

Justice Committee

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

Written submission from the Fire Brigades' Union

Introduction

1. The Fire Brigades' Union (FBU) is the democratic and professional voice of firefighters across the UK. Legal Services is the cornerstone of the services we provide to our members. The FBU understand the importance of civil litigation in terms of not only securing justice for an individual member but also for improving health and safety across the entire fire and rescue service.
2. The FBU accordingly view the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill as very important and welcome the opportunity to provide evidence to the Justice Committee.

Overall view of the Bill

3. The FBU fully support the recommendations of Sheriff Principal Taylor in relation to Qualified One Way Cost Shifting (QOCS) and the introduction of Group Procedure in Scotland. We are pleased to note that the Scottish Government are seeking to implement Sheriff Principal Taylor's recommendations fully in relation to those areas. However, we believe that the current drafting of the Bill fails to do so.
4. The FBU take the view that the current drafting does not meet Sheriff Principal Taylor's recommendations in relation to certainty or the appropriate (high) level at which the benefit of QOCS may be removed.
5. The FBU believe that on the current wording of the Bill Trade Union backed cases may not benefit from QOCS.
6. The FBU believe that the Bill has overlooked the £100,000 exclusive jurisdiction of the Sheriff Court in relation to Group Proceedings.
7. The FBU note that the Bill does not deal with court fees in any way. The FBU submit that it is essential that the problems with court fees which have been highlighted in various consultations in the past on the issue of court fees must be addressed legislatively in the current Bill.

Section 8 – Restriction on pursuer's liability for expenses in personal injury claims

8. As a matter of generality, the introduction of such a restriction is an extremely welcome one. The problem is that the current drafting of the Bill is such that the bar is set far too low in relation to circumstances where the protection provided by the Bill (the restriction on the pursuer's liability for expenses) is removed. In particular, sub sections 8(4)(a) and (b) make it too easy for the general protection

to be removed. They are an open invitation to a defender to seek to have an award for expenses made against the Pursuer.

9. The FBU are aware that the Bill seeks to follow the recommendations of Sheriff Principal James Taylor. However, Sheriff Principal James Taylor was clear in stating that there was the need for certainty and the need to ensure that the bar for removing the restriction on the pursuer's liability for expenses to be set at a high level. On the current drafting, the bar is set too low and there will be no certainty because there is little doubt that the wording will positively encourage defenders to seek expenses under sub section 8(4).
10. Sheriff Principal Taylor correctly identified the need for certainty in relation to QOCS. This very important objective in relation to improving access to justice at the heart of the concept of QOCS will be lost if the benefit of QOCS can be easily removed and therefore if a claimant remains at risk of the defenders arguing for expenses at the end of the case based upon the pursuer's conduct. Sheriff Principal Taylor accordingly recommended that the test for removing QOCS must be set as a high bar. The current drafting does not set the bar high enough. The FBU would submit that the bar is set lower than in the equivalent rules in England and Wales. The FBU would therefore submit that far from providing certainty the current drafting is an open invitation to defenders to attack the benefit of QOCS in a very high percentage of cases.
11. The Bill states that the benefit of QOCS may be removed "if the claimant makes a fraudulent representation **in connection with** proceedings". On this drafting a pursuer could "over egg" a part of his/her claim in relation to a fairly peripheral issue and the benefit of QOCS could be removed. That test is far too low. The FBU would submit that the benefit of QOCS should only be removed if there is fraudulent conduct on the part of the claimant that is both material and goes to the heart of the case.
12. Sheriff Principal Taylor recommended that the benefit of QOCS be removed if the claimant's behaviour is "Wednesbury unreasonable". This is a well-recognised legal test that is not easily met. The Bill as currently drafted allows the benefit of QOCS to be removed "if the claimant behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings". This is not the Wednesbury test. This would allow the benefit of QOCS to be removed for conduct significantly less than that amounting to Wednesbury unreasonableness.
13. Sub section (a) should be amended to ensure that any fraudulent conduct is material and goes to the heart of the case.
14. Sub section (b) should be amended to reflect the "Wednesbury test" as recommended by Sheriff Principal Taylor.

Section 10 – Third party funding of civil litigation

15. On the current drafting of Section 10 of the Bill there is a significant risk that Trade Union funded cases would not benefit from QOCS. Such an outcome was not recommended by Sheriff Principal Taylor. Such an outcome would be unjust and unacceptable. Section 10 must be amended to make it clear that the Section does not apply to Trade Union funded cases and that accordingly trade union funded cases will benefit from QOCS.
16. Like sub-section 10(4), which expressly excludes the Scottish Legal Aid Fund, the Bill requires to be amended to expressly exclude Trade Union funded from Section 10.

Group litigation

17. The Bill correctly identifies that Group Proceedings should only exist at the Court of Session. It however fails to recognise that there will be Group Proceedings where individual cases within the Group process have a value of less than £100,000 and which, accordingly in terms of the Court Reform (Scotland) Act 2014 may not be litigated at the Court of Session.
18. The 2014 Act accordingly requires to be amended to exclude Group Proceedings from the £100,000 exclusive jurisdiction of the Sheriff Court.

Court fees

19. The current pay as you go model of court fees represents a significant barrier to access to justice. It is a barrier that is arguably as significant as that in relation to defenders' costs that the current Bill seeks to address. The current pay as you go model is particularly problematic for Trade Unions in financial terms. It places a significant cash flow burden on trades unions. Further, in light of the very recent Supreme Court judgment in relation to Employment Tribunal fees (*R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51) the current model for court fees is arguably illegal.
20. The Scottish Government states that the purpose of the current Bill is to improve access to justice by creating more accessible, affordable and equitable civil justice system. All of those objectives also require the current model for payment of court fees to be changed.
21. The FBU submit that court fees should only be payable by a claimant at the end of a case if they have been successful and only when the court fees have been recovered from the defender as part of the normal judicial account process. The FBU believes that the Bill should be amended to introduce a section in relation to court fees that mirrors the current section placing a restriction on pursuer's liability for expenses in personal injury claims (Section 8).