

# **CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018**

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## **EXPLANATORY NOTES**

### **THE ACT – AN OVERVIEW**

3. Traditionally in Scotland litigation has been funded in one of three ways – through private funding, legal aid, or trade union funding. In the last 20 to 30 years this situation has changed. Increased pressure on public funding for legal aid and a decline in trade union membership has resulted in a decline in those types of funding for civil cases. In turn this has led to the rise of speculative funding, in the form of speculative fee agreements<sup>1</sup> and damages based agreements<sup>2</sup> to fill the void.
4. The Act seeks to increase access to justice in civil actions by:
  - making the costs of civil court action more predictable;
  - increasing funding options for pursuing civil actions; and
  - introducing a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.
5. The provisions in the Act take forward recommendations from Sheriff Principal James A. Taylor’s Review of the Expenses and Funding of Civil Litigation in Scotland<sup>3</sup>, published in September 2013. The Scottish Government issued its response to the review in June 2014<sup>4</sup> and the Act will implement the recommendations identified in the response as falling within the Scottish Government’s remit. The Scottish Government is also working with other partners to support the wider delivery of the reforms, for example, some recommendations which fall within the powers and remit of the Scottish Civil Justice Council.
6. The opportunity is also being taken in the Act to implement a small number of outstanding recommendations from the Rt Hon Lord Gill’s Report of the Scottish Civil Courts Review (the “SCCR”)<sup>5</sup>. These recommendations relate to group proceedings (sometimes known as multi-party or “class” actions) and the auditors of court.
7. The Act is split into six parts:

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<sup>1</sup> A “speculative fee agreement” is an agreement between lawyers and their clients in Scotland by which clients are only required to pay legal fees if the litigation is successful. The success fee is calculated either by reference to the fee element of the judicial expenses payable by the unsuccessful party, or by reference to the hourly rate agreed by the solicitor and client. Should the client be unsuccessful, in most cases no fee is payable. In some cases, however, clients may be liable to pay their lawyer a lower fee and may still be liable for the expenses of their opponents.

<sup>2</sup> A “damages based agreement” is an agreement under which, if a case is won, the lawyer’s fee is calculated as a percentage of their client’s damages. If the case is lost, however, no fee is payable (though a lower fee may be payable in commercial cases).

<sup>3</sup> <http://www.gov.scot/About/Review/taylor-review/Report>

<sup>4</sup> <http://www.gov.scot/Resource/0045/00451822.pdf>

<sup>5</sup> Published in two volumes, September 2009:

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

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

**Part 1: Success fee agreements** — This part sets out the definition of “success fee agreements” to cover all types of speculative fee agreements and damages based agreements. It also provides for damages<sup>6</sup> based agreements to be enforceable by solicitors in Scotland. It confers powers on the Scottish Ministers to stipulate, through regulations, the maximum amount that can be considered in the calculation of the success fee<sup>7</sup> and to make further provision about the form and content of success fee agreements. It further empowers the Scottish Ministers to specify, by way of regulations, matters for which success fee agreements cannot be entered. It also makes special provision for success fee agreements relating to personal injury claims.

**Part 2: Expenses in civil litigation** — This part restricts the court’s ability to make an award of expenses against a person making a personal injury claim, provided the person conducts the proceedings in an appropriate manner. This is known as “qualified one-way cost shifting” or “QOCS”<sup>8</sup>. It also provides the courts with the power to award expenses against a third-party funder with a financial interest in the litigation and, separately, places a requirement on a party in receipt of any form of financial assistance to disclose to the court the identity of the third party funder and nature of the assistance (subject to exemptions). Further, in cases where expenses are awarded to a party to the proceedings who is represented free of charge, this part gives the courts the power to require a payment to be made to a charity registered in Scotland which is designated by the Lord President of the Court of Session. It also enshrines in statute the power of the courts to make legal representatives personally liable for expenses where they breach their duties to the court.

**Part 3: Auditor of court**<sup>9</sup> — This part makes provision for auditors of court (the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and auditors of sheriff courts) to become salaried positions appointed and employed by the Scottish Courts and Tribunal Services (“SCTS”). It places a duty on the Auditor of the Court of Session to issue guidance to auditors of court about the exercise of their functions and on SCTS to publish details of auditors’ work and fees generated by taxations.

**Part 4: Group proceedings** — This part makes provision for group proceedings to be developed for Scotland, available as “opt-in” or “opt-out” procedure in the Court of Session.

**Part 5: Review of operation of Act** – This part makes provision for post-legislative review.

**Part 6: General provision** — This part includes provisions in relation to subordinate legislation, interpretation and commencement.

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<sup>6</sup> “Damages” is the term given to the sum of money awarded by a court as compensation for a wrong or injury.  
<sup>7</sup> “Success fees” are fees that may be paid by successful parties to their lawyers or claims management company following a speculative fee agreement or damages based agreement.  
<sup>8</sup> “Cost shifting” is the ordering by a court that one person is to pay another’s expenses. Usually this operates on the basis that a “loser pays”, so that the unsuccessful party is required to pay the successful party’s recoverable expenses. “Qualified one-way cost shifting” is a regime under which the defender pays the pursuer’s expenses if the action is successful, but the pursuer does not pay the opponent’s expenses if the action is unsuccessful.  
<sup>9</sup> An “auditor” is an officer of court responsible for the taxation of accounts of expenses in litigation, for the purposes of quantifying the expenses due by one party to another.