

Justice Committee

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

Written submission from the Family Law Association

1. The Family Law Association was established in 1989. We currently have around 300 members throughout Scotland. Most of our members are practising family law solicitors. One of our aims is to monitor and promote the reform of family law which serves the needs and concerns of families across Scotland and beyond.
2. The issue of expenses and funding of civil litigation in Scotland is one which impacts upon the clients we represent. We welcome the opportunity to provide evidence to the Scottish Parliament's Justice Committee on the draft Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.
3. The Policy Memorandum to the Bill states that clause 10 is to "make provision for commercial third party funders of civil litigations to be liable for judicial expenses with the funded litigant". Unlike the present position, the Bill seeks to create the possibility of making third party funders liable to expenses in the event of an unsuccessful action.
4. We are concerned that, as presently drafted, the Bill may have an impact on family proceedings. We are aware of cases in which, for example, friends and family have given soft loans to clients to enable them to proceed with the litigation. We are aware of instances in which clients, and particularly those clients who have been dependent on their spouse or partner for support throughout the course of their marriage, require a litigation loan to raise proceedings. We are also aware of cases where loans given by, for example, parents to children to fund deposits for, say, a pre-marriage property then becomes part of the dispute in the context of subsequent divorce proceedings.
5. It could be said that the lenders in these examples have no financial interest in the outcome of proceedings and so disclosure is not required as per clause 10. However, we are concerned that this is not beyond doubt. The soft loan, litigation loan and deposit may all require to be repaid. Accordingly, it could be argued that the "lender" in each instance has a direct interest in the outcome of the proceedings because they seek repayment of the loan.
6. Our view is that it cannot be helpful or appropriate to require parties to family proceedings to disclose funding arrangements of this type. We are concerned about the potential impact upon the conduct of family proceedings and in particular the impact upon those parties who require the Court to make a determination to secure a fair outcome.
7. It may be more appropriate for clause 10 to expressly exclude family proceedings or perhaps it should only apply to, as the Policy Memorandum states, commercial third party funders.
8. The Family Law Association has no further comments to make.

Family Law Association
18 August 2017