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

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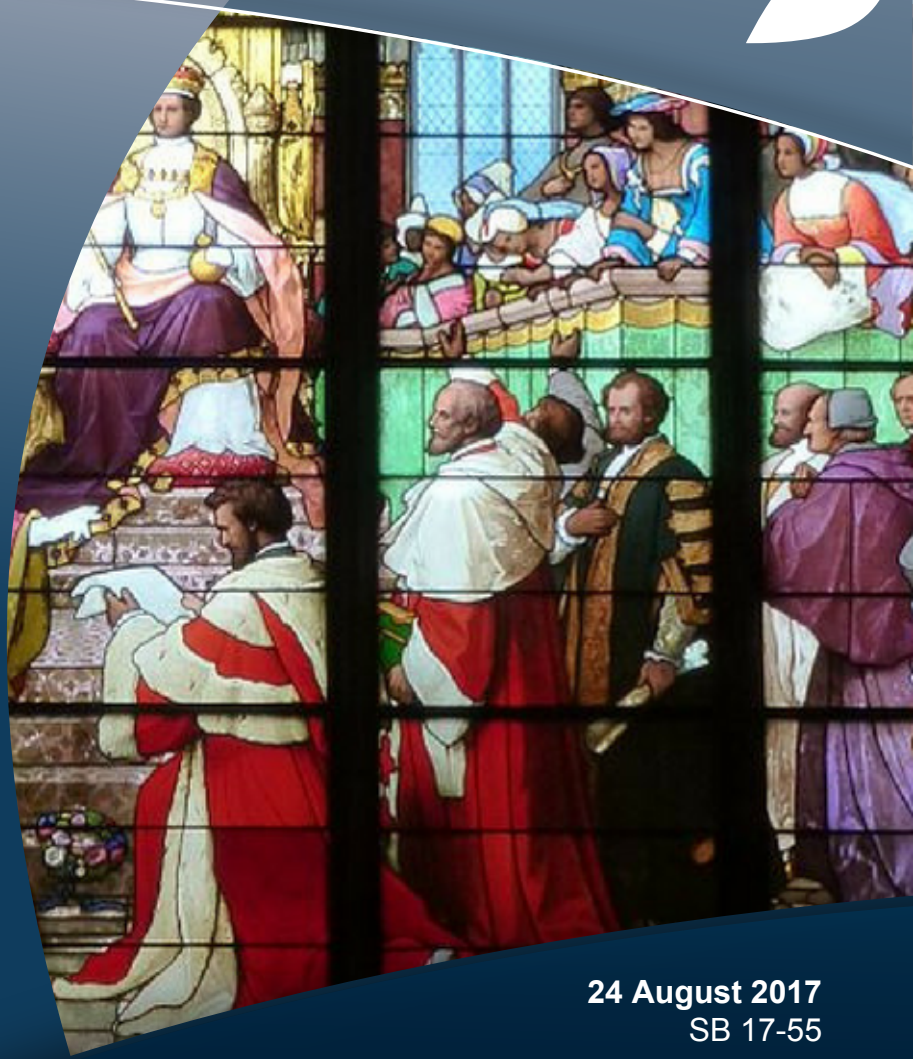
The Civil Litigation Bill aims to increase the funding options available to those with a legal claim as well as making the costs of taking legal action more predictable.



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Contents

About this briefing

The Civil Litigation Bill implements a number of recommendations from the Taylor Review of Expenses and Funding of Civil Litigation in Scotland. It aims to increase access to justice in Scotland.

This briefing discusses the following changes proposed in the Bill:

- Introducing damages-based agreements, which would allow solicitors to be paid a percentage of the client's compensation where a court claim is successful. The Bill would enable percentage caps to be put in place to limit the fee level in these and other forms of no win, no fee arrangements.
- Introducing qualified, one-way costs shifting for personal injury cases. This would protect a pursuer from being required to pay the defenders' legal expenses if they lost their case, but still allow them to claim legal expenses from the defender if they won;
- Enabling a party represented free of charge to claim legal expenses from the other side if they won their case, with the money being paid to charity;
- Placing new requirements on commercially-motivated third parties who fund litigation in which they do not have a direct interest;
- Creating salaried posts for auditors of the court, to be employed through the Scottish Courts and Tribunals Service; and
- Empowering the court to introduce rules to support group proceedings, whereby one set of court proceedings may be brought on behalf of two or more parties.

The Bill - relevant dates and documents

Michael Matheson MSP introduced the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill in the Scottish Parliament on 1 June 2017. It is a Scottish Government Bill.

The Bill (as introduced) [1] is accompanied by a number of documents, including:

- Explanatory Notes [2]
- a Policy Memorandum [3] , and
- a Financial Memorandum [4] .

According to the Policy Memorandum (paragraph 4), the Bill aims:

> " to make the costs of court action more predictable, increase the funding options for pursuers of civil actions and introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions. "

Scottish Parliament consideration of the Bill

The Justice Committee is the lead committee in relation to Stage 1 consideration of the Bill. It issued a Call for Evidence [5] from those with an interest in the Bill. The closing date to submit views was **Friday 18 August 2017**.

Taking court action

The civil courts

The difference between the civil and criminal courts

The court system is divided into civil and criminal courts - although often the same judicial personnel sit in the same buildings when dealing with both matters.

Criminal courts deal with the trial and, where found guilty, the sentencing of those accused of crimes. The civil courts deal with disputes about legal rights and obligations between people or organisations. The types of dispute dealt with by the civil courts include divorce, debt recovery and claims for compensation for personal injury.

The civil courts in Scotland are currently undergoing significant reform

The reforms affect both court structure and procedural rules. More information about the new structure is available in the SPICe briefing "Civil Justice - Civil Courts and Tribunals" (2017) [6] .

The SPICe briefing "Civil Justice - Going to court" [7] (2016) contains more information about taking court action.

The structure of the civil court system

Civil courts in Scotland:

The sheriff courts - these hear cases for the first time ("at first instance"). Cases with a value of up to £100,000 must be raised first in the sheriff courts. There is a specialist sheriff court which deals only with personal injury claims - the **Sheriff Personal Injury Court**.

The Sheriff Appeal Court - this hears appeals from the decisions of sheriffs. Its judgments must be followed by all sheriffs.

The "Outer House" of the Court of Session - the Outer House also hears cases for the first time. Some types of action - notably judicial review - must be raised in the Court of Session. Cases with a value of more than £100,000 can be raised in either the sheriff courts or the Court of Session.

The "Inner House" of the Court of Session - Appeals from the Sheriff Appeal Court or the Outer House are dealt with by the Inner House of the Court of Session. The Sheriff Appeal Court or Inner House must give its permission before an appeal can be made. Judgments from the Court of Session must be followed by the lower courts.

Relevant civil courts outside Scotland

It is possible to appeal decisions of the Inner House of the Court of Session to the **UK Supreme Court**. The Inner House or the UK Supreme Court must give permission before an appeal can proceed.

Judgments of the UK Supreme Court in Scottish cases must be followed by Scottish courts. UK Supreme Court decisions in other cases will be highly persuasive if the law is the same between Scotland and England, Wales or Northern Ireland.

The **Court of Justice of the European Union** (also referred to as the "European Court of Justice") issues binding interpretations of EU law. Its decisions must be followed by UK courts, although this will no longer be the case when the UK exits the EU.

The **European Court of Human Rights** deals with disputes over the rights contained in the European Convention on Human Rights. Its decisions are addressed to national governments, as the bodies responsible for upholding Convention rights. The UK courts can take into account its decisions when dealing with domestic cases.

Terminology

Various technical words and phrases are used to describe courts and court processes. The most common are defined below.

Advocate - an advocate is a lawyer with expertise in making legal arguments. Where a case is heard in the Court of Session, a solicitor must use an advocate or solicitor-advocate (or similar professional with rights of audience) to present it.

After the event (ATE) insurance - insurance to cover against the risk of having to pay the opposing party's legal expenses in court action. ATE insurance is not as widely available in Scotland as it is in England.

At first instance - this describes when a court hears a case for the first time. The court may have to consider issues of fact (for example, whether there was a contract of employment in place) as well as issues of law. A court may also hear a case on appeal from a lower court.

Binding - the decision of a higher court is binding on lower courts. This means that the judges in the lower court have to follow the decision when dealing with similar cases.

Claims management companies - companies which handle legal claims from individuals, usually on the basis of charging a percentage of the compensation awarded if the case is won. Claims management companies do not employ solicitors and must pass a claim on (perhaps for the payment of a referral fee) if representation in court is needed.

Damages-based agreements (DBAs) - a form of no win, no fee agreement where a solicitor gets a percentage share of the damages awarded if the case is successful.

Defender - the party defending court action. The party bringing court action is the pursuer.

Domestic courts - these are the courts based in Scotland or, depending on the context, courts based in the UK.

Judicial review - a form of court action which challenges official decision-making. Judicial review actions must be raised in the Court of Session.

Jurisdiction - a court's jurisdiction is the geographical areas or subject matters over which it has the power to make a decision. For example, sheriff courts have exclusive jurisdiction in Scotland to hear claims with a monetary value of up to £100,000.

Lay representative - lay representatives are non-legally qualified people who may represent someone in court. They may come from an advice agency or a support group. There are court rules setting out when lay representatives may have rights of audience.

Lord President - the most senior member of the judiciary in Scotland. The Lord President has responsibilities for court administration as well as deciding court cases.

Lower courts - this refers to courts lower down in the judicial hierarchy than the court in question. When used generally, it refers to the sheriff courts in a civil law context.

Pro bono - the phrase used to describe when a lawyer provides their services for free.

Petitioner - the party bringing court action in certain Court of Session proceedings, most notably judicial review. The party opposing the action is the respondent.

Pursuer - the party bringing court action (also known as the "claimant" under Simple Procedure court rules). The party defending court action is known as the defender. See also petitioner and respondent.

Qualified, one way costs shifting (QOCS) - a departure from the normal rule that the loser pays the winner's legal expenses. Under QOCS, the pursuer is not liable for the defender's legal expenses if they lose, but can still claims their expenses from the defender if they win.

Respondent - the person opposing court action in certain proceedings, most notably judicial review in the Court of Session.

Rights of audience - this refers to the right to be heard by a court. Solicitors have rights of audience to be heard in the sheriff courts. However, only advocates, solicitor-advocates and similar professionals have rights of audience to be heard in the Court of Session. Lay representatives may also have rights of audience.

Senior courts - the phrase refers to the Court of Session in a Scottish context and may also be used to include the UK Supreme Court.

Solicitor-advocate - a solicitor-advocate is a solicitor who has undergone additional training in making legal arguments. They have rights of audience to present cases in the Court of Session.

Success fee agreement - any agreement to pay a solicitor based on the outcome of the action. It covers damages-based agreements and agreements where the solicitor gets an uplift in fees where the action is successful. Part 1 of the Bill covers all success fee agreements.

Supra-national courts - these are courts outside the UK, such as the European Court of Justice or the European Court of Human Rights.

Taxation - the process for independently reviewing the fees charged by a solicitor for a piece of work. Taxation is carried out by an auditor of the court. Judicial taxation is the process of calculating the expenses to be paid by the losing party in litigation to the winning party.

Third party funders - individuals or organisations which pay for legal action which they are not directly involved in as an investment opportunity. Investors agree to fund the litigation for an (often significant) share of any monetary award.

Expenses of court action

A key issue for anyone considering taking legal action is how much it is going to cost. A party must consider their own costs in taking the action, and also the risk that they may have to pay the other side's expenses if they lose.

What are legal expenses?

Legal expenses are the costs associated with taking court action. This will include the fees to be paid to a solicitor.

It will also include other costs, such as the costs of commissioning expert evidence, fees for using the courts and using an advocate (where necessary). These additional costs are paid by the solicitor initially and recovered from the client later. They are referred to as **outlays**.

The rule that "expenses follow success"

Generally, the losing party in court action will be expected to pay the winning party's legal expenses. There are exceptions to this rule and, ultimately, the court has discretion as to who should be liable to pay legal expenses.

This rule significantly increases the risk of taking court action. Not only must a party be able to fund their own legal bill, but they may also be asked to pay their opponent's.

The solicitor's fees that the loser must pay are calculated using a statutory table. It is common for the actual fee charged by the winner's solicitor to be higher. In this case, the winning party remains liable to pay the difference between what is recovered from the loser and the actual bill.

The role of the Civil Litigation Bill

Concern has been expressed that people are not able to defend legal rights or enforce obligations because taking legal action is too expensive. The Bill aims to increase the funding options available to those with a legal claim as well as making the costs of taking legal action more predictable.

The funding options available to someone considering legal action

Solicitors are traditionally paid an hourly rate. However, the options for funding have expanded significantly in recent years. Government funding, through legal aid, may also be available.

Solicitor fees

Like other professionals, solicitors charge fees to cover the work they do. Clients could be charged an hourly rate, a set rate for the whole job, or in various other ways. Different solicitors charge different fees - and clients can negotiate over the price or the way the work is charged for.

Solicitors can, of course, choose to work for free. This is described as working "**pro bono**".

Solicitors may also agree to work on a "no win, no fee" basis.

No win, no fee

No win, no fee arrangements work to shift the risk in taking legal action. Pursuers benefit because they will only pay their solicitor if the case is won. However, solicitors will usually only be prepared to take on cases with a good prospect of success.

How no win, no fee arrangements work

Solicitors may choose to work on the basis that they charge no fee if a case is lost but get an enhanced fee if the case is won. There are various permutations of this arrangement too, so that a solicitor may charge a lower fee if a case is lost rather than no fee. A client may, or may not, be liable for the solicitor's outlays even where the case is lost.

No win, no fee arrangements are particularly common in relation to personal injury actions, although they may be used for other forms of legal action too.

The "success fee"

Where a party wins under a "no win, no fee" arrangement, the solicitor can increase the fee they would normally charge for the work. This is known as the success fee.

Currently, a solicitor must charge on the basis of the professional services they have provided. It is against the law for solicitors to calculate their fee as a percentage of the compensation won (although the Bill would change this).

The present law permits a solicitor to charge up to 100% more (in other words, double the standard fee) where they are successful.

Solicitors will usually minimise their risk by taking on cases with a good prospect of success

When taking on a case on a no win, no fee basis, a solicitor will consider how likely it is that the case will be won. Solicitors are likely to be unwilling to take on cases which do not have a good prospect of success, due to the the risk that they will not get paid.

This can be argued to be useful in weeding out weak cases. However, it can also mean that cases of importance to the client, but with a higher risk, cannot be funded in this way.

Legal aid

Legal aid provides help with the costs of a solicitor's service so that those on low and moderate incomes can access legal support.

Importantly, someone receiving legal aid is usually protected against having to pay their opponent's legal expenses. This significantly reduces the risk of taking legal action.

About legal aid

The Scottish Government pays for legal aid, and it is administered by the Scottish Legal Aid Board (SLAB).

There are two types of legal aid for civil justice matters:

- Civil Legal Aid; and
- Advice and Assistance.

Legal aid claimants are protected against having legal expenses awarded against them

Usually, the courts will not make an award of legal expenses against someone claiming legal aid. Technically, the court has the power to "modify" an award of expenses against a legally aided party. This means that the award can be reduced: however, the power is almost always used to remove all liability.

Being protected from the risk of paying your opponent's legal expenses is a big advantage. It significantly reduces the risk of taking legal action.

The cost of legal aid is reducing

The cost of legal aid to the public purse has been falling in recent years. This is partly down to the Scottish Government's stated policy of making the system more efficient. However, reducing costs have also been driven by a general downward trend in taking court action. This means that that there has been less demand for legal aid.

The legal aid system is currently being reviewed

The Scottish Government has announced an independent review of legal aid. It is due to report in early 2018.

Civil Legal Aid

Civil Legal Aid is a form of legal aid which is available to pay for advice and representation in court from a solicitor on a civil law matter.

Civil Legal Aid is not available for some forms of legal action, for example for simplified divorce proceedings or action before a number of tribunals. This is because it is considered possible for someone to represent themselves in these forums.

The qualifying criteria for Civil Legal Aid are:

- that there is a plausible legal basis for the claim;
- that it is reasonable in the particular circumstances of the case that legal aid is granted; and
- that the applicant meets the financial eligibility criteria.

Financial eligibility

If they meet the other tests, someone can qualify for Civil Legal Aid if they have disposable income of up to £26,239 and disposable capital of up to £13,017 (in some cases, it can be more).

Disposable income is income after necessary expenditure - such as rent, mortgage or childcare costs - has been deducted. Thus, someone with an income of significantly more that £26,239 may qualify.

Those with disposable income of more than £3,521 or disposable capital of more than £7,854 will have to pay a financial contribution towards the cost of legal aid. For those with income or assets at the higher end of the scale, this contribution can be significant.

Advice and Assistance

Advice and Assistance can pay for advice - but not representation in court - from a solicitor. It is available for advice on any question of Scots law.

Someone can qualify for civil Advice and Assistance if their disposable income is not more than £245 per week and their disposable capital is not more than £1,716. Those with a disposable income between £105 and £245 will have to make a contribution from their income to the cost of legal aid.

Taxation

In the context of legal expenses, taxation is an independent review of the fees charged by a solicitor for legal work. It is carried out by an auditor of the court. It has nothing to do with the tax system.

Judicial taxation sets the expenses to be paid by the losing party to the winner at the conclusion of a court case.

Taxation looks at whether it was reasonable to carry out the work in question

The auditor looks at whether it was reasonable for the lawyer to carry out the work which has been charged for. As a general rule, it will be considered reasonable for a solicitor to have carried out any work directly authorised by the client.

Taxation does not examine the quality of the work carried out.

When is taxation used?

Taxation is commonly used to settle the amount to be paid by the losing party to cover the winning party's legal expenses. This is referred to as judicial taxation.

Clients can also ask for a solicitor's account to be taxed before they pay it (although it is not possible to challenge any fee agreed in writing in advance). This can be agreed as the basis on which a client is billed.

It is open to a solicitor to submit their own accounts for taxation. In some cases - for example when working for a trustee in bankruptcy - taxation is a legal requirement.

The role of auditor of the court

An auditor of the court will look at the work charged for to decide if it was reasonable in the context. Most of the court auditors currently carrying out taxation are self-employed, although the role has previously also been carried out by court staff.

Parties who use an auditor must pay a fee for their work. This is based on the value of the account they are taxing. Auditors can listen to the arguments presented by either side at a hearing if requested to do so.

Recent developments in Scotland's civil justice system

The Gill Review

In 2007, the then Scottish Executive initiated a wide-ranging review of civil court structures and procedures in Scotland. The Scottish Civil Courts Review was headed up by Lord Gill, a senior member of the judiciary. It is commonly referred to as the Gill Review.

Lord Gill's remit was to:

> " review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods [...]"
>
> Scottish Civil Courts Review, 2009[8]

The final report [8] was published in 2009. It contained a raft of recommendations, covering two volumes. The key recommendations were as follows:

- removing low value cases from the Court of Session by requiring cases up to a certain value (currently £100,000) to be raised in the sheriff court;
- creating a new tier of judge - the summary sheriff - to deal with less complex cases;
- increased "case management" powers for judges, so that they, rather than the parties to the court action, fix the manner and timescales in which a case will be dealt with by the court;
- creation of the Scottish Civil Justice Council to modernise court procedure rules and keep them under review; and
- modernisation of court practices in various areas, including increased use of IT and alternative dispute resolution, and better support for people who represent themselves in court.

The review identified high costs as a barrier to exercising legal rights

One of the major conclusions of the Gill Review was that the costs of taking court action were often disproportionate to the issues at stake. These high costs acted as a barrier to people exercising their legal rights.

Lord Gill intended that his structural reforms and modernisation drive would partly address this issue by making the court system more efficient and effective. However, he also recognised that specific work needed to be carried out on reducing the costs associated with taking court action, and making them more predictable.

Jackson's review of civil litigation costs in England and Wales

At the time, Lord Justice Jackson was taking forward a Review of Civil Litigation Costs [9] in England and Wales. Lord Gill understood that Lord Justice Jackson's recommendations could have an impact north of the border too.

Recommendation to establish the Taylor Review

He therefore recommended that a separate working group should be established to look at legal expenses, taking into account the outcome of the Jackson Review. This was to become the Taylor Review - some of the recommendations of which this Bill takes forward.

The Taylor Review

Following Lord Gill's recommendation for a working group to look at legal expenses, the Scottish Government established the Review of Expenses and Funding of Civil Litigation. This was lead by Sheriff Principal Taylor and is often referred to as the Taylor Review.

The Taylor Review looked at how litigation was funded

The review looked in detail at how litigation was currently funded, what barriers existed to using the courts and what alternatives to public funding might be available.

The review published its final report in 2013. It is a detailed discussion of issues around litigation costs in Scotland. In describing its impact, Sheriff Principal Taylor stated:

> “ Court action is always going to be stressful for litigants. Much of the stress is a fear of the unknown: 'Will I win my case and if I don’t, what will it cost me?' Apart from the success or otherwise of the action, the most significant unknown is the size of the legal bill which will land at the unsuccessful litigant’s door. I believe that the recommendations in this Report, if implemented, will go a long way to reduce that stress and thus remove barriers which presently deny access to justice for all.”
>
> Sheriff Principal Taylor, 2013[10]

The Taylor Review made wide-ranging recommendations. Many of them are being taken forward through the Scottish Civil Justice Council via changes to court rules. Most of those requiring primary legislation are being taken forward in the Bill.

Taylor Review recommendations

The Review's main recommendations were as follows:

- that judges should have the discretion to award **expenses at the actual hourly rate charged** by the solicitor in commercial cases. This would mean that the winner would recover the full cost of engaging in legal action from the loser.
- that court rules allowing for **expenses management** in commercial cases should be piloted. This would give the judge control over the expenses run up by each side and therefore increase their predicability for the loser. English court procedural rules already provide for expenses management. There, parties may be asked to draw up indicative budgets in advance of litigation.
- **protective expenses orders** limit the liability for legal expenses of the person bringing the action if they lose. Sheriff Principal Taylor recommended that the courts should have the power to make protective expenses orders in cases raising matters of public interest. The level at which the cap should be set should be a matter for court

discretion, except where rules of court (such as in certain environmental cases) set specific limits.

- that, in personal injury cases, defenders should not generally be able to recover their legal expenses from pursuers if they won the case. Pursuers would still be able to recover expenses from defenders, though, where they won. This is known as **qualified, one-way costs shifting** (QOCS). It reflects the "asymmetric" relationship between pursuers - who are usually individuals - and defenders - who are usually insurance companies or public bodies with significant resources and legal experience.
- that solicitors should be able to offer **damages-based agreements** (DBAs). These are no win, no fee arrangements where the solicitor takes a percentage of the compensation awarded if the case is won. Sheriff Principal Taylor recommended that the percentage taken in this way should be capped, and that solicitors should, in addition, be entitled to keep any legal expenses recovered from the losing party. The percentage cap should also apply to other forms of no win, no fee arrangements.
- the Gill Review recommended that there should be a **group procedure** in the Scottish courts. This would allow multiple parties to be involved in the same legal claim (for example, a large number of consumers affected by a breach of consumer law). Sheriff Principal Taylor argues that the detail of the procedure should be developed by the Scottish Civil Justice Council. The funding arrangements should be the same as they were for individual claims (including QOCS for personal injury cases).
- that **claims management companies** in Scotland should be subject to regulation. Only regulated firms should be able to offer damages-based agreements and pay referral fees.

Scottish Civil Justice Council

The Scottish Civil Justice Council (SCJC) has the role of keeping civil court practice and procedure under review. It was created by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013.

It is in the process of modernising court procedural rules in line with the recommendations in the Gill Review.

The SCJC's responsibilities

The SCJC has the following statutory functions:

- to keep the civil justice system under review;
- to review the practice and procedure used in civil proceedings in Scotland's courts;
- to prepare draft civil procedure rules, to be submitted to the Court of Session;
- to provide advice and make recommendations to the Lord President on the development of the civil justice system; and
- to provide any advice the Lord President may request on matters relating to the civil justice system.

These powers are designed to enable the SCJC to play an ongoing, active role in modernising Scotland's civil justice system.

The SCJC's role in controlling civil litigation costs

Only those of Sheriff Principal Taylor's recommendations which require primary legislation are covered in the Bill. Many of the recommendations will be taken forward via changes to court rules instead.

The SCJC will be responsible for this work, through its Costs and Funding Committee.

Alternative Business Structures

Traditionally, solicitors have only been able to work on their own or with other solicitors. The term "alternative business structures" (ABS) refers to a new structure which would allow non-solicitors to invest in solicitor firms, or solicitors to work in other businesses.

The advantages and disadvantages of alternative business structures

Proponents of ABS argue that they create opportunities for investment and innovation. For example, solicitors could be in business with other professionals such as tax advisers or architects. Non-legal businesses such as insurers or professional services companies would be able to invest in solicitor businesses.

Opponents raise concerns about the increased potential for conflict of interest. This could occur, for example, where a parent organisation's desire to generate profit conflicted with the duties owed by a solicitor to the court or their client.

Progress in Scotland

The Legal Services (Scotland) Act 2010 created the regulatory framework for ABS. It set regulatory objectives, as well as a requirement that new businesses were majority owned by solicitors or other regulated professionals.

However, before new business structures can develop, a regulatory regime needs to be operational. A number of aspects of the regulatory framework are not yet in place.

It is therefore not currently possible for businesses to take advantage of the more relaxed rules. The Scottish Government is working with stakeholders to take this forward.

The Independent review of legal services regulation will also look at future developments in the delivery of legal services.

ABS and civil litigation costs

Sheriff Principal Taylor was alive to the potential impact of ABS on civil litigation practices. He noted the potential for claims management companies, insurers and third party funders to go into business with solicitors.

He considered that recommendations about a general regulatory framework went beyond his remit. However, he argued that an overarching regime which targeted an activity rather

than a group of people would be the most effective way of regulating multi-disciplinary businesses.

Independent review of legal services regulation

The Scottish Government has announced a review of legal services regulation [11] . This will consider the regulation of claims management companies, as well as regulation of the legal profession.

Reasons for setting up the review

The Scottish Government states that the review was set up to address several issues, including:

- that the current regulatory framework may not be effective in the face of changes to the way legal services are delivered; and
- that the process for making complaints against a solicitor is too slow and complex.

The review panel is made up of representatives of the legal profession as well as related public bodies. It is due to report by the end of 2018.

Claims management firms

Claims management firms are not currently subject to any regulation in Scotland (although they are in England and Wales). Sheriff Principal Taylor recommended that claims management companies should be regulated to prevent undesirable practices emerging. He stated that only regulated firms should be able to offer damages-based agreements or accept referral fees.

The Legal Services Review will consider the regulation of claims management firms as part of its remit.

What the Bill does

Broadly speaking, the Bill takes forward the parts of the Taylor Review which require primary legislation.

However, a number of Sheriff Principal Taylor's recommendations will be taken forward in other ways. The Bill also takes forward recommendations from the Gill Review which have not previously been dealt with.

The Policy Memorandum (paragraph 11) describes the situation as follows:

> " 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 drafted by the Scottish Civil Justice Council. The recommendations regarding sanction for counsel were provided for in the 2014 Act (at section 108) . The other recommendations require further 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 considered in the recently announced review of legal services. "

The aims of the Bill are:

- to increase the options for funding legal action - eg. through "damages-based agreements";
- to make the costs of litigation more predictable by capping the maximum percentage of an award which can be taken to pay solicitors' fees in any form of no win, no fee agreement;
- to create greater equality in the funding relationship between pursuers and defenders in personal injury actions through "qualified, one way costs shifting" (QOCS);
- to improve transparency and consistency in the way Auditors of the Court carry out their functions; and
- to introduce rules to allow "group proceedings" in court - these are where one set of court proceedings are brought by two or more parties.

What consultation has been carried out on the Bill's proposals?

Both Lord Gill and Sheriff Principal Taylor consulted with interested people and organisations as part of their review processes. Separately, in 2015, the Scottish Government consulted on the likely impact of the proposals which make up the Bill. The key documents are:

- the Scottish Government consultation [12] ; and

- an independent analysis of responses [13] .

All non-confidential responses to the Scottish Government consultation are available on its website.

Damages-based agreements

Damages-based agreements (DBAs) are no win, no fee agreements where the solicitor gets a percentage share of the compensation awarded if the case is successful.

Solicitors are not currently allowed to claim a share of the damages. However, Sheriff Principal Taylor recommended that this restriction be lifted. He thought DBAs were easy to understand and would increase access to the courts.

DBAs are already offered by claims management companies. Some firms of solicitors run their own claims management companies to take advantage of this.

This section looks at:

- historic restrictions on offering DBAs;
- proposals in the Bill for DBAs;
- caps on the percentage solicitors can take from a damages award;
- the treatment of damages for future loss; and
- the views of respondents to the Scottish Government's consultation.

Historic restrictions on offering DBAs

Traditionally, lawyers have been prevented from entering into any form of agreement which gave them undue interest in the outcome of the litigation. This was seen as creating conflicts of interest.

Examples of potential conflicts of interest

For instance, a solicitor may be tempted to delay the outcome of a case, or settle early, to their own financial benefit rather than in the interests of their client. At the extreme end, a solicitor may be tempted to be dishonest to ensure a case is won.

No win, no fee agreements

Originally, the ban extended to any form of payment where a lawyer may have an interest in the outcome of the case, including no win, no fee arrangements. However, the ban on no win, no fee agreements where the success fee is calculated as an uplift of the solicitor's fees was lifted in 1992.

These have since become a common arrangement, especially in personal injury actions.

Damages-based agreements

DBAs were considered to be particularly objectionable as "pactum de quota litis" - in other words, an agreement for a share of the litigation. It is currently unlawful for a solicitor to enforce payment under such an agreement from a client.

The Faculty of Advocates' Guide to Professional Conduct [14] specifically prohibits their use. The Faculty states, in its response to the Scottish Government's consultation [15] , that it will consider re-visiting this rule if the proposals in the Bill become law.

Proposals in the Bill for damages-based agreements

Section 1 of the Bill defines a "success fee agreement". This definition is wide enough to cover existing no win, no fee arrangements - where a solicitor gets an uplift in their fees if the case is won - as well as DBAs. This means that the Bill's requirements on form and content will apply equally to both types of arrangement.

Section 2 of the Bill would remove the legal prohibition on solicitors enforcing DBAs.

Sections 3 to 7 go on to regulate how such agreements must operate.

To be enforceable, a success fee agreement must:

- be in writing;
- state how the success fee will be calculated; and
- meet such other requirements as may be put in place via secondary legislation.

Unless the agreement specifically provides otherwise, solicitors will be entitled to keep any legal expenses paid by the losing side, as well as any success fee.

Additional provisions for personal injury claims

In personal injury claims, to be enforceable, a success fee agreement must:

- be genuinely no win, no fee - so that the pursuer does not have to pay any fees or outlays, if they lose.

Under qualified, one-way costs shifting, pursuers in personal injury actions will not usually have to pay their opponent's legal expenses if they lose. This means that there will, in the vast majority of cases, be no costs attached to pursuing a personal injury claim.

Prohibitions on the use of success fee agreements

The Bill prohibits the use of success fee agreements in family law proceedings. These include things like divorce and child maintenance disputes. Scottish Ministers can exclude further types of proceedings via secondary legislation.

More about the Bill's provisions for success fee agreements

The Bill contains further provisions relating to:

- the power to cap success fees; and

- the treatment of compensation for future loss in personal injury claims.

Power to cap the amount which can be taken as a success fee

Section 4 gives Scottish Ministers the power, via secondary legislation, to cap the success fee which a solicitor may charge. The caps would apply to existing no win, no fee agreements (where solicitors get an uplift in their fees), as well as to DBAs.

How the caps will operate

For DBAs, it is expected that regulation will take the form of a cap setting the maximum amount which a solicitor can take from their client's damages.

For existing forms of no win, no fee arrangements, secondary legislation already caps at 100% the maximum uplift a solicitor can claim on their fees. It is expected that the Bill's proposals would result in an additional cap, requiring that the success fee represented no more than a specific percentage of the client's damages.

So, in a hypothetical example, a solicitor may be able to take a success fee of 100% of their professional fees, to the extent that this is not more than 20% of the client's personal injury compensation award.

Sheriff Principal Taylor's recommended caps

The Policy Memorandum states (paragraph 21) that it is "expected" that the powers will be used to follow Sheriff Principal Taylor's recommendations in this area. He set maximum percentage caps on the amount of compensation which could be claimed by solicitors under DBAs and other forms of success fee agreements.

Taylor recommended the following caps (see paragraphs 88 to 91 of Chapter 9 of his report).

In **personal injury** cases:

- 20% for the first £100,000 of damages;
- 10% of damages between £100,000 and £500,000;
- 2.5% of damages above £500,000.

He recommended a cap of 35% of compensation in **employment tribunal** cases.

In **all other civil actions**, he states that the cap should be 50% of any monetary award.

Where a DBA breaches any compensation cap in place, the Bill provides that it would be unenforceable.

Enforcement against claims management companies

Claims management companies commonly offer damages-based agreements. It is the Scottish Government's intention that any caps set out in secondary legislation will also apply to them.

Section 1 of the Bill applies its provisions on success fee agreements to providers of "relevant legal services". The Scottish Government argues that the definition of relevant legal services is wide enough to include claims management companies.

Compensation for future loss in personal injury claims

The Bill provides for solicitors to be able to include damages for future loss in the calculation of their success fee in personal injury claims, except in limited circumstances.

What is future loss?

Personal injury claims may contain a claim for compensation for losses and expenses expected to arise in the future. These elements of a claim are referred to as "future loss".

Future loss can cover things like lost earnings while an injured person is off work recovering, or travel expenses for expected future hospital appointments. In more serious personal injury cases, it could cover loss of all future earnings, as well as the costs of future nursing care and specialist equipment which may be needed.

Consequences of running out of compensation

The future loss element of a serious personal injury claim can be significant. An injured person who runs out of compensation before their death may not be able to pay for things like nursing care or specialist accommodation.

This can have a big impact on their quality of life. It is also likely that local authority and NHS services will fill the gap, placing a bigger burden on the taxpayer too.

Contrasting approaches of Lord Justice Jackson and Sheriff Principal Taylor

Lord Justice Jackson's approach to future loss

Allowing solicitors to take a percentage of the damages awarded in personal injury cases will affect the amount of compensation left to the injured person to meet their future needs. For this reason, Lord Justice Jackson recommended that damages for future loss were excluded from the calculation of a solicitor's fees in his review of civil litigation costs in England.

Sheriff Principal Taylor's approach to future loss

However, Sheriff Principal Taylor did not support this approach. In the main, his concerns appeared to be practical (see paragraphs 92 to 103 of Chapter 9 of his review).

The vast majority of personal injury cases do not require a court hearing. Instead, an offer of settlement is made at some stage in the process.

This offer may be a general sum, not broken down into different types of loss. Requiring the future care element to be identified - by negotiation between the parties, or through the courts - would build in unnecessary work and delay.

Sheriff Principal Taylor did think that some protection was needed for pursuers where significant elements of future care were involved. He noted that this was provided, to an

extent, by the fact that he had recommended that the percentage a solicitor could deduct from damages in high value cases (over £500,000) was limited to 2.5%

Where compensation is made as periodical payments

In high value cases where future care needs are a big issue, compensation is sometimes awarded as an annual payment rather than a lump sum. Sheriff Principal Taylor recommended that damages payable as periodical payments should also be excluded from the percentage calculation of the solicitor's success fee.

Provisions in the Bill dealing with future loss

Section 6 of the Bill provides that damages for future loss will be excluded from the calculation of the solicitor's success fee where:

- they exceed £1 million; and
- the solicitor has advised the pursuer to accept them in the form of periodical payments.

Sheriff Principal Taylor notes that periodical payments are only available in very high value cases, which happen rarely (see paragraph 109 of Chapter 9 of his report). Thus, the effect of this provision is likely to be that, in the majority of cases, damages for future loss will be included in the calculation of the success fee.

Conflict of interest between solicitor and client

A solicitor may lose a substantial part of his or her fee if they advise their client to accept periodical payments. Thus, they may be tempted to act in their own interest rather than the interest of the client.

To protect against this, the Bill introduces additional checks where a solicitor advises not to accept compensation in the form of periodical payments.

Where **compensation is awarded by the court**, and the solicitor does not advise acceptance of periodical payments, the court must agree that this is in the pursuer's "best interests".

Where **compensation is paid as a result of an agreement between the parties**, an independent actuary must agree that payment in a lump sum is in the pursuer's "best interests".

The views of those responding to the Scottish Government consultation on damages-based agreements

The Scottish Government consulted on the impact of Sheriff Principal Taylor's proposals in relation to success fee agreements generally and DBAs specifically.

This briefing summarises respondents views on:

- the impact of success fee agreements;

- putting caps in place for success fee agreements; and
- the treatment of compensation for future loss.

The impact of success fee agreements

There was a general feeling that success fee agreements might increase access to justice, although their impact was not clear.

For example, some respondents noted that current no win, no fee agreements (where the solicitor gets an uplift in their fee) had already contributed significantly to access to justice. Others noted that many firms of solicitors had close associations with claims management companies which offered DBAs, so the legal system was already exposed to their advantages.

The advantages of DBAs

Some solicitor firms representing pursuers did spell out what they saw as the advantages of DBAs. Digby Brown argued that they were easy to understand and provided certainty as to the amount of damages which would go the the pursuer. They were therefore popular with the general public.

It was also noted that, by providing a headline percentage, DBAs made it easy to compare services between solicitors. This could drive competition. It was also suggested that clients liked the fact that DBAs incentivised solicitors to maximise the compensation which was recovered.

The disadvantages of DBAs

Glasgow City Council expressed concern that DBAs incentivised solicitors to draw out cases (to increase the judicial expenses payable) and put upwards pressure on the amount of damages claimed. Other bodies noted the potential for an increase in the number of claims against them.

Insurers expressed concerns about conflict of interest and an increased risk of unscrupulous behaviour - for example, a solicitor may be tempted to inflate the value of a claim.

Putting caps in place for success fee agreements

The majority of respondents supported a cap on the success fee which could be charged. Although many argued that the market was working to regulate this, it was generally accepted that there may be vulnerable or inexperienced litigants who would benefit from protection.

The Scottish Government did not consult directly on the particular caps it proposed to put in place. However, a number of respondents commented on the percentages recommended by Sheriff Principal Taylor.

Of those who commented, most felt that the caps were set at the right level. However, some defender and insurer respondents felt that they provided excessive reward for solicitors in high value cases. Some pursuer solicitor respondents argued that the top

percentage - 2.5% for awards over £500,000 - provided too little incentive for the costs and risks involved in these cases.

It was generally agreed that setting the fees involved a balancing exercise. It was recognised that too low a cap would affect the economic viability of offering representation in some cases. This would reduce access to justice.

Citizens Advice Scotland noted that allowing solicitors to keep judicial expenses as well as the success fee would encourage them to offer DBAs in low value cases.

Treatment of compensation for future loss

There was, again, a division between pursuer respondents and defender respondents on this issue. Those representing defenders believed that damages for future loss should be protected, so that the pursuer was not left in a position where they could not meet their needs.

Those representing pursuers supported the inclusion of damages for future loss in the calculation of the success fee. They did so on three broad grounds:

- **the need for lawyers to be fairly rewarded for the complex work** involved in bringing cases involving large elements of future loss. It was noted that, given the time investment, solicitors took on significant risk in running these cases on a no win, no fee basis. It was also suggested that, if returns were uneconomical, solicitors would simply not take on this type of work.
- **practical issues around calculating future loss** - as Sheriff Principal Taylor noted, the vast majority of cases do not go to court. Requiring future loss to be identified when a general settlement had been agreed between the parties would create delays and bring more cases to court.
- **the risk of incentivising delay** - the longer a solicitor spends on a case, the more damages would accrue to past, rather than future, loss.

Several respondents commented that one of the reasons why DBAs had not taken off as expected in England and Wales was the fact that future loss was protected. This made DBAs less attractive than arrangements where a solicitor got an uplift in their fees. This was particularly so for cases involving significant injury.

Qualified, one-way costs shifting

Qualified, one-way costs shifting (QOCS) is a system whereby the pursuer is not liable for the defender's legal expenses if they lose, but can claim their own expenses from the defender if they win. The Bill would introduce QOCS for personal injury court cases.

Sheriff Principal Taylor argued that QOCS should apply in personal injury cases due to the "David and Goliath" relationship between pursuers and defenders.

QOCS, combined with no win, no fee agreements, mean that a pursuer can raise a personal injury action without any financial risk.

This part of the briefing looks at:

- why QOCS is being introduced;
- the proposals in the Bill for QOCS;
- other forms of protection against an adverse award of expenses; and
- what respondents to the Scottish Government's consultation said.

Why QOCS is being introduced

QOCS is a departure from the normal rule that the loser pays the winner's legal expenses. Sheriff Principal Taylor thought that this was justified due to the asymmetric relationship between pursuers and defenders in personal injury actions.

Generally, pursuers in personal injury cases will be individuals with little or no previous experience of civil litigation. Defenders, on the other hand, will usually be insurance companies or public bodies with significant experience of both the law and tactical issues in civil litigation.

However, QOCS will apply to all personal injury court cases, even where the defender is not an experienced litigator.

Only a very small proportion of personal injury claims end up in court

The vast majority of personal injury cases are settled through negotiation before reaching court.

Pursuers and defenders may still have expenses as a result of this process. How these are dealt with are a matter for negotiation between the parties. A settlement agreement will generally include a sum to cover the pursuer's solicitor's fees and outlays.

Sheriff Principal Taylor's views

Sheriff Principal Taylor argued that the current expenses rules could operate to prevent access to justice. Some pursuers may be put off from pursuing legitimate claims due to a fear of an award of legal expenses against them. QOCS, he believed, was the best way to address this problem.

Sheriff Principal Taylor also noted that, in personal injuries court cases, defenders rarely recovered their legal expenses from pursuers who had lost their cases anyway. The change would therefore not have significant financial implications for most defenders.

The situation in England and Wales

QOCS was introduced for personal injury cases in England and Wales in 2013, following a recommendation from Lord Justice Jackson. It has been suggested that QOCS should be extended to other areas, such as claims against the police [16] , but no action has been taken yet.

The proposals in the Bill for QOCS

Section 8 of the Bill makes provision for QOCS to apply in personal injury court claims, including appeals.

Courts will retain the discretion to make legal expenses awards in relation to other types of claims which may be raised as part of the proceedings.

In order to benefit from QOCS, a person must **conduct the court proceedings in an "appropriate manner"**. This is further defined, so that a person can lose protection only if they:

- make fraudulent claims;
- do not comply with reasonably expected standards of behaviour; or
- in some other way, abuse court procedures to advance their case.

It is possible for exceptions to QOCS to be introduced by Act of Sederunt - a form of secondary legislation made by the Court of Session.

Other forms of protection against an adverse award of expenses

Sheriff Principal Taylor's main concern when recommending QOCS was to increase access to justice. He sought to combat the effect that the risk of having to pay the other side's legal expenses might have on a pursuer's willingness to take forward a personal injuries claim.

However, there are other methods by which protection from an adverse award of expenses can be obtained. These are discussed below.

Legal aid

Someone who receives legal aid can ask for an award of expenses against them to be "modified". In practice, this almost always results in no award of expenses being made. This aspect of legal aid is sometimes referred to as the "legal aid shield".

However, the rise of no win, no fee agreements means that fewer people are pursuing personal injuries claims using legal aid. Without the introduction of QOCS, no win, no fee arrangements do not protect against an adverse award of expenses.

"After the event" insurance

ATE insurance provides insurance against having to pay your opponent's legal expenses. It is referred to as "after the event" because it is taken out after an incident (such as a car accident) has occurred to provide specific protection in court action relating to that incident. It is widely used in England and Wales.

However, Sheriff Principal Taylor concluded that the ATE insurance market was not as well developed in Scotland as it was in England and Wales (see Chapter 8, paragraphs 29 to 33). This meant that it was only available at a reasonable cost to the pursuer through

certain firms of solicitors. The insurers considered volume of business to be an important factor.

Because ATE insurance would not be available at an affordable rate to all pursuers, Taylor considered that another solution was needed.

Union membership

Some court action, particularly in the field of work-related personal injury, is taken forward by unions on behalf of individual members. This can be looked on as a form of service to members, and different unions have different schemes.

However, many people are not members of unions so do not have access to this option. In addition, unions may not provide support (or may provide limited support) for non-work related injuries.

"Before the event" insurance

"Before the event" insurance refers to general insurance to support legal action. It is taken out before any accident or similar event occurs to insure against a general rather than specific risk. It is commonly available as an add-on to household buildings and contents insurances.

But, before the event insurance is not taken out by everyone, or even every householder. In addition, policies may limit the level of cover available or exclude certain types of legal claim.

What respondents to the Scottish Government consultation said about qualified, one-way costs shifting

The Scottish Government consultation asked for views on QOCS and its likely impact. It also asked for views on the tests which would result in a pursuer losing QOCS protection.

The general principle of QOCS

Opinions on QOCS were sharply divided between those representing pursuers and those representing or insuring defenders. Broadly speaking, pursuer respondents thought that QOCS would level the playing field between pursuers and defenders and thus improve access to justice. Defender respondents thought that QOCS would open the floodgates to unfounded claims, to their significant disadvantage.

Respondents provided illustrations of how they thought the change in the balance of power would operate. Again, these reflected the deep divide between the experiences of pursuer representatives and those of defender representatives.

Pursuer representatives' views on the impact of QOCS

Pursuer respondents thought that QOCS would remove a significant risk for pursuers, making it more likely they would not be put off from bringing legitimate claims. Some suggested that defenders would no longer be able to put economic pressure on pursers to settle early, giving fairer results.

It was suggested by one respondent that there may be an overall benefit to the legal system. More controversial cases would be able to be taken forward, which would benefit the development of the law.

Pursuer respondents also attacked the suggestion that there would be more unfounded cases. They noted that solicitors in any no win, no fee agreement had an incentive to take on only cases with a good prospect of success.

Defender representatives' views on the impact of QOCS

Defender respondents argued that QOCS, coupled with no win, no fee agreements, removed all costs and risks from pursuers in personal injury cases. This would encourage unjustified claims.

Some suggested that pursuers, knowing defenders could not claim legal expenses, would be able to force defenders into settling claims on economic, rather than legal, grounds. There would be no sense in defending a claim where the cost of doing so would be more that the value of the claim, even if that claim was without merit. Some called this the "ransom effect".

It was also argued that there may be an impact on the court system generally. If there was a significant increase in unfounded claims, delays would ensue, meaning that genuine claimants would have a longer wait to receive compensation. There would also be increased costs for the courts, and for public bodies like councils and the NHS.

Views on the tests to receive QOCS protection

Pursuer respondents generally thought the tests set a high bar, which was appropriate. Defender organisations argued that the threshold was set too high, so that it was unlikely that they could recover costs even for unmeritorious claims.

Respondents also warned that the tests should be drafted clearly. Otherwise, litigation around their meaning would be pursued, as it had been in England.

Expenses where the party is represented free of charge

The Bill would enable a party who is represented for free to claim legal expenses. These expenses would be paid in the form of a donation to charity.

The phrase "**pro bono**" is used to describe situations where solicitors provide their services for free. This is separate from no win, no fee work, where the solicitor runs the risk of not being paid if the claim is unsuccessful.

Sheriff Principal Taylor's reason for making the recommendation

Sheriff Principal Taylor considered that the ability to claim legal expenses was a tactical factor in court action (Chapter 11, paragraph 148). Where a party knew that the other side would not be able to claim expenses, they would be more likely to pursue court action. On the other hand, the increased costs associated with paying your own and the other side's legal expenses was a motivating factor to reach a settlement.

He therefore recommended that the Scottish courts should have an express power to award expenses where a party is represented free of charge. This would put someone being represented for free in the same tactical position as someone who was not.

Proposals in the Bill

The Bill gives the courts the power to award legal expenses where a party is represented for free. The party must be represented by someone with rights of audience in the court, such as a solicitor or advocate.

Any award must be paid to a registered charity designated for that purpose by the Lord President. The charity must have as one of its charitable purposes improving access to justice in civil court proceedings.

Third party funding

There is an emerging market for organisations to fund litigation as an investment opportunity. Funding is advanced for a share of the financial award if the court case is successful.

The Bill would require a party to court action who receives funding in this way to disclose it to the court. It would also make it possible for the court to award legal expenses against the funder or any intermediary.

This section of the briefing looks at:

- how third party funding works; and
- the provisions in the Bill covering third party funding.

The Scottish Government did not consult on proposals for third party funding as part of its consultation on implementing some of Sheriff Principal Taylor's proposals.

How third party funding works

In this context, third party funders are commercial investors who wish to make a profit by funding other people's legal action. An investor may offer to fund litigation for a share of any monetary award.

The key things that differentiate third party funders from other forms of funding are:

- the third party funder has no legal interest in the litigation (other than as an investment); and
- the third party funder's motivation is financial gain.

There are forms of funding which could be argued to fall into this definition, although without the direct commercial motivation. These include funding by trade unions, insurance providers and the Scottish Legal Aid Board. The Scottish Government does not intend for the Bill's provisions to apply to third party funding on a non-commercial basis.

Third party funding and access to justice

Both Lord Justice Jackson in England, and Sheriff Principal Taylor in Scotland, saw third party funding as a positive development. They argued that it provided a means for some litigants to bring cases to court when otherwise they would not have been able to.

Although the pursuer was likely to lose a significant proportion of any award, it could be argued that some payment was better than no payment at all.

Third party funding can enable a party to take forward legal action without fear of the costs. It can be an advantage for commercial organisations to no longer have to carry the risk of losing as part of their accounting process.

Third party funding is directed at cases with a good prospect of success

Because third party funders are seeking to make money out of their funding proposals, they have an interest in only funding cases which are likely to be successful.

Third party funding in practice

Because of the commercial nature of third party funding, details of the sort of funding arrangements used are not generally in the public domain.

Lord Justice Jackson consulted third party funders as part of his review. Some information gleaned from those discussions was published in his preliminary report in 2009 [17] (Chapter 15, paragraphs 2.3 and 2.5).

There, he notes that some quantified a "good prospect of success" at 70%.

Funders were only interested in funding cases where the potential award was significantly higher than the costs of bringing the case. Most funders were only interested in cases with a value in the millions. However, one funder would consider cases valued at £150,000 or more.

By the time Sheriff Principal Taylor was reporting, in 2013, he noted that a market in lower value claims was developing. He highlighted a funder which offered £3,000 loans in divorce cases (see Chapter 11, paragraph 36) in England. He was also aware of at least one funder interested in entering the Scottish market (see Chapter 11, paragraph 31).

Sheriff Principal Taylor also noted that the introduction of alternative business structures for legal businesses may provide further opportunities for third party funding to develop.

Provisions in the Bill dealing with third party funding

Section 10 seeks to place certain requirements on third party litigation funders with a financial interest in the outcome of the litigation.

The Bill would give the court discretion to make an award of legal expenses against a third party funder, and any intermediary.

The Bill would also require the party to litigation to declare to the court the following information about their funding arrangements:

- the identity of the funder and any intermediary;

- the "nature of the assistance" being provided; and
- once the claim has been substantially resolved, the financial interest the funder has in the outcome.

The Bill makes it clear that the provisions on third party funding would not apply to assistance through legal aid.

In addition, it is not the Scottish Government's policy intention that section 10's provisions should apply to other forms of funding, such as trade unions or insurance providers.

Auditors of the court

Auditors of the court are responsible for assessing the reasonableness of solicitors' accounts. This process is called "taxation".

Concerns have been expressed that the appointment and role of auditors lacks transparency, and their decisions can be inconsistent.

Here, the briefing looks at:

- concerns raised in Lord Gill's Scottish Civil Courts Review about the role of auditor;
- proposals in the Bill for auditors of the court; and
- the views of respondents to the Scottish Government's consultation.

Lord Gill's Scottish Civil Courts Review and the role of auditor of the court

Lord Gill looked at the role of auditor of the court in the Scottish Civil Courts Review (2009). He noted that a previous Scottish Executive working group - the Working Group on the Legal Services Market in Scotland [18] - had raised concerns about the lack of transparency of this role. These concerns were backed up by respondents to Lord Gill's own consultation exercise.

The main concerns were (Chapter 14, paragraphs 73 to 82):

- There is **no formal recruitment process** for auditors, and therefore no assessment as to whether they have the skills to carry out the job;
- The **boundaries of the role were unclear** - for example, some auditors were sheriff court staff and their fees for judicial taxation were paid to the court[i], but some were solicitors, who kept any fees.
- There was **inconsistency between the decisions** of the Auditor of the Court of Session and sheriff court auditors, as well as between sheriff court auditors.

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i At the time, sheriff court staff who were auditors were able to keep any fees from non-court related taxation work. This practice has since stopped. Most current auditors are self-employed.

There was general support among respondents to Lord Gill's consultation for the role of auditor to become a professional, salaried one.

Lord Gill therefore recommended that auditors of court should be formerly recruited through the public appointments process and require relevant experience or qualifications. Fees for taxation should be used to cover the cost of the process.

He also stated that the Auditor of the Court of Session should have a role as "head of profession". This should involve issuing guidance to other auditors to aid consistency in decision-making.

The Scottish Government took the view that the role of auditor of court sat better as a post within the Scottish Courts and Tribunals Service, rather than a public appointment. Scottish Courts and Tribunals Service posts are recruited on the basis of open competition, under civil service rules. The Bill makes provision on this basis.

Proposals in the Bill for auditors of court

Part 3 of the Bill contains provisions intended to formalise the role of auditor of the court and to increase consistency in the decisions taken by auditors.

Office of auditor of the court

Sections 13 and 14 make provision for the offices of auditor of the courts. These are to be appointed by the Scottish Courts and Tribunals Service on terms and conditions as it sees fit. An auditor of the sheriff court will be able to deal with taxation from any sheriff court.

An auditor has authority to tax expense accounts referred by solicitors and clients, as well as those remitted by courts and tribunals (judicial taxation).

Guidance to be issued by the Auditor of the Court of Session

Section 15 provides for the Auditor of the Court of Session to issue guidance on these functions. Auditors must have regard to the guidance when they are auditing accounts.

Annual report on taxation

The Bill also requires the Scottish Courts and Tribunals Service to produce an annual report giving details of how many taxations were carried out and the fees generated.

Treatment of current auditors

The Policy Memorandum (paragraph 70) states that it is not intended that the Bill's proposals will affect current auditors of the sheriff court. Instead, those currently holding the role will be able to continue until they retire.

The current Auditor of the Court of Session will also continue in post until he retires (Policy Memorandum, paragraph 72).

The views of respondents to the Scottish Government's consultation on court auditors

The Scottish Government consulted on the impact proposals to formalise the role of auditor of the court would have.

A significant majority of respondents favoured the move to a professional, salaried post. Those who did not were either current auditors or their representative bodies.

The current role of auditor of the court

Auditors argued that their position had changed considerably from what was reported in the Gill Review.

At the time of the response, all the court auditors were self-employed. Two sheriff court auditors were solicitors and the rest were former members of court staff. This, they argued, gave them considerable, relevant experience that would be difficult to replicate.

There is now one currently employed sheriff clerk who is undertaking the role of auditor. The other sheriff court auditors are self-employed.

Guaranteeing independence

Many respondents thought the move to a salaried post would better protect independence. Where auditors had a financial interest in the outcome of the case, there would always be concerns about independence.

Respondents also suggested that increased transparency in the appointment process would promote greater confidence among the general public and the legal profession.

Auditors, on the other hand, argued that independence was better promoted through the current system of self-employment. They noted that their function was currently carried out at no cost to the public purse.

Charging on the basis of the cost of the service

A number of respondents commended the move to a salaried post on the basis that it would facilitate a change in the way services were charged for, as proposed by Lord Gill. Lord Gill recommended that fees should be charged on the basis of the cost of the service, rather than the value of the account.

Proposals to change the way that fees are charged do not appear on the face of the Bill. However, it is within the Scottish Government's existing powers to implement such a system.

Group proceedings

The Bill would give the Court of Session power to make court rules to allow one set of court proceedings to be brought on behalf of two or more parties.

Group proceedings can take various forms. Instead of being prescriptive, the Bill empowers the Court of Session to make the necessary rules.

It is the Scottish Government's intention that the Scottish Civil Justice Council will develop detailed proposals through consultation with stakeholders.

The Bill would set some requirements in relation to the procedure to be developed:

- proceedings will take place in the Court of Session;
- a person must give their express consent for group proceedings to be taken forward on their behalf (known as an "opt-in" procedure); and
- it will be possible for a "representative party" to bring group proceedings, even where that party does not have a direct interest in the outcome of the litigation.

This section looks at:

- what group proceedings are;
- "opt-in" versus "opt-out" systems;
- what the Bill does; and
- what respondents to the Scottish Government's consultation said about group proceedings.

What are group proceedings?

The Scottish Law Commission reported on the issue of group proceedings [19] in 1996 - although their preferred term was "multi-party actions". These are described as claims "where a number of persons have the same or similar rights".

The Scottish Law Commission goes on to provide more detail (Part 2, paragraph 1.1):

> " There are two essentials of a multi-party action for our purposes: a number of possible claimants or pursuers; and a single issue or a number of issues which are common to all the possible claims. It is said that the existence of this core of common issues makes it possible for all the claims to be dealt with in a single litigation and that the advantages of the single litigation outweigh the disadvantages."

There are three types of group proceedings

There are three broad types of group proceedings, as recognised by the Scottish Law Commission and the Gill Review. These are:

- **Class actions** - these are raised by a named pursuer as a representative of a class of people with the same legal issue. The representative seeks redress for themselves and for other members of the group.
- **Organisation actions** - these are raised by organisations, such as consumer groups or environmental groups, on behalf of their members or the general public. Here the organisation acts on behalf of those affected.
- **Public actions** - these are raised by public officials on behalf of the general public or a particular group of the public.

Advantages and disadvantages of group proceedings

Group proceedings can save individual pursuers money because the various costs - such as court fees and legal representation - are shared between participants. This can mean that it becomes economical to litigate in low value claims (eg. those involving small consumer purchases).

Similarly, bringing legal claims involving similar issues together saves court time and resources.

However, it can be complicated to manage group proceedings. The courts need to give detailed consideration to whether group members do indeed have claims which are similar enough to merit proceeding on a group basis. An individual participant whose legal position turns out to be different from the majority of pursuers may find that their rights are compromised.

There are also unresolved issues around funding group litigation and recovering legal expenses where the group loses the case.

"Opt-in" versus "Opt-out" systems

The Bill would create an opt-in system for participants in group proceedings.

How opt-in systems work

In opt-in systems, pursuers must expressly consent to be part of the action. Those affected who do not join the group proceedings are free to bring their own legal claims.

How opt-out systems work

In opt-out systems, the court agrees a definition of those affected by the proceedings. Anyone covered by the definition is deemed to consent to court action on their behalf unless they expressly opt out. Only those who have opted out retain the right to bring their own legal claim.

In opt-out systems, estimates are made of the number of people covered by a claim and the extent of their loss. Any monetary award will be calculated on this basis and divided between the members of the group in an appropriate manner.

In opt-out systems, there may be money left over from any financial award because not all those affected have been identified. Different legal systems have different solutions to this problem. The residual award may be donated to charity, to the court system, or to some fund that supports group litigation.

Representative organisations

Opt-out systems can have advantages for organisations bringing actions on behalf of their members or sections of the general public. Monetary awards are likely to be higher, and the deterrent effect more powerful, where damages are based on an estimation of all those affected, rather than just those who have opted-in.

This is especially the case for low value claims. Where a large number of people have suffered a small amount of damage, many may not be motivated to opt-in to court action.

However, businesses are less likely to behave unlawfully in the future if they face significant financial consequences.

Scottish Government position

In its discussions with stakeholders, the Scottish Government reports that there has been almost universal support for an "opt-in" system (Policy Memorandum, paragraph 91). The Bill therefore makes provision for this. However, the Scottish Government suggests that an opt-out system remains an option for future development (Policy Memorandum, paragraph 91).

The Bill would also enable group proceedings to be taken forward by a representative party, such as a consumer group (although this would be on an opt-in basis).

What the Bill does

Section 17 of the Bill would enable group proceedings to be raised in the Court of Session.

It would require that such proceedings follow the "opt-in" model so that participants must expressly agree to be part of the group.

It would also enable representative parties to bring court action on behalf of group members, even where the representative party is not directly affected by the issues being litigated. This would enable charities and campaigning groups to raise court action on behalf of those affected by an issue.

The consent of the court would be required before group proceedings could be taken forward. This would give the court the opportunity to consider whether the individual claims were sufficiently related to justify proceeding as a group.

Section 18 of the Bill would give the Court of Session wide powers to make provision for group proceedings via act of sederunt. Acts of sederunt are a form of secondary legislation which create court rules.

What respondents to the Scottish Government's consultation said about group proceedings

The Scottish Government consulted on its proposals for group proceedings in 2015. The approach taken in the Bill has been significantly developed since this consultation.

Of the three options presented, the majority of respondents favoured a case management approach, although there was a considerable divergence in views.

Under the case management option, court rules would be used to bring together individual claims involving similar issues. This falls short of group proceedings as envisaged by the Scottish Law Commission and the Gill Review, and is different from what is being taken forward in the Bill.

Access to justice

Even those who supported a case management approach accepted that it would have a minimal impact on increasing access to justice.

More developed class action procedures were generally thought to create the potential for savings for pursuers and defenders, which could increase access to justice.

A class action procedure, which included the option for third parties to raise proceedings, was thought to provide the biggest increase to access to justice. However, many respondents had significant reservations in relation to such an approach.

Some respondents were concerned that introducing group proceedings might encourage unjustified litigation.

Opt-in or opt-out procedures

One of the biggest concerns expressed by respondents was the impact of allowing an opt-out procedure. Those representing defenders argued that such a system would affect a defender's ability to work out the extent of its liability. The extent of liability can have an important impact on the way cases are conducted, so depriving defenders of this information would be unfair.

The Faculty of Advocates stated that an opt-out system would allow litigation to be taken forward on behalf of those totally disinterested in the outcome. This, it argued, was objectionable on principle.

Campaigning organisations, such as Citizens Advice Scotland and Which?, argued that an opt-out system was vital to increase access to justice. This was the only practical option for taking forward legal action where a large number of people had experienced a small amount of harm.

Third party representatives

The judges of the Court of Session noted that allowing third parties to bring claims on behalf of others would be a fundamental change to the way the Scottish legal system operated. Currently, only those with a direct interest in the outcome can bring a court claim.

Campaigning organisations argued for the importance of allowing third parties to bring actions. They noted that, in many situations, individuals would not be motivated to take court action on their own. Unless a third party procedure was available, businesses would not have to compensate to the full extent of the harm they cause in these situations.

Citizens Advice Scotland also noted that third party organisations could use court action in a strategic way - eg. taking a case to set a legal precedent. This could have benefits to the legal system generally.

Funding and expense issues

Some of those representing defenders were worried about how an award of legal expenses could be enforced if pursuers in a group action were to lose their case. This would be exacerbated by an opt-out model were individual pursuers were not even identified.

A number of respondents also noted that there would be issues with funding group proceedings. The legal aid system, as currently constituted, could not provide funding. A specialist fund, as discussed in the Gill and Taylor Reviews, may be needed.

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