



Law Society  
of Scotland

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

Stage 1 Briefing

11 January 2018



## Introduction

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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.

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.

The Society's Civil Justice Committee provides this Stage 1 Briefing on the Bill, which we hope assists the Scottish Parliament's scrutiny of the legislation.

## General comments

We provided written evidence to the Justice Committee on the Bill in August 2017<sup>1</sup> and provided supplementary evidence on the subject of claims management companies in November 2017<sup>2</sup>. We are committed to the regulatory objectives of supporting the rule of law and the interests of justice, promoting the interests of consumers and the public interest generally, access to justice and competition in the provision of legal services. We believe that, overall, this Bill will promote these objectives and create a more accessible, affordable and equitable civil justice system.

## Success fee agreements

Part 1 of the Bill provides for the regulation of success fee agreements (SFAs). As an option for the funding of civil litigation, we believe that these provisions can promote access to justice. The Bill introduces, at section 4, the ability for Scottish Ministers to cap the level of success fees. The expectation is that these caps will follow the recommendations of Sheriff Principal Taylor's review, though we believe that it would be helpful for this to be clarified during the passage of the Bill to provide certainty.

<sup>1</sup> [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/CL-LSS.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/CL-LSS.pdf)

<sup>2</sup> [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/CL-LSSsupplementary.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/CL-LSSsupplementary.pdf)

We noted in our written evidence to the Justice Committee that the exclusion provisions, at section 5, would prevent family actions being undertaken on a speculative fee basis. Though this is a rarely used form of funding for these actions, we believed that it should be retained. We welcome the indication from the Minister for Community Safety and Legal Affairs, Annabelle Ewing MSP, in correspondence with the Justice Committee<sup>3</sup> that amendment will be considered to allow this funding option.

For the provisions around personal injury actions in section 6 of the Bill, we stated in our written evidence:

“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.”

We welcome clarification from the Scottish Government that ordered periodic payment orders (PPOs) will be able to be made by the court, rather than agreed by the parties, in the forthcoming Damages Bill, as we had sought clarification on this issue.

## Expenses in civil litigation – Qualified One Way Cost Shifting

In our written evidence to the Justice Committee, we observed of the provisions around QOCs, “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.” We highlighted areas where we thought that revision or clarification would be helpful:

- Tenders – we highlighted in our written evidence that section 8 of the Bill did not take account of the issues raised by tenders being lodged (for instance, the assumption that section 8(4)(b) did not apply to parties receiving tenders). We maintained that if a tender was refused, following appropriate professional advice, then this could not constitute unreasonable behaviour. We understand that the Scottish Government has clarified that clarification be provided by rules of court under section 8(6) of the Bill.
- Fraudulent representation – the protection of QOCs would be removed in the event of “fraudulent representation in connection with the proceedings” (section 8(4)(a)). We believe that such statements should need to be shown to materially affect the proceedings; otherwise this may risk satellite litigation or reduce certainty.
- Reasonableness – the protection of QOCs would also be removed in the event of behaviour “below the standards reasonably expected of a party in civil proceedings” (section 8(4)(b)). We welcome the Scottish Government’s confirmation that amendments will be brought forward to make this equivalent to the well-known *Wednesbury* test of reasonableness

<sup>3</sup> [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20180111CLBill-SGresponsetoStage1Report.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20180111CLBill-SGresponsetoStage1Report.pdf)

## Expenses in civil litigation – Pro Bono Costs Orders

We support the introduction of pro bono (or legal volunteering) costs orders in section 9 of the Bill. Equivalent powers in England and Wales see funds provided to the Access to Justice Foundation. We understand that in the 2015-16 financial year, funds from this scheme generated around £120,000 in that jurisdiction.

## Expenses in civil litigation – Third Party Funding

We believe that the provisions around third party funding at section 10 of the Bill would benefit from clarification. As currently drafted, we believe that the provisions could include solicitors, after-the-event insurers – who provide cover for outlays and adverse costs awards – and others, such as trade unions. We understand that the intention of these provisions was to reflect the recommendation of the Taylor Review, namely targeted at “a funder, motivated by a desire to make a profit, who effectively purchases a stake in the outcome of the litigation”. We welcome the Scottish Government’s consideration of amendment to section 10 to ensure that these provisions more accurately reflect this intention.

## Group proceedings

We supported the introduction of group proceedings, which we believe will offer improved access to justice, allowing a number of parties to bring legal action collectively. We appreciate the rationale of introducing an ‘opt-in’ system at this stage, rather than an ‘opt-out’ system. The practical working of this new group procedure will be established by rules of court, though we highlight three considerations:

- Jury trials – these are specifically excluded from group proceedings (section 17(9)). 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 jury determination or not, and we believe this power should be retained.
- Expenses in group actions - 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.
- Flexibility - the system used in England and Wales for group litigation has proved to be very difficult for solicitors 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.

## **Claims management companies**

The current Bill does not address the issue of claims management companies (CMCs), though their regulation was an issue considered by the Taylor Review. We understand that amendment to the Financial Guidance and Claims Bill, currently before the Westminster Parliament, will address this issue with the result that law firms, alternative business structures under the Legal Services (Scotland) Act 2010 and CMCs will be regulated by the Law Society of Scotland, approved regulator under the 2010 Act or Financial Conduct Authority respectively.

## **Law Society working group on civil litigation**

As noted in the Stage 1 report by the Justice Committee, we have set up a working group to consider professional practice and ethical issues arising from the Bill, including in relation to damages-based agreements. This working group will ensure that there are appropriate safeguard in place to protect pursuers and guard against potential conflicts of interest for solicitors, making recommendations to relevant committees around rules and guidance.



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