provided for in the 2014 Act (at section 108)³. The other recommendations require further primary legislation and most will be implemented through this Bill. The main exceptions are regulation of the claims management industry and referral fees which will be considered in the recently-announced review of legal services⁴.

12. In the response to Sheriff Principal Taylor’s report, the Scottish Government committed to drawing together a range of partners and activity across the justice system to take forward the proposals. There was also a commitment to introduce primary legislation to implement, in particular, the recommendations on speculative fee agreements, damages based agreements (“DBAs”) and qualified one way costs shifting (“QOCS”) as a package and to

² <http://www.gov.scot/About/Review/taylor-review/Report>

³ The recommendation that, with the exception of personal injury actions, recoverable expenses in actions under the simple procedure should be fixed has been implemented in section 81 of the 2014 Act and the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016.

⁴ www.gov.scot/About/Review/Regulation-Legal-Services

consider the SCCR recommendations relating to group procedure and auditors of court alongside Sheriff Principal Taylor's recommendations. Specifically, the Bill includes provisions:

- to introduce sliding caps for success fee agreements (speculative fee agreements and DBAs) in personal injury and other civil actions;
- to allow DBAs to be enforceable by solicitors in Scotland;
- to introduce QOCS for personal injury cases and appeals, including clinical negligence, and specify the circumstances when the benefit of QOCS would not apply;
- to make new provision in respect of third party and *pro bono* funded litigation and for legal representatives to bear the cost where their conduct in a civil action has caused needless cost;
- to enable the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court and sheriff court auditors to become salaried posts within the Scottish Courts and Tribunal Service; and
- to allow for the introduction of a group procedure in Scotland.

Glossary of terms

Act of sederunt	Type of delegated legislation passed by the Court of Session to regulate civil procedure in the Court of Session, the Sheriff Appeal Court and the sheriff court.
After the event ("ATE") insurance	Insurance by one party against the risk of having to pay an opponent's judicial expenses, where the insurance policy is taken out after the event giving rise to court proceedings.
Auditor	An officer of court responsible for the taxation of accounts of expenses in litigation for the purposes of quantifying the expenses due by one party to another.
Before the event ("BTE") insurance	Insurance that was in place before the occurrence of the event giving rise to the court proceedings. The insurance covers the legal fees of the insured, and may also cover an opponent's expenses (in the event of the insured being ordered to pay their opponent's expenses).
Costs shifting	The ordering that one person is to pay another's expenses. Costs shifting usually operates on a "loser pays" basis, so that the unsuccessful party is required to pay the successful party's recoverable expenses.
Damages	A sum of money awarded by a court as compensation for a wrong or injury.

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

Damages based agreement (“DBA”)	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).
<i>Dominus litis</i>	A person who has an interest in the subject matter of the litigation and, through that interest, controls and directs it.
Extra-judicial taxation	The determination of expenses relating to a litigation which have not been awarded by a court or tribunal but requested by the parties.
Judicial account	The list of expenses which a successful party will present to the unsuccessful party at the conclusion of litigation when expenses have been awarded to the successful party.
Judicial expenses	The expenses which a successful party will seek to recover from the unsuccessful party in litigation on the basis of an award of court.
Judicial taxation	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.
Legal expenses insurance	Insurance that covers a person against his or her own legal fees, including disbursements, and/or the expenses of an opponent in litigation. Legal expenses insurance includes both before the event (“BTE”) and after the event (“ATE”) insurance.
“No win no fee”	An agreement between a client and a lawyer that the lawyer will only be entitled to payment should the client be successful. In Scotland such agreements are usually in the form of speculative fee agreements.
One way costs shifting	A regime under which the defender pays the pursuer’s expenses if the action is successful, but the pursuer does not pay the opponent’s expenses if the action is unsuccessful.
<i>Pactum de quota litis</i>	An agreement for the share of litigation – a damages based agreement.
<i>Pro bono</i>	Provided free of charge.
Qualified one way costs shifting (“QOCS”)	A one way expenses shifting regime that may become qualified in certain circumstances, such as where the pursuer has acted unreasonably.

Referral fees	Solicitors may be referred cases by a variety of bodies including employer and trade organisations, trade unions, Citizens Advice Bureaux and claims management companies. The arrangement will often involve the payment of a fee by the solicitor, known as the referral fee.
Review of Civil Litigation Costs	A fundamental review of the rules and principles governing the costs of civil litigation in England and Wales, conducted by Lord Justice Jackson in 2009. The Review of Civil Litigation Costs: Final Report was published in December 2009.
Scottish Civil Courts Review (“SCCR”)	Review of Scotland’s civil courts, chaired by the Rt. Hon. Lord Gill and concluding in the publication of the Report of the Scottish Civil Courts Review Volumes 1 and 2 in September 2009.
SLAB	The Scottish Legal Aid Board.
Speculative fee agreements	An agreement between lawyers and their clients in Scotland by which clients are only required to pay legal fees if the litigation is successful. Should they be unsuccessful, clients may still be liable for the expenses of their opponents and in some cases may be liable to pay their lawyer a lower fee.
Success fees	Fees that may be paid by successful parties to their lawyers following a speculative fee agreement or damages based agreement.
Tables of Fees	Tables that regulate the amount of solicitors’ fees for litigation which may be recovered as judicial expenses.
Taxation	The determination of a successful party’s expenses in litigation by an auditor of court. This process is unconnected with the tax system.

Existing law and practice

13. Traditionally in Scotland, civil litigation has been funded in three ways – through private funding, civil legal aid, or trade union funding. In the last 20-30 years this situation has changed. Increased pressure on 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 DBAs to fill the void.

14. A speculative fee agreement is a private funding agreement between a lawyer and a client under which the lawyer agrees to represent the client on a ‘no win, no fee’ basis.

Under the agreement, the lawyer does not generally receive a fee from the client if the case is lost. However, if the case is won, the lawyer's costs (the 'base costs') are generally recoverable from the losing party. In these cases, the lawyer can charge an uplift on these base costs, known as the 'success fee' which is payable by the client. An example of an 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.

15. The maximum success fee that may be charged under a speculative fee agreement is prescribed by secondary legislation (the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992). In all cases, the current maximum uplift that may be charged is 100% of the base costs.

16. DBAs are a different form of 'no win no fee' agreement under which a lawyer's fee is calculated as a percentage of the client's damages if the case is won. Commonplace in the USA, most frequently in personal injury cases but also available in commercial actions, these agreements cannot currently be enforced by solicitors in Scotland. Advocates are also expressly forbidden by the Faculty of Advocates from entering into damages based agreements. However, claims management companies ("CMCs") are able to offer such agreements. Unlike a solicitor, a CMC cannot raise court proceedings, cannot appear in court and cannot instruct counsel. The activities of such firms are becoming more common in Scotland as they can enter into DBAs whilst such agreements cannot be enforced by a solicitor. Some claims management companies in Scotland are wholly owned by solicitor firms which are regulated by the Law Society of Scotland. The activities of such companies will be considered by the Review of Regulation of the Legal Services referred to above.

CONSULTATION

17. Sheriff Principal Taylor's review consulted extensively prior to making recommendations to the Scottish Ministers. The potential provisions for inclusion in the Bill were also the subject of the Scottish Government 'Consultation on Expenses and Funding of Civil Litigation Bill'⁵, published on 30 January 2015. There were 40 responses to the consultation, received from: solicitor firms and solicitor organisations (30%), insurance industry (10%), local authorities (10%), voluntary sector (10%), court auditors (10%), other public bodies (10%), medical defence organisations (5%), Senators of the College of Justice, Sheriffs Association Scotland, Faculty of Advocates, a corporate business and other individuals. On 29 May 2015, the Scottish Government published the non-confidential consultation responses⁶ and on 28 August 2015 an independent analysis⁷ was published. A summary of comments on the proposals for the Bill is provided in the relevant sections below.

POLICY OBJECTIVES: SPECIFIC PROVISIONS

18. Underpinning Sheriff Principal Taylor's review is his conclusion that, contrary to what might be the case in England and Wales, there is little evidence of a "compensation

⁵ <http://www.gov.scot/Publications/2015/01/9932>

⁶ <http://www.gov.scot/Publications/2015/05/4629>

⁷ <http://www.gov.scot/Publications/2015/08/6159/0>

culture” in Scotland. However, he highlighted a “David and Goliath relationship” between pursuers and defenders in personal injury actions in Scotland which resulted in an inequality of arms. His recommendations aim to address this “asymmetric relationship”. Sheriff Principal Taylor had highlighted the difficulty where, in general terms, people either have to be poor enough that they qualify for legal aid or so wealthy that the costs of litigation do not matter (the “excluded middle”).

19. The policy objective of the Bill is to enhance access to justice for all, including the “excluded middle”, by promoting success fee agreements and enhancing transparency and predictability for clients in the fees they are liable to pay if they bring a claim to the civil courts.

20. In contrast with the position in England and Wales, the Scottish Government is committed to maintaining the scope of civil legal aid in Scotland. A review of legal aid in Scotland has been announced⁸. The package of proposals in this Bill, as set out in the following sections, would increase the options available for pursuers to fund their actions privately. In relation to personal injury actions, it would appear that such alternative funding arrangements are already used much more commonly than legal aid. In 2014-15, over 9000 personal injury actions were raised in Scotland, but only 127 of these were legally aided.

PART 1: SUCCESS FEE AGREEMENTS

21. The policy objective is to increase access to justice via success fee agreements and in doing so to provide a greater level of certainty and transparency for pursuers. The Bill confers powers on the Scottish Ministers, through regulations, to stipulate the maximum amount of damages that can be used to calculate the solicitor’s success fee. Although the Bill leaves it open to Ministers to specify how the success fee will be calculated, it is expected that this will be done by reference to the amount of damages awarded or agreed as recommended by Sheriff Principal Taylor. This will be the case whether the solicitor has agreed a speculative fee agreement or a damages based agreement with the client.

22. Part 1 also provides for DBAs to be enforceable by solicitors in Scotland for the first time. Success fee agreements will not, however, be competent for family proceedings or other civil proceedings that may be specified by the Scottish Ministers in regulations.

23. Specifically, the Bill will:

- (i) enable the introduction of caps on the amount of a damages award which can be included in the legal provider’s success fee in regulations. This will offer clarity and transparency and increase the attractiveness of success fee agreements to clients. It is intended to use regulations made under powers in the Bill to introduce a sliding scale of percentage caps. Sheriff Principal Taylor recommended the following scales.
 - In personal injury cases:
 - up to 20% for the first £100,000 of damages;

⁸ <http://www.gov.scot/About/Review/legal-aid-review>

- up to 10% for the next £400,000; and
 - up to 2.5% of damages over £500,000;
 - all other civil actions — up to 50% of the monetary award recovered (all caps include VAT).
- (ii) allow lawyers to enter into DBAs except in family actions⁹ (which are also excluded for speculative fee agreements), whereby lawyers receive their fees as a percentage of the damage awarded to the pursuer;
- (iii) require the solicitor to meet all outlays (except insurance premiums) in a success fee agreement (including counsel's fees) inclusive of VAT in personal injury cases (giving consumers certainty as to the total cost of their legal representation);
- (iv) allow the provider of a success fee agreement to retain any expenses recovered from the unsuccessful party, **in addition to** the agreed success fee;
- (v) require that a success fee agreement in personal injury cases must be 'no win no fee' but allow them to be entered into in commercial cases on a 'no win lower fee' basis;
- (vi) allow that the damages awarded for future loss may be included as part of a success fee calculation if they are awarded as a lump sum (rather than a periodical payment) and sets the rules where this would apply – if the future element of damages are set as a periodical payment by the court or by agreement, that part of the damages will not be included for the purposes of the success fee agreement;
- (vii) provide that a success fee agreement must be in writing and specify the percentage which will be paid by the client to the provider as a success fee in the event of success; and
- (viii) provide the Scottish Ministers with a power to make further provision by regulation about the form and content, the manner in which they are entered into, their modification and termination, the resolution of disputes, and the consequences of failure to meet these requirements.

Speculative fee agreements

24. Sheriff Principal Taylor identified three types of speculative fee agreement available at present.

⁹ Sheriff Principal Taylor noted: "The usual position in Scotland is that expenses follow success. However, given the nature of family actions, a degree of flexibility has been applied by the courts in order to take account of the different types of family actions and the manner in which the parties conduct the litigation." (Chapter 2, paragraph 83) He went on to state: "I do not consider that a recommendation from me is either appropriate or necessary in this respect. As has been noted from the cases referred to, the Scottish judiciary has been much more willing to exercise its discretion when called upon to make awards of expenses in divorce actions and actions involving children." (Chapter 2, paragraph 93) The Scottish Government concurred with this and the Bill excludes family actions from the provisions about DBAs.

- 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.

25. In a speculative fee agreement an enhanced fee will normally be charged in the event of success. The success fee is usually 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. This contrasts with DBAs whereby the success fee is calculated as a percentage of the client's damages or recovered funds. 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.

26. Sheriff Principal Taylor, in Chapter 7 of his report, observed that the growing dependence on success fee agreements is likely to continue, if not strengthen. He was in favour of such arrangements from an 'access to justice' and 'affordability' perspective.

Damages based agreements

27. In DBAs, a lawyer takes a proportion of the pursuer's recovered damages as a fee in a successful litigation. 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 specific prohibition against DBAs. 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*.

28. Traditionally, funding agreements like DBAs have been thought to create a threat of conflict of interests by giving the lawyer a direct interest in the pursuer's damages. There has been a fear that such agreements could create adverse incentives for lawyers by encouraging them to settle cases early in order to minimise their own costs and increase their profits. In some cases, however, firms of solicitors have set up separate CMCs, so that they can offer DBAs to their clients. As a result of this practice a number of different business models and funding companies have come into existence, each offering a slightly different service to clients.

Consultation

29. Questions around the proposals for success fee agreements were included in the Scottish Government consultation paper¹⁰. Although several respondents observed that the market place regulates most agreements at present, there was general consensus that the impact of the proposed statutory caps on speculative fee agreements and DBAs would benefit pursuers of claims. There was wide agreement also that the overall package would significantly minimise the risk to pursuers, particularly the proposal to introduce QOCS.

30. There was agreement, from those addressing the question, that statutory controls should apply to all who offer DBAs, including CMCs. Consideration was given to regulating CMCs by provision in the Bill. However, it was concluded that there were few CMCs operating in Scotland and that more information was required before a decision was taken on regulation. Consequently, regulation of CMCs will be considered as part of the Review of Regulation of Legal Services.

31. Respondents were divided with respect to Sheriff Principal Taylor's proposal not to ring-fence the element of damages awarded for future loss. It was observed by those in favour of ring-fencing (mainly defender respondents) that damages for future loss were awarded for a specific purpose and to put the pursuer back in the position they were in but for the incident.

32. Those agreeing with Sheriff Principal Taylor's proposal not to ring-fence future loss (mainly pursuer respondents) referred to the complexity of work and skill required to bring cases involving future loss to a successful conclusion. In addition, and in agreement with Sheriff Principal Taylor, they queried the feasibility of separating future from past loss, and agreed that a risk of ring-fencing was that delay may be incentivised so that more value in the case is attributed to past loss.

33. In the development of the Bill, two different elements were considered: lump sum payments and periodical payments. Damages for future loss are already protected from being included in the calculation of the success fee if they are to be paid as periodical instalments. As regards lump sum payments, the Scottish Government concurred with the view of Sheriff Principal Taylor that it might not be feasible to separate future to past loss and that some pursuers would look to delay to add value to past loss. Safeguards recommended by Sheriff Principal Taylor have been included in the Bill, however, in the form of independent scrutiny of the settlement where the lump sum exceeds £1,000,000 and the solicitor **has not advised** the client that the future element of the damages might be paid in periodical instalments

Benefits

34. Representation via a success fee agreement is a way of providing access to justice for those who neither qualify for legal aid nor have the resources to fund a litigation privately. Greater use of success fee agreements can assist in maintaining the focus of legal aid funding on cases where other sources of funding are not reasonably available. Whilst it is broadly

¹⁰ <http://www.gov.scot/Publications/2015/01/9932>

accepted that the impact of market forces has meant clients typically retain between 75% and 85% of the damages awarded, the introduction of caps will provide clarity and transparency so as to increase the attractiveness of success fee agreement to clients. In turn, law firms representing pursuers are likely to receive an increase in business as more pursuers are able to bring actions.

35. The policy objective of allowing the use of DBAs as a funding option in litigation is to ensure that litigants have access to a wide choice of funding methods. The current restrictions on funding options might be restricting both client and provider choice. CMCs in Scotland have been offering damages based agreements for a number of years and a significant proportion of litigation is already funded by them with clients attracted by their apparent simplicity. By removing the restrictions on solicitors, it is possible that even more clients will benefit from moving to DBA funding. This is especially so for those who secure a DBA when beforehand they might have taken forward their case by themselves or might not have pursued their claim. In these cases, removing the current restrictions might enable the legal services market to expand. Opening up to a wider choice of funding options for pursuers and their solicitors should allow more claims with merit to be brought forward. This, coupled with the greater certainty afforded by the introduction of caps, will increase access to justice for pursuers of civil litigation.

36. The policy objective of accepting Sheriff Principal Taylor's recommendation not to ring-fence future loss would remove any potential incentive on the part of a solicitor to delay a case so that more value is attributed to past loss.

Other options

37. Sheriff Principal Taylor recognised in his review that market forces maintain the level of award retained by pursuers. Typically, agreements provide that the client will retain between 75% and 85% of the damages awarded, though agreements drafted by some CMCs leave the pursuer with only 67% of the award in a successful action. This has led some to suggest that caps are not required as the market is working. However, the Scottish Government considers that greater clarity and transparency for clients can be achieved via caps and this will increase the attractiveness of success fee agreements to clients.

PART 2: EXPENSES IN CIVIL LITIGATION

Qualified one-way cost shifting

38. The policy objective for the introduction of QOCS is to protect the legitimate pursuer in a civil litigation from the possibility of bearing the defender's costs. Whereas the provisions of the Bill on success fee agreements gives clarity and transparency as to fees, QOCS will protect pursuers from the risk that they might become liable for the expenses of the defender, usually an insurance company. The Bill will introduce a general rule that the pursuer in an action for reparation in respect of personal injuries should not be found liable in expenses. The rule will, however, be subject to exceptions where the pursuer will lose the benefit of QOCS. Specifically, the Bill will:

- (i) introduce a general rule, that the pursuer in an action for reparation in respect of personal injuries should not be found liable in expenses.
- (ii) provide that the general rule at (i) is subject to exceptions, with the pursuer losing the benefit of QOCS:
 - where the court finds that fraud on the part of the pursuer is established on the balance of probabilities;
 - where the pursuer's conduct is found by the court to have been an abuse of process; or
 - where the pursuer has acted unreasonably in bringing or conducting the litigation.

Background

39. The introduction of QOCS was recommended in Chapter 8 of Sheriff Principal Taylor's report. What Sheriff Principal Taylor proposes is the introduction of QOCS in personal injury, including clinical negligence, litigation. It is 'one-way' because it would only be the pursuer who would be awarded expenses if successful, and 'qualified' because there would be circumstances in which the pursuer might lose the benefit of the rule.

Consultation

40. Questions around the proposed introduction of QOCS were included in the Scottish Government consultation paper¹¹. Views were more or less evenly divided between defender and pursuer responses on whether the introduction of QOCS would increase access to justice. Respondents representing the interests of insurers/defenders observed that the expense of litigating was an issue for both sides and it was disproportionate to defenders to remove all cost risks from one side. It was suggested that the proposals would lead to an increase in unmeritorious claims and that defenders would be forced to settle actions based on business considerations rather than the factual or legal merits of the case.

41. In direct contrast, respondents representing the interests of pursuers viewed QOCS as necessary to remove obstacles and increase access to justice for those with meritorious claims. They observed that the current system accentuates the "asymmetrical relationship" identified by Sheriff Principal Taylor and that QOCS would level the playing field.

42. In developing the Bill, it was noted that despite the defenders' concerns about QOCS, at present it is estimated that they only seek their expenses from unsuccessful pursuers in 0.1% of cases.¹² In addition, it was considered that solicitors were unlikely to accept unmeritorious cases and that there was a further check with the introduction of pre-action protocols in the sheriff court for cases of a value of £25,000 or less.

¹¹ <http://www.gov.scot/Publications/2015/01/9932>

¹² SP Taylor: Review of Expenses and Funding of Civil Litigation in Scotland, p170, para 50 of Jackson LJ, Review of Civil Litigation Costs: Preliminary Report, Vol. 1, (2009), Chapter 25, paragraph 2.6.

Benefits

43. Every litigation involves costs and potential litigants have to consider not only their own legal costs but also their potential exposure to the other side's costs. The costs involved will often be significant in comparison to the value of the case. Indeed, in many cases, the legal costs will exceed the amount at issue in the proceedings. This raises issues of access to justice, for if a pursuer's costs would exceed the likely benefit from the litigation, then a rational pursuer would not choose to bring a case at all. So there is a general rule of "costs shifting" that expenses follow success. In most cases, the successful party will be entitled to an award of expenses against the unsuccessful party which has the effect of shifting the costs of the litigation to the unsuccessful party. At present, the same rule applies whether the successful party is the pursuer or the defender. However, most defenders in personal injury actions have the strength of an insurance company behind them. It is also the case that a legally aided pursuer will benefit from the "legal aid shield" under section 18(2) of the Legal Aid (Scotland) Act 1986 which can be viewed as a form of one way costs shifting i.e. a defender will usually not recover their expenses where the pursuer is legally aided.

44. Sheriff Principal Taylor's proposals on DBAs and success fee agreements effectively limit the potential liability of a pursuer to their own agents. However, they do nothing to limit the potential liability of the unsuccessful pursuer to pay the expenses of the successful defender. As a result, it may be that pursuers would be deterred from making use of the courts for a meritorious claim in reliance on an speculative fee agreement or a DBA. The QOCS proposal addresses this by providing that in specified categories of case the pursuer will not be liable to the defender's expenses in the event that their case is unsuccessful.

45. As a result, pursuers and their lawyers are likely to benefit significantly from this proposal. Firstly, in the event they lose a case, they would no longer generally be liable for defender costs. Secondly, more meritorious cases are likely to be pursued by pursuers. Thirdly, the proposal may lead to earlier and more reasonable tender offers from defenders, more realistic damages being agreed at settlement, and to a higher proportion of cases won by pursuers.

46. As to the risk in a rise in fraudulent or unmeritorious claims, the Scottish Government considers that the introduction of pre-action protocols for claims of under £25,000 in the sheriff court as well as the risk assessment by a solicitor when considering whether to act in a case will be mitigating factors¹³. The provision in the Bill setting out the circumstances where the benefit of QOCS would be lost will be an additional safeguard. Finally, it has been suggested that the introduction of QOCS in Scotland will attract more CMCs to operate in Scotland where they are currently unregulated. Regulation of CMCs will, however, be part of the Review of Regulation of Legal Services in Scotland.

Other options

47. The alternative approach to protecting the pursuer from the possibility of bearing the defender's costs would be to rely upon insurance. Some pursuers might be protected by pre-

¹³ The Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016

existing insurance policies which include cover for legal expenses (referred to by Sheriff Principal Taylor as “before the event insurance”). Otherwise, it might be possible to insure against the potential liability for the opponent’s expenses by taking out a policy after the litigation is commenced. However, the availability of ATE insurance in Scotland is limited and attracts high premiums (the Scottish Government has been informed that this is likely to be at least 30% of the cover sought). Whilst there may be circumstances in which such insurance is appropriate, it is clear that it is not the best option and may not be a viable option in many cases.

Pro bono funding

48. The Bill will make provision that Scottish civil courts have the power to award expenses in favour of a successful party who has been represented on a pro bono basis. The payment of such an award should be made to a registered Scottish charity prescribed by the Lord President which seeks to improve access to justice in respect of civil proceedings in Scotland (e.g., Citizens Advice Scotland and Justice Scotland).

49. 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. He 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 speculative 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.

Third party funding

50. The Bill will make provision for commercial third party funders of civil litigations to be liable for judicial expenses with the funded litigant. There is also an obligation placed on parties to disclose to the court and intimate to all parties the means by which the litigation is being funded.

51. Sheriff Principal Taylor considered that it was appropriate to make provision for third party funding of litigation, where a third party agrees to fund a share of the costs of litigation in exchange for a proportion of the rewards of success. He observed that one deficiency in the present law was that third party funders would not generally be exposed to any liability for expenses. He noted, in paragraph 54 of Chapter 11 of his report, that the Scottish courts will only impose liability upon a person who is not a party to the proceedings where that person is a *dominus litis*. Third party funders would not normally be *dominus litis* and would not be liable in expenses. Sheriff Principal Taylor recommended that this should change. The Scottish Government does not wish to discourage commercial funding but is mindful that the non-funded defender should not be disadvantaged where the funded claim is unsuccessful.

52. Sheriff Principal Taylor also recommended that there should be an obligation on a party who is receiving third party funding to disclose this fact, together with the type of agreement (but not its details) and the identity and address of the funder. The only

circumstance in which a litigant is presently obliged to disclose that he or she is in receipt of third party funding is where that litigant is in receipt of civil legal aid¹⁴.

53. This reform will not affect “crowdfunding” since the funders do not have a financial interest in the outcome of the proceedings i.e. they are not commercial funders.

Awards of expenses against legal representatives

54. The policy objective is to make clear in statute that solicitors are personally liable for costs resulting from their own conduct in proceedings. The Bill will therefore make provision that the court has the power to make solicitors and other legal representatives personally liable for expenses occasioned by a serious breach of their duty to the court.

Background

55. Lord Gill sought to address an issue raised in responses to the review consultation that in current practice mistakes cost money, and, therefore, a lawyer who has caused needless cost should bear that cost. Currently awards of expenses may be made against solicitors personally at common law (e.g. *Stewart v Stewart* 1984 SLT (Sh,Ct.)). Whilst the Scottish Government considers that the inherent power of the court would allow it to make orders to the effect envisaged by Lord Gill’s recommendations at present, it appears that there is a reluctance on the part of the courts to exercise existing powers. Consequently, Lord Gill made it clear that he favoured such powers being set out in primary legislation.

Consultation

56. Questions around the proposal to make legal representatives personally liable for expenses occasioned by their own conduct were included in the Scottish Government consultation paper¹⁵. Views were divided and, of the 24 responses which addressed the issue, 14 (58%) supported the proposal and 9 (38%) did not offer support.

57. In developing the policy in the Bill, it was noted that the courts already have the power to make legal representatives personally liable for expenses as a result of inappropriate behaviour. It was considered that it was appropriate to state the power plainly in statute especially as some of the consultees representing consumers and vulnerable groups had expressed concern about lawyer behaviour.

PART 3: AUDITORS OF COURT

58. The policy objective is to increase transparency and consistency in the taxation of accounts in civil proceedings, whilst preserving the fair and adversarial character and integrity of the auditing process. (“Taxation” is defined in the glossary at the beginning of this Policy Memorandum.)

¹⁴ Act of Sederunt (Civil Legal Aid Rules) 1987

¹⁵ <http://www.gov.scot/Publications/2015/01/9932>

59. Auditors of court perform important functions in resolving disputes about expenses in which considerable amounts of money may be at stake. The Bill makes provision for auditors of court to become salaried public positions within the Scottish Courts and Tribunal Service (“SCTS”). It obliges the Auditor of the Court of Session to issue guidance to auditors of court about the exercise of their functions, including the types and levels of expenses that may be allowed in an account of expenses. It also places a duty on SCTS to publish details of the number of taxations carried out by auditors and the fees received for that work. The Scottish Government considers that these reforms will enhance confidence in the taxation process.

Background

Auditor of the Court of Session

60. The office of the Auditor was established by Act of Sederunt on 6 February 1806 and the Auditor was made a member of the College of Justice by virtue of the Court of Session Act 1821. The Auditor of the Court of Session is appointed by Scottish Ministers and after consultation with the Lord President of the Court of Session. The Auditor of the Court of Session is entitled to hold office until his or her 65th birthday.

Sheriff court auditors

61. At present, sheriff court auditors are commissioned by the sheriff principal. The majority are employed by SCTS, but some are independent practitioners (ex sheriff clerks or ex sheriff clerk deutes, or in the case of Edinburgh, two solicitors). The appointment process does not include a formal assessment of skills to carry out the role of auditor. The sheriff clerks who have auditor of court commissions carry out judicial taxations as part of their SCTS employment. The independent practitioner auditors who currently provide this service to the sheriff courts are remunerated by means of a fee based on a percentage of account submitted for taxation.

Taxation

62. The fees payable for judicial taxations (i.e., taxations remitted by the courts) are based on a percentage of the gross account as submitted, not on the value of the account as taxed¹⁶. The auditor accordingly has no financial interest in upholding or rejecting any points of dispute in relation to the account. However, in the Court of Session, where the Court may remit a motion for an additional fee to the Auditor and where the Auditor fixes the amount of the percentage increase, it could be said that there is a potential financial interest in deciding whether an additional fee should be awarded.

63. Auditors of court also carry out extra-judicial taxations in cases where there is a dispute about an account. Taxation of extra-judicial work is also necessary by law and in practice in certain circumstances. The accounts of solicitors must be taxed when representing:

- an administrator of a company under the Insolvency Acts;

¹⁶ The Court Fees (Miscellaneous Amendments) (Scotland) Order 2016.

- a liquidator appointed by the court;
- a liquidator in a creditor's voluntary liquidation;
- a trustee in bankruptcy;
- a judicial factor ;
- a curators of any kind; or
- a guardian.

A solicitor who acts as an administrator of a client's funds under a power of attorney or in a representative capacity, e.g. sole executor may well consider that taxation of the account affords protection and reassurance to those now interested in the estate. A report by the Auditor of the Court of Session is appropriate in these cases.

Scottish Civil Courts Review

64. One of the main issues raised in the SCCR report is that the appointment processes for auditors in both the Court of Session and the sheriff court do not conform to standard appointment procedures. The SCCR consultation responses raised a number of concerns about whether sheriff clerks in particular have the necessary skills and training. A further problem is the inconsistency of approach, firstly, between the Auditor of the Court of Session and sheriff court auditors and, secondly, between different individual sheriff court auditors and a general lack of transparency of arrangements.

65. In addition, the SCCR found that there was concern about the arrangements for taxing accounts of expenses. It reflected on the views expressed in the Report by the Research Working Group on the Legal Services Market in Scotland (2006)¹⁷ on a lack of transparency and consistency of taxation decisions, and potential conflicts of interest.

66. As a consequence, the SCCR considered that the taxation of judicial accounts should be part of the service provided by the civil court system and that the fees payable for taxing such accounts should be based on the cost of providing the service. Consequently, the SCCR recommended that the offices of Auditor of the Court of Session and sheriff court auditors should be salaried posts, that the status of the Auditor of the Court of Session as a member of the College of Justice should continue, and that fees payable for extra-judicial taxations and assessments should be paid into public funds. The SCCR also recommended that:

- the Auditor of the Court of Session should have a role as 'head of profession';
- the Auditor of the Court of Session should have jurisdiction over taxations in actions raised in the Sheriff Personal Injury Court.

Courts reform

67. In its response to the SCCR Report, the Scottish Government outlined broad agreement to the recommendations made about the Auditor of the Court of Session, including

¹⁷ <http://www.gov.scot/Publications/2006/04/12093822/0>

that it should be a salaried post, but took the view that judicial taxation carried out by sheriff clerks was the responsibility of the Scottish Court Service (now SCTS) and it would be for them to devise the most practical and cost effective solutions. The issue was not taken forward in what is now the 2014 Act, but the Scottish Government indicated it would be addressed as part of the response to the Sheriff Principal Taylor's review.

68. The 2014 Act also introduced the Sheriff Appeal Court which led to the introduction of the new office of auditor of the Sheriff Appeal Court. The Bill makes similar provision for this auditor as it does for the other auditors of court.

Consultation

69. Questions around auditors of court were included in the Scottish Government consultation paper¹⁸. There were 23 responses on the issue, with the majority (19 (83%)) in favour of the proposal to make the Auditor of the Court of Session and auditors in the sheriff courts into salaried public appointments. The four responses against salaried appointments came from either current auditors or their representatives. Reference was made to the current potential conflict of the Auditor of the Court of Session's fee being calculated as a percentage of the whole judicial account, not just the part in dispute.

70. The Scottish Government concurred with majority view that auditors of court should be salaried posts. It noted the concerns of those with an interest who opposed the proposal and, although the Bill does not directly address this, it is intended that there be transitional arrangements in regulations under the Bill to allow the present incumbents to continue as self-employed until their retirement.

Bill provisions

71. Although the SCCR recommended that the Auditor of the Court of Session should be a salaried post (as indeed it was until 1997) along with sheriff court auditors, it made no suggestions about who should have responsibility for appointment and governance of the position. It did, however, recommend that the Auditor of the Court of Session should have a role as "head of profession" and it is intended that the Auditor will have a role as lead professional with oversight of all auditors and quality assurance obligations. Since the other officers of court (including some sheriff court auditors) are SCTS employees the Scottish Government considers the natural employer is the SCTS and not the Scottish Government or another body. The Auditor of the Court of Session will continue to have offices in Parliament House but will sit under the wing of SCTS, which will have the function of appointing individuals to the offices of auditor specified in the Bill, including the Auditor of the Court of Session. The Auditor will continue to enjoy functional independence and the auditing process will continue as it has in the past (subject to any changes to the process made by the Court of Session by act of sederunt).

¹⁸ <http://www.gov.scot/Publications/2015/01/9932>

72. It is not proposed that the new employment arrangements will be applied to the current Auditor of the Court of Session who was appointed on a self-employed basis and has security of tenure until he reaches his 65th birthday. Recruitment and management of the Auditor will thereafter be a matter for SCTS which will have the power to appoint for such period and on such terms and conditions as it determines – as it does for all of its other staff bearing in mind its statutory obligations under the Judiciary and Courts (Scotland) Act 2008.

73. The Bill confers a duty on the Auditor of the Court of Session (as head of profession) to issue written guidance to the other auditors of court about the exercise of their functions which must relate to the types and levels of expenses that may be allowed in an account of expenses. All auditors of court (as well as the Auditor of the Court of Session) will be required to have regard to the guidance which must be published and may be revised as appropriate from time to time.

74. A duty will be placed on SCTS to publish an annual report of the number of judicial taxations carried out by auditors of court during a financial year and the payments received for that work. These duties will be applied on a transitional basis to the current Auditor of the Court of Session and those sheriff court auditors already employed by SCTS.

Benefits

75. Bringing the Auditor of the Court of Session, auditor of the Sheriff Appeal Court and sheriff court auditors within the SCTS will enable a consistent approach to be taken to the delivery of the auditor function. This will in turn provide an opportunity to develop and share knowledge, experiences and skills within a team of professionals, led by a head of profession. The Scottish Government expects this to lead to greater transparency, accuracy and consistency of approach, whilst preserving the adversarial character and integrity of the auditing regime. The Scottish Government considers that the reforms proposed will enhance confidence in the taxation process.

Other options

76. An alternative approach would be to leave the delivery of auditor and taxation function as it currently operates. However, this would not address the concerns expressed about a lack of transparency, consistency of taxing decisions and potential conflicts of interest.

PART 4: GROUP PROCEEDINGS

77. The policy objective is to allow for a group procedure (also known as a multi-party action or a class action) to be developed for Scotland. It will only be available in the Court of Session. It will be an “opt-in” only procedure and open to third party representatives (e.g., a consumer rights organisation or an environmental organisation). It will allow a single representative case to be heard in a situation where a number of people are seeking redress. The determination in that case will be adopted for all the cases that have opted-in to the action.

78. Specifically, the Bill 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, and those claims are related. Success fee agreements and QOCS will be available for group proceedings, where appropriate.

Background

79. A group procedure is relevant in a situation where a number of potential litigants have the same or similar rights. Traditionally, a group procedure covers a number of different categories.

- *Class actions* which are brought by a named pursuer who is typically the representative of a class (or group) of persons, and who seeks redress both for him/herself and for the other class members.
- *Organisation actions* which are brought by an organisation, such as a consumer protection or environmental organisation, on behalf of its members or the public at large. These are sometimes known as ‘external pursuer actions’ since a group or association is granted standing to sue on behalf of consumers for damages suffered by them.
- *Public interest actions* which are brought by public officials who seek redress for the public at large, or for a section of it.

80. Group procedures can take the form of either an ‘opt-in’ or ‘opt-out’ regime.

- ‘*Opt-in*’ means that the potential class of pursuers is identified and members must opt in to claim before or during the proceedings (normally by a specific cut-off date).
- ‘*Opt-out*’ means that the potential class of pursuers is not necessarily identifiable at the start of the proceedings. Consequently, a detailed description of the group is agreed or approved by the court and steps taken to publicise the proceedings so that pursuers can be identified and advised of their right to opt out. The court may award ‘global damages’ based on an estimate of the potential number of pursuers. Those whose claims fall within the class but who do not actively opt out of the proceedings may have their rights determined without having participated in the proceedings.

81. There are a number of different and sometimes competing policy aims in developing group procedure which range from assisting the efficiency of the courts and managing court business to deterring harmful behaviour on the part of businesses, facilitating collective redress and encouraging corporate social responsibility. In all scenarios, it is important that the development of a procedure to facilitate group procedures is balanced against the desire to avoid encouraging an opportunistic litigation culture.

Current position in Scotland

82. There is currently no group procedure in Scotland. Up to now a pragmatic approach has generally been taken in relation to mass litigation. Cases raising similar issues have been sisted pending the outcome of a test case. In some situations this system has worked

reasonably well, most notably in relation to single event disasters with an identifiable group of pursuers.

83. Some recent mass litigation, for example, prisoners' 'slopping out' claims or litigation relating to the lawfulness of bank charges has, however, shown the limitations of the current system. These are that despite the common issues raised by these actions there are no mechanisms whereby they can be transferred into a single court and managed as a group. In consequence, each pursuer has been required to pursue a claim individually resulting in unnecessary expense for both parties.

84. Discussion in relation to whether there should be a group procedure and what form that should take has been on-going since 1979 when the Scottish Consumer Council set up a working party to look into the matter¹⁹. This recommended the introduction of formal procedures for class actions and canvassed proposals to introduce actions by bodies such as consumer groups.

85. The Scottish Law Commission (SLC) considered the issue at the instance of the Lord Advocate and produced a report in 1996²⁰. The SLC recommended that a procedure for group procedures be introduced for the situation in which a number of persons have the same or similar rights. The procedure would, in so far as possible, follow that of an ordinary action but with certain special features. Special features would include a provision for court approval or 'certification' that the proceedings meet certain criteria. The SLC favoured the 'opt-in' procedure.

86. More recently, the SCCR consulted on the issue. It found that a large majority of respondents were in favour of the introduction of some form of multi-party procedure but that there was a wide range of views regarding the aim of such a procedure. Some respondents were keen to see a multi-party procedure adopted primarily to enable the courts to deal with multiple claims in a more satisfactory way. Other respondents considered that collective redress mechanisms were necessary in order to deter unlawful behaviour on the part of businesses and encourage safer working practices. The SCCR endorsed the recommendations of the SLC and recommended that a multi-party procedure should be introduced in Scotland²¹.

87. Sheriff Principal Taylor was tasked, in his review, with considering the related questions of expenses and funding. His consideration of the matter was limited by the fact that questions of expenses and funding cannot be separated from questions of procedure. He noted in his report that the new procedures necessary to permit group procedures in Scotland would have to be created before final decisions about how such actions should be funded could be made²².

¹⁹ Scottish Consumer Council (1982) *Class Actions in the Scottish Courts: A new way for consumers to obtain redress?*

²⁰ Scot Law Com No 154

²¹ Scottish Civil Courts Review Chapter 13 (Volume 2)

²² Taylor Report, p287, paragraph 9.

Consideration of issues in the current context

88. The Scottish Government committed in its consultation on the Courts Reform Bill (now the 2014 Act) to address Lord Gill's recommendations in respect of group procedures in the context of its response to Sheriff Principal Taylor's review. The Scottish Government's response to the Taylor Review also made a commitment to give this further consideration with partners. Following on from this and the work undertaken by Lord Gill and Sheriff Principal Taylor, the issue of group procedures has been discussed in the Scottish Government's short life working group on Taylor implementation and with Which?

Consultation

89. The Scottish Government consultation put forward three options.

- **Option 1:** The first and simplest option would be to introduce a "case management" procedure for mass litigation in the situation where a number of cases already before the courts give rise to similar issues of fact or law. It would be similar to the Group Litigation Order ("GLO") procedure in England and Wales. The procedure envisaged would be an "opt-in" procedure and could include a number of elements recommended by Lord Gill.
- **Option 2:** The aim of this option would be to introduce a full class action procedure. It would allow cases to be brought in the same circumstances as option 1 but with the following additional features:
 - as with option 1, the applicant would be a member of the group meeting the certification criteria outlined under that option. However, the applicant could bring the case on behalf of members of the group where those individuals had not yet initiated proceedings;
 - the Court could be given power to decide in a particular case whether procedure should be "opt-in" or "opt-out";
 - the Court could be given a power to make a global award of damages and for the disposal of any undistributed residue of an aggregate award (Gill recommendation 165); and
 - if opt out procedure is allowed then consequential amendment to prescription and limitation legislation will be required (Gill recommendation 164).
- **Option 3:** The proposal under this option is to have a full class action procedure as under option 2 but with the added element of allowing 3rd party bodies, without a direct legal interest – for example, an environmental or consumer organisation - to bring cases on behalf of groups which they represent.

This would be the most ambitious option and in policy terms would be aimed at fulfilling the wider aim of encouraging corporate social responsibility and responsible behaviour on the part of businesses, and facilitating collective redress. Option 3 would allow cases to be brought in the same circumstances as option 2 but with the following additional features:

- procedure would always be "opt-out";

- in order to ensure that only suitable bodies were able to bring cases “designated bodies” could be specified in regulations or courts rules. An alternative approach would be to allow the court to act as gatekeeper deciding whether a body was suitable in a particular case in accordance with criteria; and
- it would be a last resort procedure where other enforcement mechanisms had failed.

90. There were 21 responses to this section of the consultation paper. Eighteen expressing a preference for one of the three options in the consultation paper. Views were mixed and support was divided across all the options.

- 9 (50%) respondents stating a preference for option 1.
- 3 (17%) for option 2.
- 6 (33%) for option 3.

Several responses highlighted the complexity of the issue, the great differences between the kinds of actions raised under multi-party procedures and the difficulty therefore to arrive at a one size fits all procedure.

91. In subsequent meetings with stakeholders since the beginning of the year, there has been virtually universal support for opt-in rather than opt-out. The Bill will provide for an ‘opt-in’ regime. This is relatively straightforward whereas the challenges ‘opt out’ would present are considered too complex to resolve at this stage in the development of a group procedure. The benefit of this approach is that it presents an opportunity for the courts to gain experience from dealing with more straightforward group procedure cases. Incorporating an ‘opt-out’ option could be a consideration for the future, subject to the successful implementation of the ‘opt-in’ procedure.

92. However, it was noted that for some of those who responded to the consultation (especially those representing consumers and vulnerable groups) and favoured option 3, the possibility of a third party bringing a multi-party action on behalf of a group of claimants was of prime importance. The Scottish Government has noted this and the Bill provides for third party representation within the opt-in model.

Benefits

93. The introduction of a group procedure will help to broaden access to justice by allowing multi-litigants the opportunity to bring an action at a lower cost than individual cases. In turn, taking forward a number of related claims as a group procedure can help deliver a more streamlined and cost-effective outcome and reduce court time. An additional and important societal benefit to facilitating collective redress is the potential to deter harmful behaviour on the part of businesses and encourage corporate social responsibility. The introduction of a group procedure would help deliver a more streamlined approach to benefit both users and the courts.

94. Much of the detail of group procedure will be set out in rules of court to be developed by the Scottish Civil Justice Council. This will allow the Council to consult a wide range of interests and keep rules under review without the need for further primary legislation. In particular, the rules may provide for which types of civil cases are suitable for group proceedings – for example damages claims and certain judicial review cases. These matters of fine detail are not set out in the Bill.

Other options

95. The alternative would be to continue with the present approach of the court to dealing with multiple related claims or to open out the group procedure further by offering the opt-out option. This memorandum has highlighted above some recent examples of mass litigation (prisoners’ “slopping out” claims and litigation relating to the lawfulness of bank charges) that have shown the limitations of the current system. The opt-out option is considered to be too complex for introduction in Scotland at present and the opt-in procedure is thought to be much more straightforward for a completely new system.

96. One particular proposal not taken forward in the Bill is provision for awards of “aggregate” or “global” damages in group proceedings. The policy for the Bill is that in cases where group proceedings have determined the question of liability for the group, and the defender has not agreed to a settlement proposal, then damages will require to be assessed on an individualised basis according to existing rules of law. The Scottish Government considers that changing damages law to introduce a new concept of “global” damages would require specific, additional consultation on how this would work. However, the Scottish Government considers that it will often be possible for the measure of damages (“quantum”) to be agreed by settlement in group proceedings, potentially based on a scheme of division agreed to by each member of the group.

PART 5: GENERAL PROVISION

97. This Part includes provision in relation to subordinate legislation, interpretation and commencement.

EFFECTS ON EQUAL OPPORTUNITIES

98. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website at <http://www.scotland.gov.uk/Publications/Recent>.

99. Equality issues were considered during the policy development process and none of the final proposals were considered to give rise to the possibility of those affected being treated less favourably due to any of the protected characteristics. As the proposals in the Bill are, in the main, permissive and intended to apply equally to all affected, and appear to have no significant differential effect on the basis of age, disability, race, religion or belief, sex, sexual orientation or gender reassignment.

100. The focus of consideration in drafting the EQIA was on determining whether there may be any inadvertent effects on different groups, by examining sectors of the population likely to be affected by the Bill (primarily those contemplating or instigating a civil court

action, defenders in court actions, pursuer and defender legal professionals, those offering advice in claims management companies, and auditors of court). The bodies that could be affected include the Scottish Government, the Scottish Courts and Tribunals Service (SCTS), local authorities, the NHS Scotland health boards, and any organisation which may be subject to a personal injury action.

101. The EQIA also took into consideration existing research and confirmed that the proposals in the Bill are unlikely to have any significant differential effect on the basis of the protected characteristics. If some minor effects are present, these are considered to be proportionate.

102. With regard to eliminating unlawful discrimination, harassment and victimisation, there is no evidence to show that anyone involved in the civil court system is currently treated less favourably owing to their protected characteristic. The proposals in the Bill will not change this.

103. The impacts of the Bill is intended to be positive in relation to the protected groups. They will almost always be pursuers in civil actions and the legislation will:

- make it easier to obtain funding for civil litigation for those who do not qualify for legal aid as the funding options are widened;
- introduce sliding caps on success fees so that a greater portion of the damages awarded reaches those for whom those damages are intended; and
- introduce group proceedings and allow third party representation which will especially assist those who are more vulnerable to bring a civil court action.

104. No changes to the policy were considered necessary following the EQIA. However, the Scottish Government will continue to work with key stakeholders to ensure full account is taken of equality issues.

HUMAN RIGHTS

105. The Scottish Government has assessed the effects of the Bill on human rights.

106. The main convention right that is relevant to the Bill is Article 6 of the European Convention on Human Rights (the right to a fair trial).

107. Article 6 includes, on the civil side, a right of access to the courts which must be practical and effective. The right to a fair hearing before an independent tribunal is recognised to include the right to “equality of arms” – the right to present one’s case to a court or tribunal under conditions that do not place one party at a significant disadvantage compared to the other party to the litigation. The provisions of the Bill on success fee agreements, QOCS and group proceedings are intended to facilitate access to courts in situations where Sheriff Principal Taylor had identified practical impediments under current law and practice, and in a way that is proportionate taking into account the potential impact on defenders. In the particular example of QOCS the pursuer’s protection from awards of

expenses is “qualified” and a defender will benefit from the usual “loser pays” rule where the pursuer has acted fraudulently or otherwise unreasonably. *Coventry v Lawrence* [2015] UKSC 50 is authority that the courts will allow a margin of appreciation where the legislature pursues costs-related reforms where they are evidence-based, drawn up following credible consultation, pursue a legitimate aim and are proportionate to that aim.

108. The other main measure in the Bill that engages Article 6 is reform to the auditors of court in Part 3. Auditors of court perform important functions, determining significant disputes about expenses, and also ascertaining the amounts properly due, in particular to lawyers, but also to other professional and officials in a variety of contexts. Article 6 is engaged when the auditor taxes an account of expenses in a litigation which itself involves the determination of civil rights and obligations. Article 6 is also engaged when the auditor taxes a solicitor’s account to the solicitor’s client (in relation to a remit by the court, article 6 applies to proceedings for payment of fees and in relation to a joint remit, the auditor is acting as an arbiter). Article 6 is engaged in at least some of the other statutory functions which auditors fulfil. For relevant case law in relation to these principles see for example, *Baumann v Austria*, Application 76809/01, para 48 and *Honor v Wilson* 2007 SLT 54. The Scottish Government considers that the existing arrangements in relation to the procedure that applies at a taxation together with the arrangements for appeal and review by the courts of an auditor’s decision secure that the procedure as a whole meets the requirements of Article 6. The principles that apply in assessing the sufficiency of a review procedure are summarised in *Fazia Ali v United Kingdom*, Application 40378/10, paragraphs 75-79.

109. In relation to the auditing function the relevant aspects of this are the fact that costs issues are of an ancillary and largely technical nature and the Article 6 guarantees will therefore apply with due flexibility, auditors will hold a public office within SCTS - an independent body corporate, the auditor is an expert decision maker with an expertise not available to the court, and a diet of taxation is conducted on an adversarial basis albeit it may be relatively informal. Under current law and practice decisions of auditors are open to judicial supervision via note of objection and judicial review procedures respectively.

110. The key policy proposal in the Bill is that the offices of Auditor of the Court of Session, the auditor of the Sheriff Appeal Court and sheriff court auditors become salaried posts and that the auditors are appointed by the SCTS under civil service rules and become civil servants employed by the SCTS. The Scottish Government does not consider that these provisions affect the existing arrangements discussed above in relation to the application of Article 6. The Scottish Government considers that the arrangements ensure that the integrity of the auditing regime including in relation to Article 6 will be preserved.

EFFECTS ON PRIVACY

111. The Scottish Government does not anticipate any significant impact on privacy. Auditing-related material which would be made public under section 15 (guidance) or 16 (reports) of the Bill would not contain any identifying information about parties to litigation.

EFFECTS ON ISLAND COMMUNITIES

112. The Scottish Government does not anticipate any significant impact on island communities.

EFFECTS ON LOCAL GOVERNMENT

113. The Scottish Government does not anticipate any significant impact on local government. Further details are discussed in the Financial Memorandum which indicates that local authorities may be affected as follows:

- Firstly, the Bill will make success fee agreements more readily available, specially by allowing solicitor DBAs. This may encourage more claims in which they are defenders.
- Secondly, the introduction of QOCS may also encourage more claims which local authorities have to defend.
- Lastly, multi-party actions may also mean that there are more claims against local authorities.

The net result may be that local authorities may be required to allocate more of their funds to expenses in defending claims and paying damages in actions in which they are not successful.

EFFECTS ON SUSTAINABLE DEVELOPMENT

114. As the principal aim of the legislation is to create a more accessible, affordable and equitable civil justice system for Scotland by making the costs of court action more predictable, increasing the funding options for pursuers of civil actions and introducing a greater level of equality to the funding relationship between claimants and defenders in personal injury actions, the Scottish Government does not anticipate that the Bill will have any negative impact on sustainable development. As the EQIA indicates, the Bill is intended to be positive in relation to the protected groups. They will almost always be pursuers in civil actions and the legislation:

- will make it easier to obtain funding for civil litigation for those who do not qualify for legal aid as the funding options are widened;
- will introduce sliding caps on success fees so that a greater portion of the damages awarded reaches those for whom those damages are intended; and
- will introduce group proceedings and allow third party representation which will especially assist those who are more vulnerable to bring a civil court action.

This will contribute to the sustainable development goals of gender equality and reduced inequalities by ensuring that justice is more accessible for those in equality protected groups.

115. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

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

POLICY MEMORANDUM

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