

Justice Committee

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

Written submission from the Equality and Human Rights Commission

1. The Equality and Human Rights Commission (EHRC) previously submitted a Consultation Response on this subject on 25th April 2015 (“our 2015 response”). This submission builds upon our earlier response, in order to address the proposals now outlined in the Bill at Stage 1.
2. EHRC is the National Equality Body (NEB) for Scotland, England and Wales, working across the nine protected grounds set out in the Equality Act 2010: age, disability, sex, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment. We are an “A-status” National Human Rights Institution (NHRI). The background to our interest in this area is that the European Court of Human Rights has acknowledged the prominent place in a democratic society of the right to a fair hearing. We are concerned that there are very few non-employment discrimination claims raised in Scottish courts. There could be a number of reasons for this; solicitors may have little experience of discrimination claims and view them as being risky, and where awards are typically low, claimants can face difficulty accessing appropriate legal advice and representation. Similarly, damages for human rights cases awarded for ‘just satisfaction’ are often in the small claims bracket. EHRC therefore supports any measures which enhance access to justice, in particular in relation to discrimination and human rights claims.
3. We reiterate that we support the objective of this legislation; to enhance access to justice by increasing funding options and creating greater predictability and certainty in relation the expenses and funding of litigation. We previously expressed concerns about the proposals on tenders and regarding SLAB as a funder of last resort and are pleased that these options have not been included in the Bill. We wish to make the following additional comments in relation to parts 1, 2 and 4 of the Bill.

Part 1: success fee arrangements

4. In our 2015 response we supported the proposal for capped speculative fee agreements on the basis that they may afford access to justice for people who are ineligible for legal aid. However we expressed concerns about proposals for arrangements which would result in the payment of solicitor’s fees from damages (Damages Based Agreements).
5. Clause 3 provides that unless the agreement provides otherwise, the provider is entitled to recover the expenses without affecting the success fee. EHRC remains concerned as damages are intended to restore the injured party to the position the person was in before the event that caused them injury. It appears to us therefore to be unreasonable for an element of that sum to be taken from the pursuer to meet the solicitor’s fee in addition to an award of expenses.

6. We note that it is as yet unclear whether success fee agreements may apply to discrimination and human rights cases. Clause 5 expressly excludes family proceedings and other proceedings to be specified by Scottish Ministers (by affirmative procedure). Whilst EHRC would be in favour of extending success fee agreements to discrimination and human rights cases in principle, we would not support a Damages Based Agreement which allowed fees in addition to expenses in these cases. This is because of the already low level of damages in discrimination and human rights cases as outlined above.
7. However, clause 4 would permit the Scottish Ministers to make provision for a capped fee. Clause 19 (1) (b) permits different caps to be applied to different types of cases. We would suggest that discrimination and human rights cases should be capped at a low level to mitigate against our concerns about taking deductions from already low awards.

Part 2: expenses in civil litigation

8. In our 2015 response we supported the proposal for Qualified One-way Costs Shifting (QOCS) however suggested that discrimination and human rights claims should also be covered.
9. Clause 8 applies a restriction on liability for expenses where there is a claim for damages for personal injury or death arising from personal injury, as long as the person conducts proceedings in an appropriate manner (e.g. no fraud, abuse of process etc.). Clause 8 (3) provides that the Court is not prevented from making an award of expenses which relate to any other type of claim in the proceedings.
10. We are concerned that Clause 8 (3) may acutely affect discrimination and human rights claims where there may be a claim for a declarator and an award for just satisfaction alongside a personal injury component for injury to feelings. In these circumstances, it would be very hard to separate out the expenses from the personal injury component, leading to an increased risk of expenses for these claimants, compared to 'pure' personal injury claimants. We would recommend that discrimination and human rights cases should also be automatically eligible for QOCS.
11. Clauses 9-11 relate to civil proceedings and are not restricted to personal injury cases. These clauses were not part of the 2015 consultation so it is unclear how it is envisaged they would operate in practice and we are concerned there could be unintended negative consequences for solicitors, pro-bono services and organisations funding, facilitating and providing free legal representation.
12. Clause 9 allows for an award to be made to charity where a party is represented free of charge. It is not clear what "free of charge" means in this context, and whether services/ providers of free representation could be negatively affected if the expenses were awarded to a charity. EHRC has a particular interest in this clause as we have powers under section 28 Equality Act 2006 to fund discrimination and human rights cases. In a section 28 funded case, the litigant is provided with representation 'free of charge', but the costs are met by EHRC. We

would be concerned if, following success of a funded case, the expenses were awarded not to the successful party, but to a charity. This could have the effect of putting further pressure on EHRC's limited litigation budget for strategic cases.

13. Further, the Explanatory Notes suggest that the expenses could be awarded to a charity which aims to improve access to justice in Scotland, giving examples such as Citizens Advice Scotland and Justice Scotland. EHRC queries whether the aim of expanding access to justice might be better met by making the award to a not for profit organisation (charity or otherwise) which provides free representation.
14. Clause 10 is also a new proposal, and permits an award of expenses against third party funders of civil litigation with a financial interest in the outcome of the proceedings, with the exception of SLAB. However the extent of "financial interest" is unclear. For example, is this restricted to third party funders profiting from the outcome of a case, or would it also include funders with an interest in recouping their expenses and disbursements? EHRC is a third party funder managing public funds in order to fund strategic litigation. As such, we would be concerned if this provision gave rise to potential for an award of expenses against the Commission or other organisations such as CrowdJustice, which have an important role to play in the access to justice landscape. Under Clause 10, intermediaries are also potentially liable for expenses and it is unclear whether this could include a solicitor whose client enters into a speculative fee agreement, or even a solicitor whose fee is covered by EHRC in a funded case.
15. Clause 11 allows an award of expenses against a solicitor who is in breach of a duty to the Court. This is already the case at common law¹ in exceptional circumstances e.g. where the actions of a solicitor have caused undue delay so it is not clear how Clause 11 furthers the underlying objectives of the Bill.
16. In *R (Unison) v Lord Chancellor* [2017] UKSC 51, Lord Reed made the point at para 69 that: *"access to a Court is not of value only to the individuals involved. That is most obviously true of cases which establish principles of general importance. It is not always desirable that claims should be settled"* Lord Reed cited an equal pay case to illustrate the importance of resolving a point of genuine uncertainty in the law. It is unclear how the proposals in clauses 9-11 will further the goal of enhanced access to justice. Without clarification, these provisions may in fact deter third party funders from making a grant/ award and may deter a solicitor from taking on, or acting as funding intermediary in a novel/ riskier discrimination or human rights case which could have wider strategic importance.

Part 4: Group proceedings

17. In our 2015 response we supported proposals for Groups Proceedings, specifically for Option 3 which would allow for third party bodies without direct legal interest to bring cases on behalf of groups they represent.

¹ *Stewart v Stewart* 1984 SLT (Sh. Ct.) 58

18. We are pleased that third party bodies will be able to bring cases under the current proposals in Clause 18, subject to details to be set out by way of Act of Sederunt. We note that an Act of Sederunt may also make provision about the types of cases which could be excluded from this procedure. We would hope that discrimination and human rights cases would not be excluded from this opportunity to broaden access to justice. We would also emphasise that when making regulations on the operation of this Part, regard should be had to the tight time limits for discrimination claims (6 months) and Judicial Review (3 months).

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