

Justice Committee

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

Written submission from the Law Society of Scotland

1. The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.
2. We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.
3. The Society's Civil Justice committee welcomes the opportunity to consider and respond to the Scottish Parliament's Justice Committee call for evidence on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. The Civil Justice committee has the following comments to put forward for consideration.

General comments

4. We believe that the Bill has the potential to significantly increase access to justice. It is difficult to gauge the full impact of the Bill, as many of the details of the provisions will be made at a later stage, through regulations, Acts of Sederunt and the like. As things stand, responses have to be given about subjects in which there are a lot of unknowns: certainty is the key for members (pursuer and defender agents) and anything that can be done to provide that is to be encouraged.
5. In the report by Sheriff Principal Taylor, reference was made to the Contingent Legal Aid Fund and how that could help with the problems which exist in the current system. No reference is made to it in the Bill or the related paperwork and it is a concern that it has not been included. Agents using the Fund were able to get funds to cover the initial outlays necessarily incurred in investigating and raising claims on the clear understanding that these would be repaid to the Scottish Legal Aid Board if the claim was successful and funds were paid out to the claimant. Given that one of the main concerns raised with the Bill is the wording of Section 10, this Fund deals neatly with those problems and allowed solicitors to investigate and progress claims properly.

Call for evidence

Whether the Bill will achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system

6. While QOCS (qualified one-way costs shifting) will certainly help in terms of making claims easier and less risky for claimants, the changes which are being proposed are not entirely in accordance with Taylor and in many instances the perceived wrong (the David and Goliath scenario of individual claimant against large organisation) does not exist to the extent envisaged.

The specific provisions in the Bill which:

(i) regulate success fee agreements (sometimes called ‘no win, no fee’ agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements

7. While it is helpful to have a clear statement of these being allowed, the particular provisions raise other practical problems for solicitors and the detail of the cap has not been confirmed. We would welcome an indication from Scottish Government around the levels likely to be set by regulations.

(ii) allow solicitors to enforce damages based agreements (a form of ‘no win, no fee’ agreement, where the fee is calculated as a percentage of the damages recovered)

8. For the sake of the public, this is a positive statement and allows them to pursue claims using a solicitor who they can trust and who works in a regulated environment rather than using claims management companies, which are not.

(iii) introduce ‘qualified one way costs shifting’, which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender’s legal expenses even if the action is unsuccessful

9. Although there are arguments about whether QOCS should be introduced at all, the basic terms are good and will help provide certainty which is the priority for solicitors. Concern does exist about the existing drafting of the exceptions to QOCS which are set out in Section 8 and to avoid unnecessary satellite litigation we would urge a review of that as part of the current scrutiny process.

(iv) give the courts the power to order that a payment be made to a charity where expenses are awarded to a party represented for free

10. While we are unclear about how often this will actually be used in practice, we have no issue with the current proposal. There exist similar provisions in England and Wales, where funds are provided to the Access to Justice Foundation. We understand that in the 2015-16 financial year, funds from this scheme generated around £120,000.

(v) require a party to disclose the identity of any third party funder and provide the courts with the power to award expenses against that third party

11. Our principal position is that the category of ‘third party funder’ needs to be clarified and narrowed to achieve the true intention (and in doing so, exclude solicitors and After the Event insurers (ATE’s)). If that can be done, the basic provisions for disclosure and for awards are acceptable but it would be helpful if “may make an award” (section 10(3)) could be clarified as it is not clear at this stage exactly what is envisaged. As currently drafted, one of the consequences of the Bill would be that for-profit crowdfunding, emerging in a number of jurisdictions, would likely prove impractical.

(vi) make legal representatives personally liable for any costs caused by a serious breach of their duty to the court

12. As this already exists, we do not consider this to be an issue.

(vii) enable auditors (who are responsible for determining the amount of expenses due by one party in litigation to another) to become salaried posts within the Scottish Courts and Tribunals Service

13. We do not have comments on this provision of the Bill.

(viii) allow for the introduction of a group procedure in Scotland, which would enable people with similar claims to bring a joint action

14. While the basic idea is a good one, it is important that lessons are learned from the experience in England and Wales and that flexibility remains so that parties to the action have ability to progress their client’s position and be heard fairly by the court before decisions are made. A concern does exist about why juries have been excluded from the process. We had also suggested in our previous response to consultation in this area that there could be some judicial discretion around the use of opt-in or opt-out procedures, depending upon the subject matter of the litigation.

Any other matters relating to the Bill, such as any financial impacts or whether there are other provisions which should be included

15. We do not have comments on the financial impacts of the Bill: much will depend, for instance, on the procedure established for group proceedings.

Comments on Specific Sections

Section 1: Success Fee Agreements

16. The definition of success fee agreements is clear and workable.

Section 4: Power to Cap Success Fees

17. While it is anticipated that the limits will follow along the lines set out by Sheriff Principal Taylor, it would be helpful if this information could be made available by Scottish Government during the current scrutiny of the Bill.
18. We presume that section 4(5) can't be retrospective but it would be useful to have clarification.

Section 5: Exclusions for Family

19. Excluding family proceedings (and others) is entirely sensible and should be encouraged. We do believe that the existing capability to fund family actions under speculative fee arrangements, though this may not be common, should be retained. Otherwise, and as explained below, a good argument exists for continuing the exclusion to cover other parts of the Bill.

Section 6: Personal Injury Claims

20. While the basic principle is in order, there is a concern about the timing of the agreement being entered into. The issue is particularly important in medical negligence cases. Any SFA should only be entered in the second stage of the process and ideally a client should fund the cost of any initial reports needed as part of pre-litigation investigation. If that happens, the public will still be protected, without falling foul of the rules.
21. Section 6(6) needs to run concurrently with the proposed rules on Periodical Payment Orders (PPO's). It would be helpful if it could be clarified whether the court will have power to award it (as opposed to parties agreeing it extra-judicially). While the involvement is an understandable consequence of this happening, it is not clear who is supposed to meet the cost of the actuary providing the service: clarification on this point would be helpful. An easy solution is not apparent as it seems unlikely that the court will issue a PPO without an actuary being involved and that is an additional expense that has to be met by one or both parties. Solicitors would encourage the idea of independent advice being obtained as DBA's only work if conflicts are managed by that independent advice being given.

Section 7: Form, content etc.

22. We do not understand the purpose of section 7(3)(d)? It is not clear why it has been included in the first place: We would suggest that it be removed entirely.

Section 8: Restriction on Pursuer's Liability

23. A significant concern is that the draft Bill does not appear to take account of the issues raised by tenders being lodged. The draft does not reflect the findings of Sheriff Principal Taylor and clarification is needed in terms of the status of a tender (particularly given the situation which now exists with pursuers' offers). If

the Act of Sederunt reflects Taylor, the problem will be solved but that is not guaranteed and clarification is needed.

24. Section 8(4) is key and it is assumed that (b) is not intended to deal with parties who receive tenders. If counsel and agents give advice to a client about a tender, that must surely be agreed to be treated as reasonable behaviour.
25. Section 8(4)(a) needs to have wording added to include a degree of materiality which attaches to the alleged "fraudulent representation". If that does not happen, satellite litigation may follow. Wording along the lines of "materially affect the outcome or progress of the litigation" could provide clarity. The concern we have is that any failure in the Bill to provide the certainty agents need will make it more important for clients to have insurance in place to cover the risks. That would make the situation more complicated and expensive, contrary to the purpose and aim of this legislation.
26. Section 8(4)(b) also adds uncertainty. Again the concern is that the wording proposed will simply lead to satellite litigation. Any action which leads to the removal of the QOCS protection needs to be serious and inappropriate and the Bill needs to reflect that. Focusing on financial gain for the claimant may be one way of achieving that.
27. If section 8(4)(b) was better framed, there is an argument that section 8(4)(a) would be unnecessary and that anything that would have fallen into (a) will automatically be covered by (b).
28. We refer to the recommendations of the Taylor report and are concerned that the Bill is not accurately reflecting what the report recommended. In our view, QOCS was proposed as a means of increasing certainty for parties and that the number of exceptions to that general principle should be minor and that should remain central to the current process.

Section 10: Third Party Funding of Civil Litigation

29. As drafted, we believe that the section may have unintended consequences. We consider the purpose of the section to deal with hedge funding of litigation (and related types of behaviour) but the current draft will have it apply to any solicitor who even pays an outlay for a client. Taken to its logical conclusion, this process could end up with QOCS almost never applying to any case. QOCS is designed to achieve equality of arms so it is important it applies as widely as possible.
30. The section makes reference to an Act of Sederunt to follow and more detail is required now to allow for meaningful discussion. A more specific and accurate definition of "funder" would be of much assistance in dealing with the issues identified.
31. Making sure solicitors can help investigate cases properly and help with funding outlays, promotes access to justice and ensures effective outcomes for clients. There is also the risk that the wording, as currently drafted, ends up as being a

disincentive to parties having insurance at all and that would be an undesirable outcome.

32. For these reasons, excluding solicitors from the definition of third party funders would be the simplest solution (the definition would be to solicitors acting in the normal way as agents, rather than being a blanket exclusion regardless of what the solicitor is doing). We would also suggest that an exclusion is also made for After The Event Insurers (ATE's) as they provide cover for outlays and adverse cost awards and once QOCS is introduced that will be restricted to outlays only, removing the need to have them included in the definition of third party funders.
33. Repeating the exclusion in section 5, we would suggest that family actions (and other proceedings covered by section 5) are excluded from this section. Regardless of exclusions, the existing wording needs to be tightened so that there is a clear statement of who is involved in an action and in what capacity when disclosure is made at the outset. The existing wording is too vague and general and is not helpful for agents or clients.

Section 11: Awards of Expenses against Legal Representatives

34. This power already exists, which does raise the question why the provision is included to place the power on a statutory footing. However, this is unlikely to be a significant issue for solicitors in practice as this sanction already exists.

Section 17: Group Proceedings

35. The basic proposals for group actions seem sensible and should be able to work for solicitors in practice. A system which proceeds on the basis of "opt in" (rather than "opt out") is a positive development and is welcomed by agents.
36. The system used in England and Wales has proved to be very difficult for agents and is too strict. Any system for group actions needs flexibility and experience suggests that if the position is properly explained to the court, both sides have an adequate opportunity to put their case to the court. As a result, once all parties have been heard, a middle ground has been possible and that is a pattern that should continue. It is clear that some kind of procedure is needed to deal with these claims. Interestingly England and Wales distinguishes "class actions" and "group actions" and it is not clear if that has been deliberately omitted from the current draft but it would be helpful if that was considered. Class actions and group actions are not the same and that should be recognised.
37. No explanation has been provided for the exclusion of juries for these actions (Section 17(9)). Some cases are appropriate for jury trials and some are not. The option was included in the Taylor Review recommendations. The proposed arrangement could be useful if it operates up to the point of determining liability but there has to be greater flexibility on the settlement of each claim for each and every member of the group. Parties currently have the right to choose, so if that is being taken away, a cogent explanation is required.

38. In group proceedings, regularly one case is run on liability only but not to be binding on the rest. It appears that process will change as a result of this legislation and it would be helpful to understand the rationale for this. Also, the question of how issues of expenses in group actions will be dealt with has not been considered in the Bill and, we believe, would be helpful to address.

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