

Equality Impact Assessment – Results

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

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Scottish Government
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EQUALITY IMPACT ASSESSMENT – RESULTS

Title of policy	Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Summary of aims and desired outcomes of policy	The principal aim of the legislation is to create a more accessible, affordable and equitable civil justice system for Scotland by making the costs of court action more predictable, increasing the funding options for pursuers of civil actions and introducing a greater level of equality to the funding relationship between claimants and defenders in personal injury actions.
Directorate: Division: Team	Justice: Civil Law & Legal System Division: Courts Team

Executive Summary

An Equality Impact Assessment (EQIA) is to aid the Scottish Government in discharging its Public Sector Equality Duty under section 149 of the Equality Act 2010. The Scottish Government is required to assess the impact of proposed legislation against the needs in the public sector equality duty - to eliminate unlawful discrimination, to advance equality of opportunity and to foster good relations.

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill will provide the legislation needed to implement many of the recommendations of Sheriff Principal Taylor's 2013 Review of Expenses and Funding of Civil Litigation in Scotland¹. In addition, it will make provisions relating to recommendations by Lord Gill in his 2009 Report of the Scottish Civil Courts Review² about two topics which have not yet been implemented.

Equality issues were considered during the policy development process and none of the final proposals were considered to give rise to the possibility of those affected being treated less favourably due to any of the protected characteristics.

As the proposals in the Bill are, in the main, permissive and intended to apply equally to all affected and as responses to a consultation on the proposals did not identify any detrimental effect on the basis of the protected characteristics, it was considered that a relatively limited Equality Impact Assessment (EQIA) would be appropriate.

The focus of consideration was on determining whether there may be any inadvertent effects on different groups, by examining sectors of the population likely

¹ <http://www.gov.scot/About/Review/taylor-review/Report>

² <http://www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-reform>

to be affected by the Bill – primarily those contemplating or instigating a civil court action, defenders in court actions and pursuer and defender legal professionals.

The EQIA took into consideration all the available evidence and confirmed that the proposals in the Bill are unlikely to have any significant differential effect on the basis of the protected characteristics. Furthermore, consultation responses indicate that the Bill's provisions may have a positive impact on people with a disability.

No changes to the policy were considered necessary following the EQIA. However, the Scottish Government will continue to work with key stakeholders to ensure full account is taken of equality issues.

Background

Scottish Civil Courts Review

The Rt Hon Lord Gill's Report of the Scottish Civil Courts Review ("the SCCR"), published in September 2009, sets out the most comprehensive programme of reform of the civil courts in generations. 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.

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 as follows.

- 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;
- 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 2014 Act, 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 then Cabinet Secretary for Justice, Kenny MacAskill MSP, in September 2013. 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 approved by the Scottish Civil Justice Council. The recommendations regarding sanction for counsel in personal injury actions were provided for in the 2014 Act. The other recommendations require primary legislation and most will be implemented through this Bill. The main exceptions are regulation of the claims management industry and referral fees which will be part of a review of the regulation of legal services.

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.

Scope of the EQIA

A framing exercise, which is recommended but not required, was not carried out owing to the nature and extent of the proposals and the limited evidence in relation to protected groups and the civil justice system. There has been ongoing consultation with key stakeholder groups and justice partners during the policy development process. Discussions with stakeholders, policy colleagues in Scottish Government and justice partners covered the potential impact of the Government's policy proposals. Assessments for Justice Bills, along with feedback on equality matters received from stakeholders at various meetings and through written responses submitted to the consultation, were used to decide if a formal framing exercise would be necessary and of value. The scope of the EQIA reflects the size and effect of the Bill.

The sources of information and evidence drawn on by the Scottish Government in carrying out the EQIA include:

- The public consultation ("Expenses and Funding of Civil Litigation Bill: A Consultation")³ on the proposals to be included in the Bill⁴;
- The analysis of responses to that Consultation ("Expenses and Funding of Civil Litigation Bill: Analysis of Consultation")⁵;
- The European Convention on Human Rights (ECHR)⁶;
- Justice Disability Steering Group: Access to Justice final report (June 2010)⁷;

³ <http://www.gov.scot/Publications/2015/01/9932>

⁴ Note that the Bill now has a different name.

⁵ <http://www.gov.scot/Publications/2015/08/6159>

⁶ http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁷ http://www.capability-scotland.org.uk/media/63459/jdsg_final_report_rh_21898_26908.pdf

- Scottish Government Equality Outcomes: Lesbian, Gay, Bisexual and Transgender Evidence Review (2013)⁸; and
- The Scottish Government Equality Evidence Finder.

Evidence was also collected from statistics and other information provided by the Scottish Government and justice partners as well as through engagement with stakeholders.

The consultation

The Government's consultation paper set out in detail the proposed changes to be taken forward in this Bill. The consultation included questions on impact and equality and was sent to equality and consumer groups as well as to those representing the legal profession. Responses to these questions were used to inform the EQIA. Of those that responded, no concerns were raised about the impact of proposals on specific protected groups. We therefore tentatively concluded that there is an absence of concern regarding the impact of the proposals on those groups.

Given that the proposals in the Bill appeared to have no significant direct effect in relation to the protected characteristics, the Scottish Government's focus in carrying out the EQIA was to examine the available evidence to attempt to determine whether there may be any indirect effects on the protected characteristics, by analysing where possible the groups likely to be affected by the Bill's provisions. The public equality duties - to eliminate unlawful discrimination; to advance equality of opportunity; and to foster good relations - were also considered as part of the EQIA.

The Equalities and Human Rights Commission (EHRC) focussed on their equality mandate and human rights issues which in particular affect groups protected under equality legislation. Their response set out their views on these issues but did not respond to the specified questions in the consultation paper or go into detail about the effects from the point of view of the different protected groups. The EHRC noted that "even if people [with discrimination and human rights claims] could otherwise fund their own representation through speculative fee agreements, they often cannot afford the risk of paying the other side's costs". The Commission would "accordingly support the proposals for Qualified One-way Costs Shifting (QOCS)" though it noted that the proposals only applied to personal injury cases.

Independent Living in Scotland (ILiS) also welcomed the proposal for the introduction of QOCS. ILiS stated that "the principle that 'funds follow success' can put people off fighting their case as they know they will be responsible for costs incurred by the other party. We therefore believe that introducing a system of qualified one-way costs shifting would increase access to justice for disabled people".

The EHRC was in favour of the proposed introduction of sliding caps. It stated that "a cap on speculative fee agreements in personal injury and other civil actions would be welcomed as a protection against the potential scope for excessive charging".

⁸ <http://www.gov.scot/Resource/0042/00420922.pdf>

The EHRC expressed its reservations about damages based agreements (DBAs). It noted that “in discrimination and human rights claims, damages are usually relatively low” and DBAs may not be viable as a means of funding such cases. The Commission’s view was that damages are “awarded to reflect the injury to the pursuer and compensate the pursuer for the harm done”. The Commission therefore considered it “unreasonable for an element of that sum to be taken from the pursuer to meet the solicitor’s fee”.

We have noted this reservation but as DBAs will be voluntary and other funding options are still available (including speculative fee agreements and, if the applicant qualifies, legal aid) we consider the proposal to introduce solicitor DBAs to be proportionate.

The Senators of the College of Justice stated in their consultation response: “There may be benefits arising from class actions [Group Proceedings] for people who share a protected characteristic.” Both the EHRC and ILiS also welcomed the proposal to introduce group proceedings. The EHRC stated: “Class actions would improve access to justice in Scotland, providing an important opportunity for members of the affected group who would otherwise be denied an effective remedy. This would include group members who may for a reason related to their disability, e.g. due to communication difficulties, be less able to initiate and pursue their claims under the existing court procedures.”

Scottish Women’s Aid was concerned that the proposal in the consultation that legal aid be the ‘funder of last resort’ may negatively impact on women experiencing domestic abuse. The Scottish Government has not included that provision in the Bill and consequently those concerns about a negative impact will not arise.

Key findings

Having considered the data and evidence gathered, the potential impacts – negative and positive – were considered that the proposals might have on each of the protected characteristics.

There are very few relevant available statistics on the protected characteristics in relation to civil justice. Civil Justice Statistics in Scotland 2015-16⁹ gives a breakdown of the civil court actions by type of case but neither the Scottish Government nor the Scottish Courts and Tribunals Service collect specific information relating to the protected characteristics of people who make use of the civil courts, other than age. The Scottish Crime and Justice Survey 2014¹⁰ does contain some information on the protected characteristics of people experiencing civil law problems, though not all such problems will be resolved in court.

NB: There is no specific relevant civil justice information available in relation to pregnancy and maternity, religion or belief, sexual orientation or gender reassignment. The Scottish Government Equality Outcomes: Lesbian, Gay, Bisexual and Transgender Evidence Review found that “Regarding access to justice

⁹ <http://www.gov.scot/Publications/2017/03/5915>

¹⁰ <http://www.gov.scot/Publications/2016/03/5269>.

and legal aid, no information has been found on the sexual orientation of applicants for civil or criminal legal aid.”¹¹

Age	Positive	Negative	None	Reasons for decision
Eliminating unlawful discrimination, harassment and victimisation			X	The Civil Justice Statistics in Scotland 2015-16 ¹² show that 56% of personal injury claims arise out of road traffic accidents. These statistics ¹³ provide a breakdown by age of those killed or suffering serious injury and indicate that those aged between 16 and 59 (76%) are most likely to raise a claim relating to personal injury arising from a road traffic accident.
Advancing equality of opportunity			X	
Promoting good relations among and between different age groups			X	<p>The Scottish Crime and Justice Survey 2014¹⁴ found that 21% of adults had experienced at least one civil law problem in the last three years. People aged over 60 are less likely to have experienced civil legal problems in the last three years than those in other age brackets (11% of those aged over 60, compared to 18% of those aged 16-24, 29% of those aged 25-44, and 24% of those aged 45-59).</p> <p>The statistics available suggest that the Bill’s provisions which improve access to justice by opening up funding options and making the expenses in civil litigation more predictable will be most relevant to people in the economically active age bracket, who appear to be more likely to be users of the civil courts. However, the Scottish Government considers the Bill to be neutral in respect of this protected status as pursuers of all ages will benefit from the Bill’s provisions.</p>

¹¹ <http://www.gov.scot/Resource/0042/00420922.pdf> (Paragraph 4.42)

¹² The Civil Justice Statistics in Scotland 2015-16.

¹³ The Transport Scotland Report “Key Reported Road Casualties in Scotland 2015”
<http://www.gov.scot/Publications/2017/03/5915/1>

¹⁴ <http://www.gov.scot/Publications/2016/03/5269>.

Disability	Positive	Negative	None	Reasons for decision
Eliminating unlawful discrimination, harassment and victimisation			X	Independent Living in Scotland's view is that the Bill's provisions for qualified one-way costs shifting will increase access to justice for disabled people. The Equalities and Human Rights Commission also stated that the Bill's provisions (in relation to group proceedings) may be of particular benefit to people with a disability.
Advancing equality of opportunity	X			
Promoting good relations among and between disabled and able bodied people			X	<p>The Scottish Crime and Justice Survey 2014-15¹⁵ found that the prevalence of civil legal problems is higher for people with a disability at 30% as opposed to 19% in the general population. In addition, only 39% of people with a disability had solved their problems whereas 52% without a disability had succeeded in resolving their problems.</p> <p>The higher prevalence of civil law problems for people with a disability may also mean that they are more likely to be users of the civil courts than others, including in relation to personal injury. If that is the case then the Bill's provisions which improve access to justice by opening up funding options and making the expenses in civil litigation more predictable may be more relevant to this group, though the Scottish Government considers the Bill to be broadly neutral in respect of this protected status as others will also benefit from the Bill's provisions.</p>

Gender	Positive	Negative	None	Reasons for decision
Eliminating unlawful discrimination			X	The majority (56%) of personal injury actions relate to road traffic accidents ¹⁶ . The Transport Scotland Report "Key

¹⁵ <http://www.gov.scot/Publications/2016/03/5269>

¹⁶ <http://www.gov.scot/Publications/2017/03/5915/1>

Advancing equality of opportunity			X	Reported Road Casualties in Scotland 2015 ¹⁷ indicates that 56% of those involved in accidents resulting in death or serious injury were men.
Promoting good relations between men and women			X	This may mean that men are slightly more likely to be users of the civil courts in relation to personal injury. If that is the case more men may benefit from the Bill's provisions which improve access to justice by opening up funding options and making the expenses in civil litigation more predictable. However, this potential effect is marginal and the Scottish Government considers the Bill to be neutral in respect of this protected characteristic as it does not discriminate against those bringing civil actions on the basis of gender.

Race	Positive	Negative	None	Reasons for decision
Eliminating unlawful discrimination			X	The Scottish Government's "The Experience of Civil Law Problems in Scotland 1997-2004" ¹⁸ found that 1 in 3 people from a minority ethnic group experienced civil law problems over a five year period compared to 1 in 4 for the general population. The higher prevalence of civil law problems for people from a minority ethnic group may mean that they are more likely to be users of the civil courts than others. If that is the case then the Bill's provisions which improve access to justice by opening up funding options and making the expenses in civil litigation more predictable will be more relevant for this group. However, the Scottish Government considers the Bill to be neutral in respect of this protected status as people from all ethnic groups will benefit from the Bill's provisions.
Advancing equality of opportunity			X	
Promoting good race relations			X	

¹⁷ <https://www.transport.gov.scot/media/20068/j436212.pdf>

¹⁸ <http://www.gov.scot/Resource/Doc/331382/0107862.pdf>

Recommendations and conclusion

The overall purpose of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is to implement Sheriff Principal Taylor's and Lord Gill's recommendations to make the civil justice system more affordable, more predictable, and thus, more accessible.

The impact of the Bill is broadly neutral in relation to the protected characteristics, though consultation responses indicate that it will have a positive impact in relation to people with a disability. There may also be a positive impact on other protected groups if it is reasonable to assume that they will almost always be pursuers in civil actions as the legislation is intended to:

- make it easier to obtain funding for civil litigation for those who do not qualify for legal aid as the funding options are widened;
- introduce sliding caps on success fees so that a greater portion of the damages awarded reaches those for whom those damages are intended; and
- introduce group proceedings and allow third party representation which will especially assist those who are more vulnerable to bring a civil court action.

The Scottish Government has not made any changes to the policy in the Bill as a result of the EQIA, as the proposals in the Bill are intended to apply equally to all affected, and appear to have some positive and no significant differential effect on the basis of the protected characteristics.



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