

## POLICY NOTE

### THE CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018 (COMMENCEMENT NO. 1, TRANSITIONAL AND SAVING PROVISIONS) REGULATIONS 2018

#### SSI 2018/368 (C. 23)

The above instrument (the “Regulations”) is made in exercise of the powers conferred by section 27(3) and (4) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the 2018 Act”).

#### Background

The 2018 Act received Royal Assent on 5 June 2018. It provides a framework for the implementation of the recommendations of the Review of the Expenses and Funding of Civil Litigation<sup>1</sup> carried out by Sheriff Principal James Taylor which require primary legislation. The overarching aim of the 2018 Act is to increase access to justice by creating a more accessible, affordable and equitable civil justice system for Scotland that:

- makes the costs of civil action more predictable;
- increases the funding options for pursuers of civil actions; and
- introduces a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

#### Policy Objectives

The Regulations provide for commencement, transitional and saving arrangements.

Regulation 2 commences certain provisions of the 2018 Act on 30 January 2019. The main policy objective for the Regulations is to commence Part 3 of the Act which concerns auditors of court.

#### *Auditors of court*

The policy objective is to increase transparency and consistency in the taxation of accounts in civil proceedings, whilst preserving the fair and adversarial character and integrity of the auditing process. “Taxation” is the process whereby the expenses of a successful party in litigation are determined by an auditor of court where there is dispute with the losing party – the usual rule is that expenses follow success. (This process is unconnected to the tax system.) Auditors of court perform important functions in resolving disputes about expenses in which considerable amounts of money may be at stake.

#### *Auditor of the Court of Session*

The Auditor of the Court of Session is currently appointed by the Scottish Ministers and is entitled to hold office until his or her 65<sup>th</sup> birthday. The Auditor is paid a modest stipend by the Scottish Ministers and fees for judicial audits are charged and retained in line with the

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<sup>1</sup> <https://www.gov.scot/Publications/2013/10/8023>

Court of Session etc. Fees Order 2018 (S.S.I. 2018/83). The Auditor is also entitled to retain fees paid to him for the taxation of extra-judicial accounts<sup>2</sup>.

### *Auditor of the Sheriff Appeal Court*

The Auditor of the Court of Session currently holds the office of auditor of the Sheriff Appeal Court, but the provisions of the 2018 Act do not require this to be the case should SCTS wish to adopt a different approach in the future.

### *Sheriff court auditors*

At present, sheriff court auditors are appointed by the sheriff principal for each sheriffdom. Some are employed by the Scottish Courts and Tribunals Service (SCTS), but some are independent practitioners (ex-sheriff clerks or solicitors). The self-employed auditors who currently provide this service to the sheriff courts are remunerated by means of a fee based on a percentage of account submitted for taxation.

### *Scottish Civil Courts Review*

One of the issues raised in the 2009 Scottish Civil Courts Review (SCCR) headed by Lord Gill, the then Lord Justice Clerk, was that the appointment processes for auditors in both the Court of Session and the sheriff court did not conform to standard appointment procedures. The SCCR consultation responses raised a number of concerns about whether sheriff clerks in particular had the necessary skills and training. A further problem was the inconsistency of approach, firstly, between the Auditor of the Court of Session and sheriff court auditors and, secondly, between different individual sheriff court auditors and a general lack of transparency of arrangements.

In addition, the SCCR found that there was concern about the arrangements for taxing accounts of expenses. It reflected on the views expressed in the Report by the Research Working Group on the Legal Services Market in Scotland (2006)<sup>3</sup> on a lack of transparency and consistency of taxation decisions, and potential conflicts of interest.

As a consequence, the SCCR considered that the taxation of judicial accounts should be part of the service provided by the civil court system and that the fees payable for taxing such accounts should be based on the cost of providing the service. Consequently, the SCCR recommended that the offices of Auditor of the Court of Session and sheriff court auditors should be salaried posts and that fees payable for extra-judicial taxations and assessments should be paid into public funds. The SCCR also recommended that the Auditor of the Court of Session should have a role as ‘head of profession’.

The 2018 Act makes provision for all auditors of court to become salaried public positions within SCTS. It requires the Auditor of the Court of Session to issue guidance, as head of profession, to auditors of court about the exercise of their functions, including the types and levels of expenses that may be allowed in an account of expenses. It also places a duty on

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<sup>2</sup> The determination of expenses relating to a litigation which have not been awarded by a court or tribunal but requested by the parties.

<sup>3</sup> <http://www.gov.scot/Publications/2006/04/12093822/0>

SCTS to publish details of the number of taxations carried out by auditors and the fees received for that work. The Scottish Government considers that these reforms will enhance consistency, transparency and confidence in the taxation process.

It is proposed that the new arrangements will not be applied to the current Auditor of the Court of Session who was appointed on a self-employed basis and has security of tenure until he reaches his 65th birthday. Recruitment and management of the Auditor will thereafter be a matter for SCTS which will have the power to appoint auditors under section 14(3) and (4) of the 2018 Act for such period and on such terms and conditions as it determines – as is the case for clerks and other officers of court. If the current Auditor retires or resigns, then the new legislative regime will apply in full to his successor.

As noted above, some auditors of the sheriff court are already employed by SCTS but for those that are independent practitioners it is intended that they should be permitted to continue to act as self-employed auditors until they retire. This is because auditors employed by SCTS will not have capacity to carry out all judicial and extra-judicial taxations (whereby disputes about judicial expenses are resolved) for some time. It is therefore necessary to make saving and transitional provision to permit independent auditors to continue to operate for the time being. Should any of the self-employed auditors become employed by the SCTS, the provisions of the 2018 Act will fully apply to them.

It is proposed that, on a transitional basis, the work of self-employed auditors will not be subject to the reporting duty under section 19. But it is hoped that they will provide information to SCTS on a voluntary basis on the numbers of taxations they are carrying out. SCTS will include information about the taxations carried out by their own employed auditors in the report required under section 19.

The commencement of section 14 of the 2018 Act has the effect of commencing the Scottish Administration (Offices) Order 2018 (S.I. 2018/781) which was laid before the Scottish Parliament on 4 July 2018 and which ensures that employed auditors of court will be office holders in the Scottish Administration in the same way that sheriff clerks and their deputies are at present. Section 64(3) of the Scotland Act 1998 requires office-holders in the Scottish Administration to pay sums received into the Scottish Consolidated Fund. In the case of auditors of court, this will include receipts from extra-judicial taxations.

#### *Other commencements*

The Scottish Government has taken the opportunity to commence some technical aspects of the 2018 Act, namely powers of the Scottish Ministers and of the Court of Session to make secondary legislation.

The Scottish Government has issued a consultation on aspects of Part 1 of the 2018 Act, specifically on caps on success fees (section 4), possible exclusions from success fee agreements (section 5) and success fee agreements more generally (section 7) and the relevant regulation making powers are being commenced in this instrument.

The Scottish Civil Justice Council (SCJC), which will be responsible for recommending appropriate rules of court to the Court of Session, has indicated that rules requests received

under the 2018 Act will be one of its work priorities for 2018-19.<sup>4</sup> The SCJC has, however, also indicated that, depending upon when these come forward, it is unlikely that the Council will be able to conclude all of these tasks in this Programme year.

Provisions in Parts 2 and 4 of the 2018 Act will require to be supplemented by rules of court before they can be commenced. This is particularly the case in relation to Part 4 of the Bill, on group proceedings, and the SCJC anticipate that the development of rules for group proceedings will be a significant work project.

The Regulations therefore do not substantively commence Parts 1, 2 and 4 at this juncture, however regulation making powers in Parts 1 and 4 are expressly commenced to pave the way for substantive commencement in due course.

## **Commencement**

The Regulations come into force on 30 January 2019.

## **Consultation**

No public consultation has taken place on the Regulations as they are being made as a consequence of the 2018 Act. A targeted consultation was held with interested stakeholders, including SCTS, the Lord President's Private Office, the Law Society of Scotland, the Auditor of the Court of Session and the Society of Sheriff Court Auditors.

The Government consulted on the legislative proposals in 2015. The consultation can be viewed on the Scottish Government website at:

<https://www.gov.scot/Publications/2013/10/8023/5>

The analysis of consultation responses can be viewed on the Scottish Government website at:

<https://www.gov.scot/Publications/2015/08/6159/3>

## **Impact assessments**

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <https://www.gov.scot/Publications/2017/06/9266/1> and the Bill was found to have no significant effects in relation to the protected characteristics.

No other impact assessments are required in respect of these Regulations.

## **Financial effects**

The financial effects of the 2108 Act were set out in the Financial Memorandum for the Bill:

[http://www.parliament.scot/Civil%20Litigation%20\(Expenses%20and%20Group%20Proceedings\)%20\(Scotland\)%20Bill/SPBill14FMS052017.pdf](http://www.parliament.scot/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14FMS052017.pdf)

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<sup>4</sup> <http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/annual-reports-and-libraries/scjc-annual-report-2017-2018-and-annual-programme-2018-19.pdf?sfvrsn=2>

A Business and Regulatory Impact Assessment (BRIA) for the Bill was published on the Scottish Government website at:

<https://www.gov.scot/Publications/2017/06/7388>

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