

**Final Business and Regulatory  
Impact Assessment**

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

**June 2017**



**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

# Final Business and Regulatory Impact Assessment

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

### Abbreviations

|      |   |
|------|---|
| ATE  | after-the-event [insurance]               |
| BRIA | business and regulatory impact assessment |
| BTE  | before-the-event [insurance]              |
| DBA  | damages base agreement                    |
| EQIA | equality impact assessment                |
| FOIL | Forum of Insurance Lawyers                |
| FSCM | Forum of Scottish Claims Managers         |
| MSP  | Member of the Scottish Parliament         |
| NHS  | National Health Service                   |
| QOCS | qualified one-way costs shifting          |
| SCCR | Scottish Civil Courts Review              |
| SCJC | Scottish Civil Justice Council            |
| SCTS | Scottish Courts and Tribunals Service     |
| STUC | Scottish Trades Union Congress            |

### Purpose and intended effect

- **Background**

#### Scottish Civil Courts Review

The Rt Hon Lord Gill's Report of the Scottish Civil Courts Review ("the SCCR"), published in September 2009, set out a comprehensive programme of reform of the civil courts<sup>1</sup>. The remit of the SCCR was to review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to:

- the cost of litigation to parties and to the public purse;
- the role of mediation and other methods of dispute resolution in relation to court process;
- the development of modern methods of communication and case management; and
- the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts.

<sup>1</sup> Published in two volumes, September 2009:

- volume 1: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>
- volume 2: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>

The Scottish Government accepted the vision provided by Lord Gill and broadly accepted the detail of his recommendations. A range of work was taken forward to implement the recommendations. During the course of Lord Gill's deliberations, Lord Justice Jackson was appointed to undertake a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales. Lord Gill took the view that recommendations from this review in England and Wales could have considerable implications for the conduct of litigation in Scotland. Accordingly, it was decided that the SCCR would not address the issue of litigation expenses in Scotland in detail and Lord Gill recommended that a separate review should be undertaken.

### **Review of Expenses and Funding of Civil Litigation**

On 4 March 2011, the Minister for Community Safety, Fergus Ewing MSP, asked Sheriff Principal James A. Taylor to chair a Review of the Expenses and Funding of Civil Litigation in Scotland. The remit of the review was to review the costs and funding of civil litigation in the Court of Session and sheriff court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review. In undertaking the review, Sheriff Principal Taylor was to consult widely, gather evidence, compare the expenses regime in Scotland with those of other jurisdictions and have regard to research and previous enquiries into costs and funding, including the Civil Litigation Costs Review of Lord Justice Jackson. The brief was:

- to consider issues in relation to the affordability of litigation; the recoverability and assessment of expenses; and different models of funding litigation (including contingency, speculative and conditional fees, before the event ("BTE") and after the event ("ATE") insurance, referral fees and claims management);
- to consider the extent to which alternatives to public funding may secure appropriate access to justice, and pay particular attention to the potential impact of any recommendations on publicly funded legal assistance;
- to have regard to the principles of civil justice outlined in Chapter 1, paragraph 5 of the SCCR;
- to consider other factors and reasons why parties may not litigate in Scotland; and
- to report with recommendations to the Scottish Ministers, together with supporting evidence within 18 months of the work commencing.

The resulting report by Sheriff Principal Taylor is therefore interlinked with the SCCR and can be viewed as a continuation of that work; indeed the review was carried out on the assumption that Lord Gill's recommendations, which form the basis of the Courts Reform (Scotland) Act 2014<sup>2</sup>, would be in place. These structural changes create the framework to enable the recommendations from Sheriff Principal Taylor's review to be implemented.

Sheriff Principal Taylor presented his Review of Expenses and Funding of Civil Litigation in Scotland report to the Cabinet Secretary for Justice, Kenny MacAskill MSP, in September 2013<sup>3</sup>. The report contained 85 recommendations aimed at delivering greater predictability and certainty in relation to the cost of litigation, thereby increasing access to justice. Approximately half the recommendations do not require primary legislation and will be mostly implemented by rules of court to be drafted by the Scottish Civil Justice Council ("SCJC"). The recommendations regarding sanction for counsel in personal injury actions were provided for in the 2014 Act. The other recommendations require primary legislation and

<sup>2</sup> <http://www.legislation.gov.uk/asp/2014/18/contents/enacted>

<sup>3</sup> Published September 2013. See: <http://www.gov.scot/Resource/0043/00438205.pdf>

most will be implemented through this Bill. The main exceptions are regulation of the claims management industry and referral fees which will be subject to a forthcoming review of legal services.

Further explanation of the policy behind the Bill is contained in the Policy Memorandum which also contains a glossary of the legal and technical terms.

In the response to the report, the Scottish Government committed to drawing together a range of partners and activity across the justice system to take forward the proposals. There was also a commitment to introduce primary legislation to implement, in particular, the recommendations on speculative fee agreements, damages based agreements (“DBAs”) and qualified one way costs shifting (“QOCS”) as a package and to consider the SCCR recommendations relating to group procedures and auditors of court alongside Sheriff Principal Taylor’s recommendations.

Specifically, the Bill includes provisions:

- to introduce sliding caps for success fee agreements (speculative fee agreements and DBAs) in personal injury and other civil actions;
- to allow DBAs to be enforceable by solicitors in Scotland;
- to introduce QOCS for personal injury cases and appeals, including clinical negligence, and specify the circumstances when the benefit of QOCS would not apply;
- to allow for new court rules in respect of third party and pro bono funded litigation and for legal representatives to bear the cost where their conduct in a civil action has caused needless cost;
- to enable the Auditor of the Court of Session and sheriff court auditors to become salaried posts within the Scottish Courts and Tribunal Service; and
- to allow for the introduction of a group procedure in Scotland.

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

### **Objective**

The Bill is aimed at enhancing predictability and transparency in relation to expenses in civil litigation in Scotland in the interests of access to justice.

### **Rationale for Government intervention**

Overall the Scottish Government believes that the Bill will provide greater access to justice and greater predictability of costs. It will extend the funding options available to parties who wish to enforce their legal claims.

In particular the policy proposals in the Bill are set to contribute to the realisation of the following outcomes:

- National Outcome 1 on living in a Scotland that is the most attractive place for doing business in Europe.
- National Outcome 11 on resilient communities by increasing public confidence in justice institutions and processes.
- National Outcome 16 on high quality, continually improving public services that are efficient and responsive to local people’s needs.

## **Benefits**

Sheriff Principal Taylor highlighted a “David and Goliath relationship” between pursuers and defenders in personal injury actions in Scotland which has resulted in an inequality of arms. His recommendations are aimed at addressing this “asymmetric relationship” with a focus on access to justice for the “excluded middle” who do not qualify for legal aid and are unable to fund their litigation privately. The review highlighted the difficulty where, in general terms, people either have to be poor enough that they qualify for legal aid or so rich that the costs do not matter. As that leaves many people, indeed potentially the majority of the population feeling shut out from the legal process, it is important that this issue is addressed by extending the funding options available and making the costs more predictable.

The package of review proposals in relation to success fee agreements and qualified one way costs shifting is directly aimed at tackling the issue and forms the core of the proposed Bill. This includes measures to introduce sliding caps on the amount that can be taken from an award of damages in the solicitor’s success fee; allowing damages based agreements to be offered to clients by solicitors in Scotland; and to introduce a system of QOCS in personal injury cases so that a legitimate pursuer is not liable for the other side’s expenses except in certain circumstances where there is fraudulent or unreasonable behaviour, or behaviour amounting to an abuse of process.

The introduction of a group proceedings procedure in Scotland for the first time will assist the courts to deal with multiple cases where a number of potential litigants have the same or similar claims. At present, despite the common issues which may be involved in these actions there are no mechanisms whereby they can be transferred into a single court and managed as a group. In consequence, each pursuer has been required to pursue a claim individually resulting in unnecessary expense for both parties. The proposal will help to make the courts more efficient. Collective redress mechanisms may also deter unlawful behaviour on the part of businesses and encourage safer working practices.

Bringing the Auditor of the Court of Session, auditor of the Sheriff Appeal Court and sheriff court auditors within the SCTS will enable a consistent approach to be taken to the delivery of the auditor function. This will in turn provide an opportunity to develop and share knowledge, experiences and skills within a team of professionals, led by the Auditor of the Court of Session as head of profession. The Scottish Government expects this to lead to greater transparency and consistency of approach, whilst preserving the fair and adversarial character and integrity of the auditing regime. The Scottish Government considers that the reforms proposed will enhance confidence in the taxation process.

## **Other possible reforms impacting on businesses**

The Scottish Government has set up two independent reviews on the legal aid system<sup>4</sup> and the regulation of legal services<sup>5</sup>.

Sheriff Principal Taylor’s proposals on the regulation of claims management companies, referral fees and funder of last resort will be considered in those reviews and are not provided for in the Bill.

<sup>4</sup> <http://www.gov.scot/About/Review/legal-aid-review>

<sup>5</sup> <http://www.gov.scot/About/Review/Regulation-Legal-Services>

## Consultation

- **Public consultation**

A public consultation on the main policy proposals on the Bill was held from 30 January 2015 to 24 April 2015. There were 40 responses received from: solicitor firms and solicitor organisations (30%), insurance industry (10%), local authorities (10%), voluntary sector (10%), court auditors (10%), other public bodies (10%), medical defence organisations (5%), Senators of the College of Justice, Sheriffs Association Scotland, Faculty of Advocates, a corporate business and other individuals.

Consultation paper - <http://www.scotland.gov.uk/Publications/2013/02/5302>

Responses - <http://www.gov.scot/Publications/2015/05/4629/downloads>

Analysis - <http://www.gov.scot/Resource/0048/00484357.pdf>

- **Within Government**

The policy proposals for the Bill have been discussed with the Lord President's Private Office and the SCTS.

- **Business**

Meetings were scheduled with specific businesses as set out under the "Scottish Firms Impact Test" section. A range of business interests, and businesses of different sizes were sampled. Comments were taken verbally on the questionnaire at meetings and written responses were received from some BRIA consultees whilst others referred the Bill Team to parts of their main consultation responses.

## Options

### Option 1 - Do nothing

This option means that the situation will remain as at present. There will be no changes to the methods of funding litigation. There will be no cap on the success fee that a lawyer or claims management company will be able to levy on a pursuer in the event of a successful action. There will be no change in the taxation régime in Scotland.

### Option 2 – Implement the proposals in the Civil Courts (Expenses and Group Procedures) (Scotland) Bill

The proposals are aimed at enhancing predictability and transparency in relation to expenses in civil litigation in Scotland in the interests of access to justice. The intention is that those contemplating litigation will have better information about the cost of litigating whether they are successful or unsuccessful in an action.

In addition, the Bill will open up more options to fund litigation through permitting solicitors to offer damage based agreements and by introducing group proceedings.

It will also introduce a group proceedings procedure in Scotland for the first time, though the detail of the procedure will be provided in rules of court.

Finally, it is expected that a more transparent taxation process will lead to lead to greater transparency and consistency of approach in taxations.

(For further information see the Financial Memorandum that accompanies the Bill.)

## **Sectors and groups affected**

Both options have impacts for the following sectors and groups:

- party litigants;
- consumer bodies/advocacy groups;
- businesses which litigate (large and small business);
- local authorities and the NHS and Health Boards;
- insurers;
- advocates and solicitor advocates;
- solicitors
- those with rights of audience under section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990; and
- the Scottish Courts and Tribunals Service (SCTS).

## **Benefits and costs of the options**

### **Option 1 - Do nothing**

#### **Benefits**

Doing nothing does not provide many clear benefits to Scotland or the wider public. If nothing is done, the way that cases are funded in the Scottish civil justice system will continue as one where the cost of litigation is high and to some extent unpredictable.

There would be a benefit to defenders in personal injury actions. If they are successful in such actions, they will continue to be able to claim expenses from the pursuer (though very few so do and there is judicial discretion to “modify” (reduce) a successful party’s entitlement to expenses in certain cases).

#### **Costs**

The costs of civil litigation will remain unpredictable, which acts as a disincentive to those considering pursuing civil action.

Doing nothing also means that the funding options open to pursuers will remain restricted. Damaged based agreements will only be available through unregulated claims management companies<sup>6</sup>.

There will also continue to be an inequality of arms in personal injury cases. Most defenders are or are backed by large insurance companies. The pursuer is often an individual with limited finances. This inequality can deter people from bringing cases where they will be responsible for the defender’s expenses if the action is unsuccessful.

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<sup>6</sup> The review ‘Regulating the legal profession’ announced on 25 April 2017 will, among other things, consider the regulation of claims management companies – see <http://www.gov.scot/About/Review/Regulation-Legal-Services>.

Group proceedings will not be possible in the Scottish courts. This will result in very similar cases being litigated separately in the courts often at high cost to the pursuer and clogging up the courts.

Finally, doing nothing will mean that the Auditor of the Court of Session and some of the sheriff court auditors will continue to make private profit from a public service. There will continue to be a perceived uncertainty, lack of consistency, and lack of transparency in the taxation of accounts.

## **Option 2 – Costs and benefits**

### **Success fee agreements and expenses in civil litigation**

Sections 1 to 4 and section 6 of the Bill form a package of provisions that will be of particular benefit to pursuers in civil litigation. The provisions will introduce caps in success fee agreements and allow solicitors to enter into damages based agreements.

#### **Expenses in the event of success**

At present, there are differing approaches to judicial expenses in speculative fee agreements and damages based agreements. In speculative fee agreements there are three types of arrangements:

- Type I - a solicitor may agree to accept party and party expenses with a success fee payable by their client of up to 100% of the fee element of the judicial account.
- Type II - a solicitor may agree to accept agent and client expenses in the event of the case being successful, without any percentage increase for success. This will cover work done before the start of the litigation together with any other work carried out by the solicitor which the auditor considers to be fair and reasonable.
- Type III - a solicitor may enter into a written fee agreement with their client with a stated hourly rate and a success fee calculated as a percentage uplift of that rate. The agreement will provide that the judicial account is prepared on an agent and client basis.

In damages based agreements judicial expenses may be offset against the success fee but in many cases, particularly those involving claims management companies, the legal services provider receives the judicial expenses as well as the success fee.

Sheriff Principal Taylor was attracted to the simplicity and certainty whereby, if the case is won, the legal services provider (the solicitor) is able to uplift both the agreed success fee and the expenses recovered from the defender. The solicitor will, however, be liable to pay all of the outlays, including counsels' and experts' fees (if engaged). Consequently, section 3(2) provides that the success fee agreement may allow the legal services provider to receive both the success fee and the expenses.

#### **Power to cap success fees**

Sheriff Principal Taylor recommended that a sliding scale of cap be introduced as shown in the following table. The Bill gives a power to the Scottish Ministers to introduce and set caps and it is anticipated that these will follow Sheriff Principal Taylor's recommendations. This will have the effect of facilitating access to justice and making the cost of litigation more predictable.

|                         |   |
|-------------------------|---|
| personal injury cases   | up to 20% for the first £100,000 of damages<br>up to 10% for the next £400,000<br>up to 2.5% of damages over £500,000 |
| all other civil actions | up to 50% of the monetary award recovered   |

### Benefits

This will be of particular benefit to pursuers in personal injury actions. The cost to the pursuer will be clear to them and we understand that success fee agreements where the expense of the litigation is expressed as a percentage of the damages gained is popular with clients since it is simple and straightforward, particularly as the solicitor is liable for all of the outlays.

We are informed by those businesses that we interviewed in preparation for this BRIA that, at present in success fee agreements, legal services providers (solicitors, persons with rights of audience and rights to conduct litigation by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, and claims management companies) are charging between 20% and 33% of the success fee (or an equivalent amount through a speculative fee agreement) in such cases. The caps will mean that the success fee will be at most 20% and in large value claims considerably less. The corollary is that those legal services providers which are at present taking a large percentage of the success fee will lose income when caps are introduced.

### Costs

The provision of sliding caps may affect local authorities and NHS Scotland health boards if the sliding cap encourages more people to make a claim as the success fee will be more predictable. This potential increase in actions against them may lead to public funds being spent on defending these actions. Other authorities, companies and individuals will be affected in the same way.

An issue may arise for those pursuer lawyers who rely on income from damages claims to ensure profitability. Pursuer lawyers who currently charge more than the perceived market rate could potentially see a reduction in profits owing to the cap on the level of success fee they are able to charge. However, Sheriff Principal Taylor noted in his report that such is the competition between law firms in this area that most firms charge less than the proposed statutory caps and some do not charge an enhanced fee in the event of success at all.

Some, if not all, claims management companies will be affected by this measure. The cap will mean that those firms that are charging a high percentage of the success fee will have their income decrease as pursuers benefit from the cap on success fees.

Any reduction in income for pursuer lawyers and claims management companies in success fees will be mitigated by the provisions in section 3 which provides that, where a success fee agreement has been entered into, the provider of the relevant legal services is entitled to retain any expenses recovered from the unsuccessful party, in addition to the agreed success fee. This is qualified in legal aid cases by providing that this provision is subject to section 17(2A) of the Legal Aid (Scotland) Act 1986 which states that any expenses in favour of any party in any proceedings in respect of which he is or has been in receipt of civil legal aid shall be paid to the Scottish Legal Aid Board, unless regulations under that section provide otherwise,

As far as individual pursuers in personal injury claims are concerned, section 6 provides that they are not required to make any payment other than from the success fee, except for any sums in respect of insurance premiums in connection with the claim. This means that the expenses of the case must be paid by the legal provider. The legal provider will look to recoup those expenses from the success fee.

### **Enforceability**

Section 2 of the Bill indicates that lawyers can offer the type of success fee agreement and enforce payment from the client. DBAs are agreements where the success fee is calculated usually as a percentage of the damages awarded. Solicitors and advocates are at present unable to enter into DBAs. Section 2 of the Bill will change this for solicitors, though advocates will still not be able to be involved in a DBA because of Faculty of Advocates rules. Some larger firms of solicitors have circumnavigated this prohibition by creating their own claims management companies which are able to offer DBAs.

### **Costs and benefits**

The wider choice of funding methods may lead to an increase in the number of actions raised affecting the Scottish Government, local authorities and other bodies or individuals who may be subject to a claim. It is not possible to quantify this. Some defender solicitors believe that those with valid claims have no difficulty in finding legal representation at present. They fear that some claims may not have merit. If there were to be an increase in valid claims, this may lead to councils, NHS Scotland health boards being liable for increased amounts of damages.

The SCTS would be affected in the event of an increased number of cases but the impact financially should be nil as courts fees are now set to ensure full recovery of the cost of the provision of the service.

As solicitors will be able to enter into DBAs, there is likely to be an impact on the number of cases being handled by claims management companies owing to greater competition. Those entering a DBA with a solicitor will have greater certainty as to what their fees will be. Some claims management companies charge a fee which is excluded from the 'no win no fee' agreement for referral to a solicitor. This might encourage pursuers to use solicitors who handle the case from start to finish with no hidden/extra fees. It may be that law firms operating claims management companies will wind them down and run claims management from within the firm, but this is a matter for the market to determine, subject to the Review of the Regulation of Legal Services which was announced by the Scottish Government on 25 April 2017.

### **Qualified one-way cost shifting**

Section 6(2) of the Bill provides for what is known as QOCS. Even in a relatively modest claim, legal expenses can mount up. In many cases, the legal costs will exceed the amount at issue in the proceedings. If a pursuer's expenses are likely to exceed the likely benefit of the litigation, then it is likely that the case will not be pursued. Concern about the cost of losing a case can deter members of the public from bringing a genuine claim. Liability for expenses is a crucial component of access to justice but can act as a barrier to access to justice.

The general rule in litigation is therefore that "expenses follow success" – the unsuccessful party bears the successful party's expenses. In other words, the costs are shifted. In personal injury litigation, most pursuers are private individuals without the financial means to fund the loss of a litigation, while the vast majority of defenders have the strength of an insurance company behind them.

The proposals in section 1 of the Bill on success fee agreements limit the potential liability of a pursuer in such personal injury cases to his or her own solicitor, but they do nothing to limit the potential liability of the unsuccessful pursuer to pay the expenses of the defender, if the defender is successful. Pursuers may therefore still be deterred from making use of the courts for a meritorious claim even if they have the benefit of a success fee agreement.

Section 8 of the Bill means that the court must not make an award of expenses against the pursuer of a claim or appeal in civil proceedings for personal injuries, including clinical negligence, where they have conducted proceedings in an appropriate manner. Consequently, defenders will generally be ordered to pay the expenses of successful pursuers but, subject to certain exceptions, they will not recover their own expenses even if they successfully defend the claim.

Parties which have a valid case will therefore be able to bring a personal injury claim but at proportionate cost and without having to worry about paying the expenses of the defender if they lose. QOCS will therefore introduce equality of arms between pursuers and defenders, most of whom will be or will have the backing of insurance companies in personal injury actions so that the costs become more appropriate.

#### Costs and benefits

There are not expected to be any costs to the Scottish Government except where the Scottish Government is a successful defender in a personal injury action and will be unable to recoup its expenses from the pursuer.

The introduction of QOCS may lead to an increase in the number of personal injury claims as it will permit more pursuers, who may have been inhibited by the potential liability to the costs of defenders, to bring meritorious claims. Pursuers are unlikely to raise actions with little prospect of success and the Bill provides protections for defenders where the pursuers have acted inappropriately. This will impact on the SCTS as it is anticipated more actions will go to court. However, as noted above, court fees are set to achieve full cost recovery, so there should be no financial impact.

The effect of this provision on defenders is likely to be as follows. Firstly, in cases which they are successful they would now be liable for their own costs instead of recovering their costs from unsuccessful pursuers (unless an award of expenses is made under section 8(3) in the particular circumstances provided for in section 8(4)). There is, however, little evidence that they seek to recover their costs from unsuccessful pursuers at present. Secondly, the proposal may result in an increased volume of cases pursued by pursuers. Thirdly, defenders may be more constrained in the amount of legal costs they are willing to incur as they will now be liable for their own costs, regardless of the outcome of the case under the proposal.

However, the effect on defenders may be less than would first appear. Sheriff Principal Taylor noted: "Jackson LJ observed in his Preliminary Report that in a sample of between 22,000 and 23,000 notified claims obtained from an insurer, costs orders against claimants were obtained in only 0.1% of the sample." Sheriff Principal Taylor commented: "While I do not have equivalent statistics for this jurisdiction, all qualitative evidence and my own experience point to the position being broadly the same." (SP Taylor: Review of Expenses and Funding of Civil Litigation in Scotland, p170, para 50 cf Jackson LJ, Review of Civil Litigation Costs: Preliminary Report, Vol. 1, (2009), Chapter 25, paragraph 2.6.) This means that defenders very rarely press for expenses in cases that they win. As a result, their marginal loss owing to these changes would be very limited.

The fact that defenders will no longer be able to recoup their expenses from the pursuer may lead to more cases being settled out of court. Defenders will have to balance the cost of going to court with the risk of losing a case. For example, if expenses in a case exceed the expected payout, insurers may settle rather than go to court even if they consider it likely that they will be successful in the case. A very common type of action is a personal injury claim for whiplash following a road traffic accident. According to the UK Government the average payout in 2015 was around £1,850 (See “Reforming the soft tissue injury (whiplash) claims process” consultation, p 7 which can be viewed at:

[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/579193/RPC-3432\\_2\\_-MoJ\\_Reforming\\_the\\_soft\\_tissue\\_injury\\_whiplash\\_process\\_-\\_IA\\_c\\_-\\_opinion.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579193/RPC-3432_2_-MoJ_Reforming_the_soft_tissue_injury_whiplash_process_-_IA_c_-_opinion.pdf)). Whiplash is notoriously difficult to verify and unless there is obvious fraud, insurers will not defend such cases as they will not recoup their expenses.

As pursuers will no longer be generally liable for defendant costs in the event of losing a case, there will be no need to use ATE insurance. The effect is not likely to be great as it is understood that the high cost of ATE insurance, which is set at around 30% of the amount insured, means that it is not very prevalent in Scotland. This will be seen as advantageous to pursuers as ATE insurance is one of the ‘surprise’ hidden costs levied on pursuers by claims management companies advertising ‘no win, no fee’.

### **Pro bono funding**

The purpose of an award of expenses in litigation is to compensate the successful party for having to pay for legal representation. Sheriff Principal Taylor noted that the extent of a party’s potential liability in expenses has an important tactical influence on the conduct of other parties to a litigation. The potential liability to meet the other side’s expenses is often a powerful motivation for settling a case. Taylor was unaware of any case in which expenses had been awarded in favour of a party who had been represented *pro bono* that is, represented free of charge, rather than on the basis of a success fee agreement, in which fees would only be charged in the event of success). On this basis, it was suggested that such a party might be at a disadvantage in relation to prospects of settlement. This is because:

- if solicitors and counsel do not seek judicial expenses when representing clients *pro bono*, this may encourage their opponents to be more obdurate and protract proceedings unnecessarily – they should not benefit from the fact that the opponent was represented *pro bono*.
- If the opponent of a party represented *pro bono* is aware that an award of expenses is unlikely to be made against them, there is not a level playing field when negotiating a settlement.

The vast majority of respondents to the consultation by Taylor were in favour of an express power to make it clear that the courts should have the power to make an award of expenses where the successful party has been represented on a *pro bono* basis.

This provides equality of treatment to litigants who are represented *pro bono*, because awards can still be made against them if they lose. The potential for an award of expenses even in favour of a *pro bono* represented party may deter litigants whose claim is without merit.

### **Costs and benefits**

The effect of this is that the court may make an order for expenses to be made against defenders even when the pursuer is represented free of charge. The beneficiary will be a

charity registered in the Scottish Charity Register with a charitable purpose of improving access to justice.

The potential liability for an expenses order is likely to make defenders more open to settlement.

### **Third party funding**

Third party funding refers to the provision of financial support for a litigation by individuals or companies with no pre-existing interest in the litigation. The Bill provides that it will be competent to award expenses against a person who has an interest in a litigation, but who is not a party. A person having an interest in a litigation would be a person who funds it, in whole or in part, and who has a financial stake in the outcome. This would include success fee agreements provided by claims management companies.

#### **Costs and benefits**

The third party funder and any intermediary may be liable to an award of expenses against them.

The benefit of this provision is that the non-funded party will have greater confidence that the funded party will not act unreasonably because the funder becomes potentially liable for expenses. Sheriff Principal Taylor noted that the extent of a party's potential liability in expenses has an important tactical influence on the conduct of other parties to a litigation. The potential liability to meet the other side's expenses is often a powerful motivation for settling a case.

### **Award of expenses against legal representatives**

The Bill provides for an award of expenses to be made against a legal representative in a case where the court considers that they have committed a serious breach of their duties. This only affects legal representatives and is already an option open to the court although very rarely exercised.

#### **Costs and benefits**

The legal representative of a party to the litigation may be liable to an award of expenses against them if they conduct the case in an inappropriate manner.

The benefit of this provision is that a party to litigation will have greater confidence that the legal representative of the opposing party will not act unreasonably because in such circumstances the opposing party's legal representative becomes potentially liable for expenses.

### **Auditors of court**

This provisions in Part 3 of the Bill affect the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and those auditors of the sheriff court who are not already employees of the SCTS (the majority of the auditors of the sheriff court are sheriff clerks and already employed by SCTS. Some auditors, however, are self-employed or in the case of the two Edinburgh Sheriff Court auditors, employed by or partners in solicitor firms).

Taxation is the determination of a successful party's expenses in litigation by an auditor of court.

The Auditor of the Court of Session also holds the post of auditor of the Sheriff Appeal Court at present, by virtue of a separate commission. His total earnings are not a matter of public record. He performs both judicial and extra-judicial taxations and takes a percentage of the value of the account as taxed. Judicial taxations are ordered by a court or tribunal whereas extra-judicial taxations may be requested by the parties.

**Table 5**

| <b>Year</b> | <b>Fees claimed by the Auditor of the Court of Session</b> |
|-------------|--|
| 2014/15     | £106,836   |
| 2015/16     | £148,957   |
| 2016/17     | £76,014  |

Table 5 gives some detail of the fees claimed by the present Auditor of the Court of Session from the Scottish Government. These are monies the Scottish Government pays to the Auditor to reimburse him for the loss of fees incurred from those litigants who are exempt from paying a court fee such as legally aided litigants and those receiving a passporting benefit (includes lodging/cancellation fees plus any fee fund dues). The Auditor's income will also include the earnings that he makes from other judicial taxations, extra-judicial audits and fee assessments.

The Auditor of the Court of Session is responsible for the costs relating to his 4 members of staff which was £114,740 in wages in 2016. He also pays rental to the SCTS for his accommodation, the rental being £24,360 in 2016.

It is proposed that the Auditor of the Court of Session will become a member of SCTS staff. Although the current earnings of the present Auditor of the Court of Session are not confirmed, it is likely that the post in future will involve a lower rate of remuneration. This will not affect the present Auditor as it is envisaged that transitional provision will allow him to continue in his post as a self-employed person until his 65<sup>th</sup> birthday in 2022.

#### Costs and benefits

There are not expected to be any costs on the Scottish Government as a result of the provisions relating to auditor of court though it will benefit by the saving of £13,000 per annum which is currently paid to the Auditor of the Court of Session as a stipend.

SCTS will become responsible for the employment of the Auditor of the Court of Session and the auditor of the Sheriff Appeal Court as well as an increased number of auditors of the sheriff court. This will lead to an increase in its staff budget and other costs and the loss of rental income from the Auditor of the court of Session. However, it is considered that the changes will be to benefit of the SCTS. It will receive all fees in both judicial and extra judicial taxations in all the Scottish courts. Although this income is unquantifiable, it is expected to more than cover the increase in staff costs and other expenditure. It is proposed that the auditors of court become office-holders in the Scottish Administration by virtue of an order under section 126(8)(b) of the Scotland Act 1998. By virtue of section 64(3) of that Act a sum received by an office-holder in the Scottish Administration must be paid into the Scottish Consolidated Fund. In the case of auditors of court this would include receipts in relation to extra-judicial taxation.

As far as costs on local authorities, other bodies, individuals, and businesses are concerned, the requirement that guidance be issued by the Auditor of the Court of Session as to what expenses are allowed and at what level is likely to lead to fewer cases being put forward for taxation and therefore costs generated in that way will be reduced.

## Group proceedings

At present, it is not possible to bring group proceedings (also known as a multi-party action or a class action) in Scotland. Individuals seeking redress must raise their own individual action. The provision in the Bill allows for group procedure to be developed for Scotland for the first time. It will be available as an “opt-in” only procedure in the Court of Session and the representative of the group does not need to be a member of the group. Specifically, it will give the Court of Session the power to make rules by an act of sederunt for group proceedings where two or more persons have a separate claim which may be the subject of civil proceedings.

The Scottish Government does not consider that there are likely to be a large number of actions using this procedure, though large numbers of pursuers may be party to some of the actions leading to an increase in personal injury and damages claims as those who have suffered injury may be encouraged by the possibility of opting-in to group proceedings. It is not possible at this stage to quantify the number of actions that will be brought and how many pursuers will use the new provision. The Civil Justice Statistics in Scotland 2015-16 indicate that 300 asbestos related claims were raised in the Scottish courts in 2015-16 (see <http://www.gov.scot/Resource/0051/00515767.pdf>, tables 15-17). This is an example of the type of case that might be considered suitable for group proceedings. Another example is that of the Volkswagen car emissions issue. An article and video in ‘the Herald’ stated that Thompsons Solicitors, “has 800 of the claims, with an estimated 400 with other solicitors” (See [www.heraldscotland.com/news/15181197.%20Video\\_VW\\_faces\\_5\\_million\\_legal\\_claim\\_in\\_biggest\\_ever\\_Scots\\_class\\_action\\_over\\_emissions\\_scandal/](http://www.heraldscotland.com/news/15181197.%20Video_VW_faces_5_million_legal_claim_in_biggest_ever_Scots_class_action_over_emissions_scandal/)).

## Costs

The Bill’s provisions relating to group proceedings are not expected to have cost implications for the Scottish Government. Group procedure will be provided for by Court of Session rules. Also, so far as SCTS is concerned, permitting group proceedings only in the Court of Session may increase the number of cases heard in the Court of Session and possibly lead to fewer cases in the Sheriff Personal Injury Court and the other sheriff courts. As court fees are now set at rates which reflect full cost recovery, it is not considered that there will be any financial impact on SCTS as a result of more or fewer cases in the specific courts (see the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 which came into force on 28 November 2016).

There might be an impact on the SCTS as the introduction of group proceedings may lead to more pursuers making similar claims as part of one action. But these will be taken forward as a single action, rather than a large number of separate actions which will assist the efficiency of the court.

Local authorities and other authorities, for example NHS Scotland health boards, and companies or individuals who might be subject to a group proceeding may be affected by the provision.

This is likely to lead to an increased number of people bringing claims to the courts as some of those with a claim may be more willing to opt into group proceedings rather than take on the burdens of litigating as an individual. If such a group proceeding is successful, it is probable that more pursuers will be awarded damages than if each had to claim as an individual leading to the total damages bill to the defender being higher. It is not possible at this stage to put any figures on this. In mitigation of this increase, the fact that a number of claims are to be heard in one action in the Court of Session may lead to a reduction in legal

costs of a larger number of claims in the Court of Session, the Sheriff Personal Injury Court, and the other sheriff courts, especially if sanction for counsel was likely to be granted in the lower courts. Again, this is not quantifiable.

On the other hand, if a number of pursuers opt in to a group proceeding, the costs of defending that action may well be less than defending a number of individual cases.

Individual pursuers may be better off as a result of the possibility of group proceedings, especially those who do not proceed on the basis of funding by a success fee agreement or legal aid. This is because legal costs will be shared between the various parties which have opted into the action.

### **Scottish Firms Impact Test**

In setting out to understand the impact that the proposals might have on Scottish businesses a questionnaire was devised and issued to a number of companies. In almost every case meetings were arranged with companies. Businesses requiring to litigate, and providers of legal services in different parts of the country were identified. Interviews and meetings of relevance were conducted between January and March 2017 as follows:

- The Law Society of Scotland
- The Faculty of Advocates
- Digby Brown
- Balfour and Manson
- DWF
- Forum of Scottish Claims Managers (FSCM)
- Forum of Insurance Lawyers (FOIL)
- The Scottish Trades Union Congress (STUC)

The Faculty and the Law Society are regulatory and representative organisations. In terms of personal injury cases, they represent both pursuer and defender lawyers. Digby Brown and Balfour and Manson are solicitor firms specialising in personal injury actions. Digby Brown owns its own claims management company. DWF is a solicitor firm structured into two legal service areas covering commercial services and insurance services. The Forum of Scottish Claims Managers and the Forum of Insurance Lawyers are representative organisations of the defender insurance lawyer community. The STUC is the umbrella trades union organisation in Scotland.

In terms of the likely cost or benefit to impacted businesses the following points were made by consultees:

#### **Comments from BRIA consultees on sliding caps**

All consultees were in favour of the introduction of sliding caps in relation to success fees.

One representative body was concerned about composite offers in personal injury cases. A composite offer is an offer to settle out of court, the sum being offered being intended to cover both damages and expenses without specifying the proportion allocated to each. The issue is how much relates to damages and is, therefore, subject to the cap.

### **Comments from BRIA consultees on solicitors being able to offer DBAs**

- the provision allowing solicitors to offer DBAs might lead to more English solicitor firms operating in Scotland, thus increasing competition.
- to be a successful option for pursuer lawyer firms, they need to generate a considerable volume of DBAs. Very few firms might be able to sustain the necessary volume and there will, consequently, be little impact in terms of competition.
- cases that go to court can make damages up to three times more than cases that settle early. A solicitor who deals with the case from start to finish will have the best interests of the pursuer in view.

### **Comments from BRIA consultees on qualified one-way cost shifting**

Opinions on QOCS were divided with pursuer solicitors favouring its introduction and defender solicitors expressing more concern.

Defender solicitors were concerned that:

- QOCS would lead to a rise in unmeritorious claims. Although Sheriff Principal Taylor writing in 2013 considered that Scotland did not have a compensation culture, the businesses consulted for this BRIA thought there was evidence of a rise in such a culture with an increase in claims management companies operating North of the border. It was noted that whilst the numbers of personal injury cases have decreased in England and Wales over the last four years, they have increased in Scotland;
- There was no incentive to defend an action if the expenses of pursuer added to their own expenses in the litigation was likely to be higher than the award;
- QOCS may mean that more cases get to court rather than settle as the risk to the pursuer is removed and pursuers may perceive that damages awarded by the court may be higher.

One representative body considered that:

- fraudulent claims are not a big issue in Scotland at present;
- the circumstances in which QOCS is not granted will be rare. It drew similarities with grant of legal aid where legal aid is not granted if lawyers present the case in an inappropriate manner; and
- QOCS is an issue for an individual defender without insurance or legal aid. In such a situation QOCS does not provide a 'level playing field'. These cases will be rare.

One firm of solicitors noted that although defenders will suffer as a result of the introduction of QOCS, defender solicitors are likely to benefit in the same way that pursuer solicitors will benefit from increased business as a result of the increased access to justice for pursuers.

One representative body welcomed the introduction of QOCS and the equality of arms that it will achieve.

### **Comments from BRIA consultees on auditors of court**

All of the parties consulted considered it appropriate that the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court and the sheriff court auditors be salaried officials within the SCTS.

### Comments from BRIA consultees on group proceedings

All the consultees were supportive of the introduction of group proceedings. All agreed that the opt-in model should be adopted as this is more straightforward and, therefore, more appropriate to a new procedure in Scotland. This included one representative body which, at the time of the consultation, had favoured the opt-out model but on reflection changed its mind to the opt-in model, at least initially.

### Test run of business forms

There are no new business forms proposed.

### Competition assessment

Generally, in terms of competitiveness, there were comments that the provisions in the Bill are likely to lead to more competition with solicitors in particular benefitting from being able to enter into DBAs. The corollary of that is that claims management companies would suffer from this increased competition from solicitors.

### Legal Aid Impact Test

The Bill may lead to even fewer claims for legal aid due to the greater availability of damages based agreements. Claims for legal aid for personal injury cases are running at a very low level. The table below gives details of legal aid applications in personal injury cases over the last three years for which statistics are available.

|  | 2013-14 | 2014-15 | 2015-16 |
|--|---------|---------|---------|
| Total number of personal injury cases initiated in the courts  | 8,287   | 9,210   | 8,766   |
| Applications for full civil legal aid received                 | 392     | 337     | 294     |
| Grants of full civil legal aid made (certificates issued)      | 156     | 127     | 114     |
| Total cost (inc VAT) of payments on full civil legal aid cases | £4.6M   | £2.4M   | £2.3M   |
| Average case cost of full civil legal aid cases                | £23,000 | £15,700 | £17,400 |

This comparison of the court and legal aid statistics makes it clear that most personal injury cases are funded by other methods than by legal aid. For example, in 2015-16, there were 8,766 personal injury cases initiated, but of those, only 294 (3%) involved an application for legal aid of which 114 (1%) received a full grant of legal aid. The Bill will further widen those alternative funding options.

Some pursuers are likely to prefer to be funded by legal aid if they qualify. This is because those so funded will receive 100% of the damages awarded instead of having to pay a success fee out of those damages. Others may be attracted to the simplicity of a DBA or their legal representative may not offer legal aid. This may lead to a reduction in the number of legal aid cases.

## **Enforcement, sanctions and monitoring**

The Bill is largely permissive setting out different funding methods in civil cases. Enforcement and sanctions will not apply except in situations where litigants use the court processes inappropriately. It will be for the courts to “police” matters, in terms of awards of expenses, in such cases.

The auditor of court provisions do require that the auditors follow guidance issued by the Auditor of the Court of Session and it will be the Auditor’s and the Scottish Courts and Tribunal Service’s role to monitor compliance with that guidance. The Bill also requires greater transparency of all the auditors of court. This will be monitored through the reports that the SCTS is required to publish regarding taxations carried out by each of the auditor of court groups.

The SCJC was established on 28 May 2013 under the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. It will prepare draft rules of procedure for the civil courts relating to the provisions in the Bill and advise the Lord President on the development of the civil justice system in Scotland. The appropriate SCJC committees will deliver the detail envisaged by the Bill as well as other new procedures enabled by the Bill such as group proceedings under the enabling powers in sections 103 and 104 of the Courts Reform Act 2014. Changes in court rules for civil procedure are implemented through acts of sederunt that the Court of Session may make.

In addition, approximately half of the recommendations made by Sheriff Principal Taylor do not require primary legislation and most of these will be implemented by court rules drawn up by the SCJC.

## **Implementation and delivery plan**

The Bill is expected to proceed through Parliament and, if passed, Royal Assent would be obtained around the Spring of 2018 with implementation commencing thereafter. The Scottish Government will work with the SCTS and the Scottish Civil Justice Council on developing an implementation timetable for the various proposals in the Bill. Many of the proposals are linked and the procedures and rules for some elements of the reforms will need to be in place before they can come into effect.

## **Post-implementation review**

The Scottish Government and SCTS will continually review the changes during implementation.

## **Summary and recommendation**

Option 2 is recommended. The Bill implements many of the recommendations from Sheriff Principal Taylor’s Review of the Expenses and Funding of Civil Litigation in Scotland together with recommendations made in Lord Gill’s Report of the Scottish Civil Courts Review that have not yet been implemented. The Bill implementing option 2 will improve access to justice by offering pursuers increased funding options, by promoting a greater equality of arms, and by introducing group proceedings.

**Summary costs and benefits table**

|  |  |
|--|--|
| Option 1 – Do nothing  |  |
| Option 1 – Costs   | Option 1 - Benefits  |
| <p>The costs of civil litigation will be unpredictable and in some cases very high. For example, in discussions with business stakeholders about personal injury, it became apparent that in some “no win no fee cases” claims management companies take 33% of the success fee. Where this fee is intended to fund the long-term care of an individual, this means that that individual is not receiving the full benefit intended.</p> <p>Doing nothing means that the funding options open to litigators will remain restricted. Damaged based agreements will only be available through unregulated claims management companies. It also means that group proceedings will not be possible in the Scottish courts. This will result in very similar cases being litigated separately in the courts often at high cost to the pursuer and clogging up the courts.</p> <p>There will also continue to be an inequality of arms in personal injury cases with large insurance companies perceived as being able to muster vast resources to defend their corner deterring pursuers with few financial resources from bringing cases where they will be responsible for the defender’s expenses in an unsuccessful action.</p> <p>Finally, doing nothing will mean that the Auditor of the Court of Session and some of the sheriff court auditors will continue to make private profit from public service. There will continue to be uncertainty, lack of consistency, and lack of transparency in taxation of accounts.</p> | <p>Doing nothing does not provide many clear benefits to Scotland or the wider public. If nothing is done, the way that cases are funded in the Scottish civil justice system will continue as one where the cost of litigation is high and to some extent unpredictable.</p> <p>There would be a benefit to defenders in personal injury actions. If they are successful in such actions, they will continue to be able to claim expenses from the pursuer (though very few so do).</p> |

|   |   |
|---|---|
| Option 2 – implement Sheriff Principal Taylor’s and Lord Gill’s recommendations requiring primary legislation in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill  |   |
| Option 2 – Costs  | Option 2 - Benefits   |
| <p>The provisions of this Bill will not involve many direct costs.</p> <p>The widening of the availability of DBAs to solicitors is likely have an adverse effect on the business of claims management companies.</p> <p>The increased access to justice through the availability of solicitor DBAs, QOCS, caps on success fees, and group proceedings might mean that more claims for personal injury are made and if those claims are successful, defenders might be liable for an overall increase in the damages that they pay out.</p> <p>The group that the Bill will affect in terms of costs are the auditors of court. The posts of Auditor of the Court of Session and the auditor of the Sheriff Appeal Court are likely to paid at a lower rate when the posts are transferred to the SCTS. As there will be transitional arrangements deferring this change until the present incumbent retires, he will not personally be affected. Transitional arrangements deferring the transfer of all non-SCTS sheriff court auditors to the SCTS will mean that those independent auditors currently holding a commission to be an auditor of court will be unaffected.</p> <p>The SCTS will have increased staffing costs as result of all the auditors of court being members of staff. However, it is considered that the increased revenues from taxation, particularly that carried out by the Auditor of the Court of Session will be greater than the increased staffing cost.</p> <p>If the provisions in the Bill increase the number of personal injury claims, it may lead to an increase in claims funded by legal aid, though the numbers are likely to be very small as currently only 1% of cases attract a full legal aid grant.</p> | <p>The Bill will widen access to justice and pursuers will be the main beneficiaries.</p> <ul style="list-style-type: none"> <li>• They will benefit from the caps on success fees which will mean that, in most cases, they will receive a greater proportion of the award.</li> <li>• They will benefit from QOCS as, in most cases, they will not be liable for the defenders’ expenses.</li> <li>• They will benefit if their case is suitable for a group proceeding action as the shared cost of the one representative action will be less than the cost of an individual action.</li> </ul> <p>Solicitors too will benefit. The increased access to justice for pursuers is likely to result in a greater number of personal injury claims and court actions arising out of those claims. Both pursuer and defender solicitors will benefit from increased business.</p> <p>As far as costs on the Scottish Government, local authorities, other bodies, individuals, and businesses are concerned, the requirement that guidance be issued by the Auditor of the Court of Session as to what expenses are allowed and at what level is likely to lead to fewer cases being put forward for taxation and therefore costs generated in that way will be reduced.</p> <p>The Scottish Government will no longer be required to pay the £13,000 stipend to the Auditor of the Court of Session.</p> <p>It is expected that the increased revenue from taxation with all auditors of court being employed by the SCTS will more than offset the extra staffing costs and loss of rental involved in all auditors being SCTS staff.</p> <p>The Bill may have a positive impact on the Legal Aid Fund. The provisions in the Bill introducing solicitor DBAs may decrease the number of personal injury claims that are legally aided as claimants may prefer the simplicity of a DBA or their legal representatives may not offer legal aid.</p> |

**Declaration and publication**

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:****Date:**

**Ms Annabelle Ewing  
Minister for Community Safety and Legal Affairs**

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The Scottish Government  
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Edinburgh  
EH1 3DG

ISBN: 978-1-78851-005-9 (web only)

Published by The Scottish Government, June 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS265552 (06/17)

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