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Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill - Stage 3

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The Civil Litigation Bill aims to increase the options available to pay for civil court action, as well as making the costs of taking court action more predictable. The Scottish Government argues that this will increase access to justice, although some stakeholders are concerned that it will create a compensation culture.



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About this briefing

This briefing looks at parliamentary consideration of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill prior to Stage 3. The changes proposed by the Bill which have attracted most attention so far are:

- regulating no win, no fee agreements, including making a new form of agreement - where lawyers can keep a percentage of the compensation awarded - available for the first time;
- changing the rules on when one party to court action has to pay the other party's [legal expenses](#), to make the costs of taking legal action more predictable. [Qualified, one-way costs shifting](#) would apply to personal injury cases; and
- introducing powers to create court rules around [group proceedings](#).

Going into Stage 3, the main areas of controversy are:

- whether lawyers should be able to take a cut of compensation for future loss (such as future care costs or loss of earnings) when calculating their success fee. It is alternatively argued that victims need this compensation to meet their future costs or, that the Bill's reforms won't work in practice if it is excluded;
- whether the operation of qualified, one-way costs shifting needs to be further refined to discourage spurious claims;
- whether the Bill needs to make alternative provision for the payment of court fees in personal injury cases, to prevent this obligation acting as a barrier to access to justice;
- how best to introduce group proceedings. The main issue of contention is whether it is best to start with the simpler "opt-in" procedure or also allow for a more complicated "opt-out" procedure.

About the Bill

The Bill's introduction and key documents

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

The [Bill and its related documents](#) are available from the Bill page on the Scottish Parliament website. The [SPICe Bill Briefing](#)¹ gives background information on the Bill's provisions and development.

The Justice Committee was designated the lead committee for Stage 1 scrutiny.

Terminology

The Bill seeks to change court rules and to create a wider range of options for individuals to fund civil court action. Discussion can therefore feature technical legal terms. The most frequently used of these are explained below.

Claims management company – a company which handles legal claims on behalf of an individual. Claims management companies do not generally employ solicitors. If court representation is needed, the company will pass the claim on to a solicitor (perhaps for the payment of a referral fee).

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

Defender – the party defending civil court action in the Scottish courts.

Future loss - in personal injury claims, compensation for losses and expenses expected to arise in the future. This could cover things like future care costs and future loss of earnings.

Group proceedings - where one set of legal proceedings are brought by two or more parties. They are sometimes referred to as class actions. Those involved share costs and risks. This can make it feasible to pursue court action which would not be economical if pursued as an individual.

Legal expenses - the costs associated with bringing a court case, such as solicitor's fees and commissioning expert evidence. A proportion of these expenses can usually be recovered from the losing side in the case.

No win, no fee agreement - see "success fee agreement" below.

Pursuer – the party bringing civil court action in the Scottish courts.

Qualified, one-way costs shifting (QOCS) – where the pursuer is not liable for the defender's legal expenses if they lose, but can still claim their expenses from the defender if they win.

Success fee agreement (SFA) – a definition in the Bill which covers any agreement to pay a solicitor based on the outcome of the legal action. It covers both DBAs and agreements where the solicitor gets an uplift in their fees if the action is successful. Such arrangements are commonly referred to as no win, no fee agreements (although, in some instances, no win, lower fee arrangements will be possible).

Summary dismissal - where a case is rejected by the court at the beginning of proceedings because it has very little chance of success.

Taxation - the process for independently reviewing the fees charged by a solicitor. Judicial taxation refers to calculating the legal expenses to be paid by the losing party in a court case to the winning party. Auditors of the court carry out taxation.

Tender - a formal offer of a sum to settle a compensation court claim. Where a party rejects a tender but fails to get a better result through court action, they can become liable for the other side's legal expenses.

Third party funders - individuals or organisations who 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 compensation.

Summary of the proposals in the Bill

Broadly speaking, the Bill takes forward the recommendations of the [Review of Expenses and Funding of Civil Litigation in Scotland](#) (2013) ² which require primary legislation. This is generally referred to as the "Taylor Review". The Bill's aim is to improve access to justice by making the costs of civil court action more predictable and increasing the options available to pay for court action.

The Bill also takes forward several reforms proposed in the [Scottish Civil Courts Review](#) (2009) ³, also known as the "Gill Review". This recommended wide-ranging changes to the civil court system in Scotland to make it more effective and efficient.

The Bill's main provisions would:

- regulate no win, no fee agreements (including [damages-based agreements](#));
- remove the legal rule which prevents lawyers enforcing damages-based agreements;
- introduce [qualified, one-way costs shifting](#) in personal injury cases. This alters the normal rule that the loser pays the winner's [legal expenses](#).
- place requirements on third parties (not otherwise involved in the legal action) who fund litigation for financial gain;
- require transparency in relation to funding arrangements from all those who bring civil court action.
- create salaried posts for auditors of the court (who carry out [taxation](#)); and
- introduce powers to create court rules governing [group proceedings](#).

Consideration at Stage 1

The Justice Committee took the lead for Stage 1 scrutiny. It held evidence sessions at its meetings on:

- [5 September 2017](#) (Scottish Government's Bill Team) ⁴
- [19 September 2017](#) (pursuers' representatives) ⁵
- [26 September 2017](#) (legal stakeholders and defender representatives) ⁶
- [31 October 2017](#) (Sheriff Principal Taylor) ⁷
- [14 November 2017](#) (access to justice stakeholders) ⁸ , and
- [21 November 2017](#) (Minister for Community Safety and Legal Affairs) ⁹ .

It published its [Stage 1 Report](#) on 21 December 2017 ¹⁰ .

Stage 1 scrutiny was also undertaken by the Delegated Powers and Law Reform Committee. It produced a [report on the delegated powers contained in the Bill](#). ¹¹

After issuing a call for evidence, the Finance and Constitution Committee decided not to undertake any further scrutiny of the Bill.

The Scottish Government's [response to the Stage 1 Report](#) was published in January 2018 ¹² .

The Stage 1 debate took place on [16 January 2018](#) ¹³ . The general principles of the Bill were supported by all parties in the Scottish Parliament. However, a number of members highlighted areas where they believed the Bill could be improved. The main concerns were that:

- there would be a regulatory gap between the introduction of the Bill and regulation of claims management companies in Scotland, to the advantage of unscrupulous claims management companies;
- the introduction of qualified, one-way costs shifting could result in an increase in unjustified court claims, with knock-on effects on the court system and insurance premiums;
- further consideration should be given to creating an opt-out system for group proceedings; and
- the Scottish Government should commit to undertaking post-legislative scrutiny on the impact of the legislation, which could look at some of the uncertainties highlighted above.

Consideration at Stage 2

The Justice Committee debated Stage 2 amendments at its meetings on [27 February 2018](#)¹⁴ and [6 March 2018](#)¹⁵.

There were many amendments, including numerous technical amendments brought forward by the Scottish Government. This briefing does not attempt to deal with all of them. Instead, it discusses the main issues associated with the Bill, and how they have progressed through Stage 1 and Stage 2 consideration.

The main issues are discussed in the sections below:

- [the regulation of claims management companies](#);
- [how to deal with compensation for future loss](#);
- [the impact of qualified, one-way costs shifting](#);
- [court fees as a barrier to access to justice](#);
- [arrangements for third party funders](#);
- [an "opt-out" procedure for group proceedings](#); and
- [provisions for post-legislative scrutiny](#).

Regulation of claims management companies

Claims management companies are not currently regulated in Scotland, although they are in England and Wales. Most claims management companies operate from England.

As part of his review, Sheriff Principal Taylor recommended that claims management companies be regulated. He also recommended that only regulated businesses (solicitors or claims management companies) should be able to offer [damages-based agreements](#).

Regulation under the UK Government's Financial Guidance and Claims Bill

At the same time as the Justice Committee undertook Stage 1 scrutiny of this Bill, the UK Parliament was considering the Financial Guidance and Claims Bill. This would tighten up the regulation of claims management companies in England and Wales. Responsibility for regulation would move from the Ministry of Justice to the Financial Conduct Authority.

During Stage 1 scrutiny of the Bill, there was agreement from both pursuer and defender representatives that claims management companies should be regulated. There were concerns that the changes proposed in the Bill would make Scotland a more attractive place for them to operate. This would increase the risk to consumers from the activities of unscrupulous businesses.

As a result, the Scottish Government agreed amendments to the Financial Guidance and Claims Bill to extend claims management company regulation by the Financial Conduct Authority to Scotland. These were the subject of a [Legislative Consent Memorandum considered by the Economy, Jobs and Fair Work Committee](#).

Stage 1 Report recommendations

The Justice Committee welcomed regulation via the Financial Guidance and Claims Bill. However, it recommended that the provisions in the Civil Litigation Bill should not be brought into force until the regulatory system was up and running.

It also asked the Scottish Government to clarify whether regulation under the Financial Guidance and Claims Bill was considered to be an interim or long-term option.

Scottish Government response

The Scottish Government noted that it did not know when regulation of claims management companies by the Financial Conduct Authority would start. It did not want to delay implementation of the Bill, and the benefits it believed it would bring, until the UK Government acted. Given that arrangements were now in place for imminent regulation, the Scottish Government considered the risks to consumers to be minimal.

The Scottish Government intended to be guided by the views of the [Review of the Regulation of Legal Services](#) as to whether regulation by the Financial Conduct Authority should continue in the longer term. The purpose of this body is to review the way those providing legal services are regulated.

Stage 2 amendments

Purpose of amendment	Result
<p>Scottish Government Amendment 20 (and many consequential amendments) would extend the definition of "relevant services" to claims management companies.</p> <p>The intention was to make clearer that claims management companies have to comply with the Bill's provisions on the regulation of success fee agreements.</p>	<p>The amendments were agreed to without division.</p>
<p>Amendment 65, in the name of Gordon Lindhurst, sought to delay implementation of the Bill until regulation of claims management companies had transferred to the Financial Conduct Authority. This would avoid a regulatory gap.</p>	<p>The amendment was disagreed to by division.</p>
<p>Amendment 20A, in the name of Daniel Johnson, sought to amend Scottish Government Amendment 20. The intention was that only regulated claims management companies would be able to offer success fee agreements.</p>	<p>The Scottish Government argued that the effect of this amendment would be to exempt claims management companies from the Bill's requirements until they were regulated.</p> <p>The amendment was not moved.</p>

How to deal with compensation for future loss

Under the Bill's provisions, solicitors working under a [success fee agreement](#) would be able to take a percentage of the client's compensation if the case is successful.

In personal injury cases, a pursuer may receive compensation for [future loss](#), such as care costs and lost earnings. A seriously injured pursuer may be entirely reliant on this to meet their future needs.

However, where the solicitor can take a percentage of this award, the amount the court has calculated they need to live on will be reduced. If someone runs out of money, local

authority and NHS services may be needed to fill the gap, placing an additional burden on the taxpayer.

Sheriff Principal Taylor's recommendation

Taylor recommended that solicitors should be able to include compensation for future loss when calculating their success fee. This would reduce the amount available to meet future costs.

His reasons for doing so were mainly practical. Most personal injury cases are settled by negotiation before they go to court. The sum offered may be an all-inclusive figure, not broken down into future and past lost. He did not want to see more cases ending up in court because of disagreements over the amount attributed to future loss.

In addition, Taylor did not want to incentivise delay by making a solicitor's reward based on past losses only.

He also argued that much of the work that solicitors undertook in high value cases (where the pursuer has sustained significant injuries) was negotiating compensation for future loss. Unless they were rewarded for this, there was a risk that damages-based agreements would not be offered in these sorts of cases.

How the Bill would operate to protect compensation for future loss

Following Sheriff Principal Taylor's recommendations, the Bill proposes a number of restrictions which would operate to provide some protection for future loss compensation.

Firstly, the Bill would set limits, via secondary legislation, on the proportion of a compensation award which could be claimed by a lawyer. The Scottish Government is expected to follow Taylor's recommendations. These were:

- 20% of the first £100,000 in compensation;
- 10% of sums between £100,000 and £500,000; and
- 2.5% of compensation above £500,000.

Thus, in very serious personal injury cases, the percentage of future loss which can be claimed as a success fee is likely to be limited to 2.5%.

Secondly, the Bill protects compensation which is paid in periodical instalments, rather than a lump sum. This is arguably the fairest way to deal with future loss in serious cases. It happens rarely at the moment, but the Scottish Government intends to amend the law to make it easier.

Thirdly, the Bill protects any award of future loss over £1 million, if the client has been advised to accept payment in periodical instalments, even if they do not actually do so.

Stage 1 Report recommendations

The Committee asked the Scottish Government to reconsider whether compensation for future loss should be excluded from the success fee calculation.

The Committee noted that Scottish Government may still choose not to ring-fence future loss compensation. In that event, the Committee recommended that the relevant

provisions should not be brought into force until the courts have the power to require periodical payments.

Scottish Government response

The Scottish Government noted that the provisions in the Bill replicated Sheriff Principal Taylor's recommendations, which had been carefully considered. It did not therefore intend to change its approach.

It also did not want to delay the benefits of the Bill until separate legislation in relation to periodical payments was in place.

Stage 2 amendments

Purpose of amendment	Result
Amendments 57, 58 and 59 , in the name of Margaret Mitchell, sought to exclude all future loss compensation from a lawyer's success fee calculation.	<p>The amendment was agreed to.</p> <p>The Scottish Government stated that it would support the amendment if the Committee did.</p> <p>Sheriff Principal Taylor has since written to the Minister for Legal Affairs ¹⁶ to highlight his concern about the impact of this amendment.</p>

The impact of qualified, one-way costs shifting

The Bill proposes to introduce qualified, one-way costs shifting (QOCS) for personal injury court cases. Under this rule, the pursuer is not liable for the defender's [legal expenses](#) if they lose, but can still claim their own expenses from the defender if they win.

Sheriff Principal Taylor argued that QOCS would address the "David and Goliath" relationship between pursuers and defenders in personal injury cases. Pursuers are usually individuals with no experience of the legal system. Defenders are usually public bodies or insurers with significant tactical and legal expertise.

Pursuers would lose the protection of QOCS if they fail to conduct their case in an acceptable manner. The Bill sets out three grounds: fraud; a failure to meet reasonable standards; and abuse of court process.

Defender representatives argued that the introduction of QOCS, without other adjustments, risked encouraging spurious claims. This would facilitate what they called a "compensation culture".

Stage 1 Report recommendations

On balance, the Committee supported the introduction of QOCS. However, it raised concerns about unintended consequences. It recommended a range of additional safeguards, including a commitment from the Scottish Government to undertake post-legislative scrutiny.

The Committee also raised concerns about the impact of QOCS on defenders who were not well-resourced - the so called "David and David" situation. It asked the Scottish Government to consider ways of dealing with this.

On the tests to lose QOCS protection, the Committee noted a range of concerns about drafting. It welcomed the Scottish Government's commitment to address this issue via Stage 2 amendments. It also called for some specific changes, including the loss of QOCS protection where a pursuer failed to beat a [tender](#) or the case was [summarily dismissed](#).

Scottish Government response

The Scottish Government made clear that it did not think that the introduction of QOCS would lead to an increase in spurious court claims. A key consideration was that solicitors were unlikely to take on cases with low chances of success on a no win, no fee basis, as they would not get paid.

On the issue of poorly resourced defenders, the Scottish Government noted the importance of certainty for pursuers. The policy was designed to ensure that pursuers could raise personal injury proceedings without fear of being liable for the defender's legal expenses. Exempting certain defenders would remove this certainty.

The Scottish Government agreed to clarify the tests to lose QOCS protection. However, it rejected a number of the Committee's specific proposals.

Stage 2 amendments

Purpose of amendment	Result
Amendment 1 , in the name of Liam Kerr, would apply QOCS only in situations where a defender was a public body or was insured. It would also exclude pursuers who were being financially supported by a third party.	The amendment was disagreed to by division.
Amendment 4 , in the name of Liam Kerr, sought to extend the definition of fraud in the Bill to cover all fraudulent behaviour (not just words).	The amendments were agreed to.
Amendment 5 , also in the name of Liam Kerr, would ensure that fraudulent behaviour which occurred before court action was raised could also be considered.	The Scottish Government agreed not to move its amendment on this issue.
Scottish Government Amendment 36 would change the definition of reasonable standards to reflect the legal definition known as "Wednesbury unreasonableness". This is a decision that is so unreasonable that no person acting reasonably could have reached it.	The amendment was agreed to by division.
Amendments 6, 7 and 8 , in the name of Liam Kerr, sought to create new grounds for losing QOCS protection. Amendments 6 and 7 dealt with failure to beat tenders and other offers in settlement. Amendment 8 dealt with summary dismissal.	The amendments were disagreed to by division (amendment 8 was not moved).
	The Scottish Government argued that these issues were better addressed in court rules than primary legislation.
Amendment 17 , in the name of Liam Kerr, would prevent QOCS applying to clinical negligence cases until a pre-action protocol was in place to deal with them. Pre-action protocols set out the steps parties must take to settle a dispute, with the intention of avoiding unnecessary court action.	The amendment was disagreed to by division.

Court fees as a barrier to access to justice

During Stage 1 consideration, the Justice Committee heard evidence that court administrative fees could be a barrier to those seeking to bring personal injury actions.

Under the Bill's provisions, those using no win, no fee agreements would be protected from this, as solicitors would have to meet all upfront costs. Where a case was successful, the solicitor would be able to reclaim the fees from the other side.

Trade unions often provide support to members to take personal injury actions. This can include covering all the legal costs. It would appear that unions will usually pay court fees upfront on behalf of members. However, if the case is lost, the member may be liable for these. Unions argue that this can act as a disincentive.

They called for a change in the way that court administrative fees for personal injury actions are charged. At present, users must pay fees in advance, each time they use court services.

Unions propose instead that fees should only be charged at the end of proceedings (where, in most cases, they can be recovered from losing defenders). This would relieve the cash-flow burden on unions.

Some unions also called for a **QOCS**-like system for court fees, so that unsuccessful pursuers were protected from liability.

Both proposals are likely to have implications for fee collection rates and court budgets.

Stage 1 Report recommendation

The Committee asked the Scottish Government to consider these points as part of its consultation on court administrative fees.

Scottish Government response

The Scottish Government agreed to consider the arguments as part of its court fees consultation. However, it noted that changing the system would increase the burden on the taxpayer for the operation of the courts.

Stage 2 amendments

Purpose of amendment	Result
Amendment 11 , in the name of Daniel Johnston, sought to require that, where QOCS applied, court administrative fees should only be paid at the end of court proceedings. He noted that, as well as helping unions, it would also be easier for many other pursuers to pay fees once they had received their compensation award.	The amendment was disagreed to by division. The Scottish Government's consultation had concluded, and the minister reiterated her support for the current system as supporting sensible use of resources.
Amendment 64 , in the name of John Finnie, would exempt those benefiting from QOCS from paying court fees.	Amendment 64 was not moved.

Arrangements for third party funders

Sheriff Principal Taylor recommended that all parties to civil court action should be transparent about how their case was funded. This should include declaring the type of funding they were receiving (eg. via a no win, no fee agreement or supported by a trade union) and the name and address of the funder.

Separately, he recommended that "professional funders" (investors who fund for a share of the compensation) should be able to be found liable for [legal expenses](#) if the case was lost.

These recommendations were conflated in the Bill as introduced, creating uncertainty as to whether trade unions or solicitors could be held liable for the legal expenses of a case. If this was the effect, it would significantly undermine [QOCS protection](#), as solicitors or trade unions could be pursued for legal expenses instead of their clients or members.

Stage 1 Report recommendations

The Committee welcomed the Scottish Government's commitment to clarify the situation through amendments at Stage 2. It called for trade unions, staff associations and solicitors to be specifically excluded, and for [third party funders](#) to be more clearly defined.

Scottish Government response

The Scottish Government confirmed that it was considering how to amend the Bill at Stage 2 to address these concerns.

Stage 2 amendments

Purpose of amendment	Result
<p>Scottish Government amendments 41 to 45 would decouple the requirements on third party funders from the transparency requirements on all those taking civil court action.</p> <p>Amendments 41 and 43 would require anyone receiving financial support to disclose the identity of the funder and the nature of the support.</p> <p>Amendments 44 and 45 would allow those with a financial interest in the outcome of the case to be held liable for legal expenses. Those offering success fee agreements would be excluded, as would support from family members in family proceedings (such as divorce).</p>	The amendments were agreed to.
<p>Amendment 61, in the name of John Finnie, would also specifically exclude trade unions and similar bodies from liability for legal expenses.</p>	
<p>Amendment 12, in the name of Daniel Johnson, sought to exclude trade unions from liability for legal expenses, and those receiving funding from a trade union from the transparency requirements.</p>	The amendment was not moved.

An "opt-out" procedure for group proceedings

The Bill would give the courts power to introduce court rules covering group proceedings. This is a form of court action where one set of legal proceedings can be brought on behalf of two or more people with similar legal problems. It is sometimes referred to as a "class action".

Those participating in group proceedings share the costs of legal action, thus reducing them. Group proceedings can therefore enable access to justice for those with low value or risky claims. The Gill Review (which looked to improve the efficiency and effectiveness of the civil courts in Scotland) recommended the introduction of group proceedings.

Opt-in versus opt-out proceedings

Provisions in the Bill as introduced would require that a person can only be part of group proceedings with their express consent. This is known as an “opt-in” procedure.

Some countries allow “opt-out” procedures where claims can be brought on behalf of a group of claimants, even if they have not all been identified. It is argued that this makes legal action viable where a large number of people have suffered a small amount of loss.

This can be important in consumer and environmental cases. People who have suffered a small amount of loss may not be motivated to join court action. However, when the costs are considered over hundreds or thousands of people, the organisation involved can make - or avoid paying - significant sums out of poor practice.

Group proceedings can be difficult to manage - for example, deciding how to share any compensation award. Drafting court rules will present a number of challenges to established legal practice.

Opt-in proceedings are easier to manage than opt-out proceedings. Thus, the Scottish Government has argued that it is appropriate to start with opt-in proceedings, with the option of considering an opt-out procedure in the future.

Stage 1 Report recommendations

The Committee welcomed provisions for group proceedings and called for court rules to be developed without delay.

It recognised that the Scottish Government was taking a pragmatic approach in introducing opt-in proceedings first. However, the Committee noted the advantages of opt-out.

It also noted that allowing the court to decide whether opt-in or opt-out proceedings were appropriate was in line with the recommendations of the Gill Review.

Scottish Government response

The Scottish Government emphasised the advantages of a cautious approach when introducing an entirely new concept to the legal system. It suggested that the introduction of an opt-out procedure could be considered once court rules governing opt-in had bedded in.

The Scottish Government noted that court rules in relation to group proceedings would be developed by the [Scottish Civil Justice Council](#). This work would involve wide consultation and could take time.

Stage 2 amendments

Purpose of amendment	Result
Amendments 13, 14 and 15 , in the name of Liam McArthur, would give the courts discretion to allow claims to proceed on an opt-out basis.	Amendment 13 was agreed to by a division of six to five. Amendments 14 and 15 were agreed to.

Provisions for post-legislative scrutiny

As [discussed above](#), the Justice Committee called on the Scottish Government to undertake post-legislative scrutiny on the impact of the introduction of [qualified, one-way costs shifting](#).

Amendments at Stage 2

Purpose of Amendment	Result
Scottish Government amendment 55 proposed post-legislative scrutiny of the entire Bill. A report would be required after five years of operation. In the case of group proceedings, the five year period would start when court rules introducing them were first brought into force.	The amendment was withdrawn.
Amendment 62 , in the name of Margaret Mitchell, proposed post-legislative scrutiny of the Bill, with a focus on QOCS and group proceedings. A report would require to be laid before the Scottish Parliament as soon as possible after the legislation had been in force for five years.	The amendment was agreed to.

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