

Justice Committee

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

Written submission from the Scottish Courts and Tribunals Service

1. This response is on behalf of the Scottish Courts and Tribunals Service (“the SCTS”) in fulfilment of its function to provide efficient and effective administration to the courts. This response does not include the views of the Judiciary.

The impact of the Bill on the court system

2. The principal policy objective of the Bill, as set out in the Policy Memorandum, is “to increase access to justice by creating a more accessible, affordable and equitable civil justice system”. Achievement of this aim is likely to increase the volume of cases within the civil courts. Our courts routinely deal with fluctuations in volume and have continued to meet targets set for the allocation of civil court ‘proof hearings’ despite some significant changes in the civil court process over recent years. However, any ‘spike’ in case volumes over a short time span may impact on court programming, particularly where this is focussed on any particular court, such as the All-Scotland Personal Injury Court.
3. The introduction of ‘Qualified one-way cost shifting’ may result in more unrepresented parties raising proceedings in court. The Policy Memorandum notes that in developing the Bill it was considered that “solicitors were unlikely to accept unmeritorious cases” which would provide a check on such actions. However, any consequent increase in cases raised in court by unrepresented parties would place particular pressures on the management of court time.
4. The Financial Memorandum notes that court fees are now set to effect full cost recovery. It is expected that the Fees Orders will be amended accordingly by the Scottish Ministers to take account of the relevant changes introduced by the Bill. In particular, an appropriate fee will require to be introduced to cover the new provisions for ‘group proceedings’.

Section 9 – expenses where party represented free of charge

5. Section 9 of the Bill, as drafted, deals with circumstances in which a party is represented by a legal representative (almost invariably a solicitor or advocate) free of charge. It appears to be predicated on the assumption that in these circumstances that party, if successful, would not be entitled to recover from the unsuccessful party any legal costs. The proposal in section 9 is that the court may in these circumstances order the unsuccessful party to make a payment to a charity, to be designated by the Lord President.
6. Section 9 has its origin in a recommendation in paragraph 145 of Chapter 11 of the Taylor Report, to the effect that “*it should be placed beyond all doubt that the Scottish courts do have power to make an award of expenses in favour of a successful party who was represented pro bono*”. We cannot find any authority to the effect that the Scottish courts lack such a power. In our view, there is no obvious reason why such a party could not obtain an award of expenses from their opponent. The successful party would be entitled to seek an interlocutor

finding their opponent liable to them in the judicial expenses of the action, and to recover those judicial expenses, and properly incurred outlays, at the rates specified in the table of fees for the relevant court. However, we understand that those who represent litigants *pro bono* do not, as a rule, seek awards of expenses when successful.

7. On one view the proposal contained in section 9 is unnecessary. Assuming, however, that it is thought to be a useful addition to the court's powers, we have a number of other concerns. Firstly, what approach is the court to take in ordering a payment under section 9? Is an award to a charity to be the norm, in every such case, or something the court will only order in particular circumstances. Section 9 provides no guidance.
8. Secondly, how is the payment to be calculated by the court? In the Taylor Report it was to be 'an award of expenses' (paragraph 161 of Chapter 11 of the Report). That was the proposal set out by the Scottish Ministers in the Consultation on the Bill, in January 2015 (paragraph 81 of the Consultation Paper). But section 9(2) simply specifies 'a payment'. Is the payment to be calculated by reference to the judicial expenses which could have been charged, or by some other means? Section 9 provides no mechanism for establishing the amount, and again, no guidance.

Part 3 of the Bill: Auditor of the Court of Session and sheriff court auditors

9. As noted in the Policy Memorandum to the Bill at paragraph 71, the Scottish Civil Courts Review (SCCR) recommended that the Auditor of the Court of Session should be a salaried post. However, it also recommended that the post should be 'subject to the usual rules governing public appointments'. The Bill has moved away from that recommendation and proposes that the Auditor of the Court of Session, along with sheriff court auditors, should be appointed by SCTS for such a period and on such other terms and conditions as the SCTS may determine. It also provides that the Auditor of the Court of Session, along with sheriff court auditors, will be members of the staff of the SCTS.
10. The Auditor of the Court of Session must be, and be seen to be, independent of government or any statutory body. This independence is important for the resolution of disputes which concern court expenses, including actions in which the Scottish Ministers, or the SCTS, is a party. There is a potential for a human rights challenge in terms of Article 6 for cases involving the Scottish Ministers and the SCTS and we would note that such a challenge, if successful, would cause significant disruption to the court system.
11. SCTS propose that, in line with the desired transparency and independence of the post, the Auditor of the Court of Session should have similar guarantees as to tenure as a judicial office holder, and any mechanism for the removal of the Auditor should be on the same basis as the removal of a judicial office holder. If security of tenure can be established, there should be no difficulty in the Auditor being appointed by the SCTS.

12. It is our view that such proposals would still allow the Auditor of the Court of Session to remain as 'head of profession' as proposed in the Policy Memorandum, providing guidance to, and oversight of, sheriff court auditors' decisions ensuring a consistent and 'quality assured' approach. Such an independent overview of sheriff court auditor decisions may indeed add to the robustness of sheriff court taxation decisions.

13. Sheriff court auditors dealing with cases in the sheriff courts, we suggest, present a different scenario. They will remain members of SCTS staff and we are content that, in terms of the provisions of the Bill, they are appointed by SCTS to that role. However, in cases where the SCTS is a party, for the audit function to be, and seen to be, independent, SCTS would seek provision in the Bill for the Auditor of the Court of Session to carry out the audit function for such cases, which will be remitted to him or her by the lower courts.

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24 August 2017