

**Justice Committee**  
**Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill**  
**Written submission from the Sheriffs' Association**

**Introduction**

1. Generally speaking, whether or not to introduce the provisions contained in the Bill are matters of policy, on which the Association does not generally comment. However, the Association has some general concerns arising out of the Bill: the alignment of the solicitor's own financial interests with the outcome of the case and the independence of an auditor appointed by and paid for by SCTS.

**Success Fees**

2. The Association is apprehensive about the effect a formal alignment of the solicitor's interest with that of their client will have on the agent. It is easily forgotten that the whole court system is dependent upon the integrity and professionalism of the solicitors involved in pleading cases. For example no averment should be made in pleadings unless there is a basis for it. Acting professionally means amongst other things: "giving advice without regard to one's own interests".
3. The Association is concerned that the introduction of success fees might create an unintended conflict of interest.
4. The Association has another general concern about this section of the Bill namely that very substantial matters are to be dealt with by regulation. Apart from the fact that regulations do not always follow as quickly as required, it is a concern that key elements of the legislation are to have no oversight, namely the maximum level of fee and the scope of success fees.
5. Section 4 provides that the maximum amount of a success fee is to be fixed by regulation. The setting of this fee is significant. It requires balancing the interests of the individual and the solicitor and ought not to be left to secondary legislation.
6. The other area of concern is section 5, which concerns the areas where a success fee is not applicable.
7. Section 5(1)(b) requires positive action to exclude types of civil proceedings but given the diversity of actions it might be better if the type of action requires to be positively included. Indeed given the complexity of applying these provisions which are essentially designed to cover personal injury claims, detailed consideration should be given to the introduction of any particular form of action.

## **Expenses in Civil Litigation**

8. The Association has concerns about the detailed operation of this part of the Bill.
9. Section 8(2) sets out the basic principle but it is not clear if the rule against awarding expenses against the pursuer means that a “no expenses due to or by” decision is precluded.
10. It is not clear what is meant in Section 8(3) by “by any other type of claim in the proceedings”.
11. It is felt that it is difficult to understand what Section 8(4)(b) really means. For example would a Minute of Amendment close to a proof date fall below the standard? At present, a significant amount of time in the National Personal Injury Court is taken up by arguments about expenses and the conduct of parties prior to and after raising proceedings. There is often argument about adherence to a voluntary protocol and alleged failure resulting in the Court being asked to modify expenses or disallow expenses.
12. It is the view of the personal injury Sheriffs that the ambiguities in the Bill will lead to a significant increase in the number of contentious motions about conduct and expenses. There is very likely to be an increased demand on the National Personal Injury Court that will require extra resources to be made available for it to be met.
13. As for Section 9 it is difficult to understand what lies behind this provision.
14. The test as set out in Section 11 is not thought to be helpful. By adding the qualification “serious” it creates an additional hurdle which does not exist at common law. The question of counsel or solicitor being liable for expenses is a complex matter in which in other jurisdictions detailed rules exist and it is the Association view that all interested parties would benefit from further clarity on what is meant by this provision. It is also interesting to note it expressly makes counsel liable, which may be at odds with the current common law position.

## **Auditor of Court**

15. The major concern the Association has with these provisions is the apparent lack of independence of an auditor. In effect the auditors will become no more than employees of the Scottish Courts and Tribunals Service (SCTS).
16. While it cannot be disputed that the current position is anomalous, particularly that of the Auditor of the Court of Session, the Bill contains no explicit recognition of the need for independence. SCTS is in charge of appointment but if the Auditor of the Court of Session is to be a member of the College of Justice, it is felt that it would be more appropriate for an independent body, perhaps the Judicial Appointments Board for Scotland, to make the appointment.
17. The provisions appear to restrict the role of the auditor when compared to the current position. Currently if an agent and client dispute a fee they can agree to a

“joint remit” to the Auditor to resolve the matter. That option does not appear to be preserved in the current proposals.

### **Group Proceedings**

18. This appears to relate to the Court of Session so the Association offers no comment on the same.

Sheriffs' Association  
7 September 2017