

Justice Committee
Civil Litigation (Expenses and Group Proceedings) Scotland Bill
Written submission from the Faculty of Advocates

Introduction

1. The Faculty of Advocates is Scotland's independent referral bar. The Lord President has described the essential qualities to which the Faculty of Advocates is dedicated in the following terms: "a commitment to excellence, a commitment to scholarship and learning, a commitment to the noblest ideals of professional conduct, and, above all, a commitment to justice for all in our society"¹.
2. The Faculty makes available to the people of Scotland a cohort of skilled advocates, with a wide range of expertise. Every one of those advocates is available for instruction on behalf of anyone who may require advice on a matter of Scots law or representation in the Scottish courts². In particular, every advocate is available to appear on behalf of any litigant in any court or tribunal in Scotland, as well as the UK Supreme Court and the Court of Justice of the European Union. Solicitors in large firms and small, urban and rural, may supplement and enhance the service which they provide to their clients by the instruction of Counsel. The bar promotes access to justice, the quality of justice and equality of arms, throughout Scotland.
3. The Faculty has been an active contributor to the review of the expenses and funding of civil litigation in Scotland³, and welcomes the opportunity to provide evidence to the Scottish Parliament's Justice Committee on the draft Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ("the Bill").
4. The Faculty continues to be supportive of the aim of the Bill – to improve access to justice by creating a more accessible, affordable and equitable civil justice system – and in general terms the Bill seeks to achieve that aim. However, the Faculty has concerns in relation to particular sections of the draft Bill, and suggests that clarification is required in relation to others.

Part 1: Success fee agreements

DBAs – regulation of claims management companies (clause 1)

5. The Faculty notes that Part 1 allows providers of "relevant legal services" to enter into damages based agreements ("DBAs"). "Relevant legal services" is defined as "the provision of advice, assistance or representation"⁴. That would appear to include solicitors, advocates and anyone else involved in "assisting" with civil litigation (or the

¹ Remarks on the introduction of the former Dean of Faculty, 5 February 2014

² The "cab-rank rule" means that an advocate may not, without good cause, refuse to accept instructions to act on behalf of any litigant if a reasonable fee is tendered.

³ Particular reference is made to the Faculty's recent written responses to (i) the Consultation Paper on Expenses and Funding of Civil Litigation in Scotland Bill, and (ii) the Impact Reference Group Paper for the proposed Expenses and Funding of Civil Litigation Bill

⁴ Clause 1(2)

contemplation of civil proceedings). In particular, it would appear to include claims management companies.

6. The Faculty in its earlier consultation response has explained that there is a public interest in the proper regulation of DBAs, and raised concerns that the Scottish Government was not proposing to regulate claims management companies. The Faculty again expresses concern that the draft Bill does not include provision for the regulation of claims management companies.

Family law proceedings (clause 5)

7. The Faculty notes from the Policy Memorandum and Explanatory Notes to the Bill that Part 1 applies to both speculative fee agreements and DBAs. For the most part, this appears sensible, although it does have one unintended consequence. Clause 5 prohibits success fee arrangements, i.e. both speculative fee agreements and DBAs, in family proceedings. Speculative fee arrangements are currently permitted in family proceedings. They are only used in a small number of cases with very particular circumstances, but where they are used they are used to good effect, and enable access to specialist representation (and therefore justice), where it might otherwise not be readily available.
8. Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland did not recommend a departure from the *status quo*, and the Faculty is not aware of this having been proposed at any time during the consultation on the proposals in the Bill. The Faculty agrees that DBAs should not be available in family law proceedings, but suggests that clause 5 should be amended to exclude only DBAs from family proceedings, and maintain the *status quo* that speculative fee agreements are permitted.

Global settlement in personal injury claims (clause 6)

9. The Faculty notes that the draft Bill does not include any mechanism by which success fees are to be calculated and ascertained in the event of a "global settlement" (i.e., where one sum is agreed to cover both damages and judicial expenses). The Faculty considers that the draft Bill should include a procedure to enable an equitable identification of the allowance for judicial expenses included in the global settlement, in order that the success fee can be calculated. In the absence of a particular mechanism being included in the Bill, there should be a clear indication of how such a mechanism will be provided.

The future element of personal injury claims

10. The Faculty is concerned about the terms of clause 6 relative to the treatment of future damages. It is important to appreciate that currently the court has no power to make an award in periodical instalments. We therefore find it difficult to see how clause 6 would operate in practice. We are also not convinced that the requirement to involve an actuary to provide independent advice without the presence of the legal advisor is desirable or workable in practice. We agree that a cap on the amount that should be chargeable is necessary. We also understand that there should be no financial incentive to choose a lump sum rather than a periodical payment. We think that a

tapered percentage limit on the total capitalised value of the claim would be the simplest, most straightforward and most workable solution.

Part 2: Expenses in civil litigation

Restriction on pursuer's liability for expenses in personal injury claims – "QOCS" (clause 8)

11. The Faculty notes that it is proposed that the costs protection afforded to persons pursuing personal injury claims would be excluded if the person:

- (a) makes a fraudulent representation in connection with the proceedings,
- (b) behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings, or
- (c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

12. In principle, the Faculty agrees with sub-paragraphs (a) and (c), subject to the following comment in relation to how sub-paragraph (a) is expressed. The Faculty considers that the wording of sub-paragraph (b) (standard reasonably expected of a party) requires further consideration. During the consultation the Faculty expressed concern about how this element of the test should be formulated. We think that a person does not conduct proceedings in an appropriate manner if in the opinion of the court that person's behaviour is so manifestly unreasonable that it would be just and equitable to make an award of expenses against him. We think that, if that high hurdle is overcome, the court should have discretion to award part or all of the expenses of the proceedings against the person depending on the circumstances.

13. The Faculty agrees that a party should be disqualified on account of fraud. However, the Faculty is concerned about the potential width of the proposed wording in sub-paragraph (a), and how it might be interpreted. For example it might be interpreted to include a statement made by a person to a health professional before proceedings were raised, which the court finds to be untrue. Such a false statement might well justify the court in exercising its discretion to modify any award of expenses in favour of the pursuer, depending on the particular circumstances of the case, but ordinarily should not be a ground for disqualifying the person from the benefit of QOCS. The Faculty considers that the fraud ground should apply only where the court determines that a person has **conducted the proceedings** fraudulently. Sub-paragraph (a) should be worded to reflect that.

14. The Faculty is also concerned at the lack of protection for defenders who are uninsured and of limited means – the "David v David" (rather than "David v Goliath") scenario. As explained in previous responses, this could result in such persons being held to ransom if they have no prospect of recovering the cost of a successful defence. It is again suggested that QOCS should only be available in claims against public bodies and insured defenders.

Third party funding of civil litigation (clause 10)

15. The Faculty understands from the Policy Memorandum⁵ that this section is intended to apply to commercial third party funders. However, as presently drafted, it applies to all third parties who provide financial assistance and have a financial interest in the outcome of the proceedings. That could, for example, be interpreted to include solicitors who act on a speculative basis, and who do not recover all of their fees. Those solicitors fund the instruction of expert reports, etc., because the pursuer does not have the resources. Indeed, it would be contrary to the ethos of “no win no fee” arrangements if the pursuer had to fund the often significant expense of instructing expert reports. Those solicitors clearly have an interest in the outcome of the proceedings, and it could be considered that any unrecoverable element of their fees is financial assistance. This is of real importance because clause 10(3) provides that the court may make an award of expenses against third party funders.
16. The Faculty suggests that the wording of clause 10 should be reconsidered to clarify precisely against whom it applies.

Parts 3 – 5

17. The Faculty does not wish to add to the comments it has already made during the consultations relative to these proposals.

Faculty of Advocates
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⁵ Paragraph 50