

EXPLANATORY NOTES

Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp 10)

£6.90

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

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the Act"). They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

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[1] and damages based agreements[2] 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[3], published in September 2013. The Scottish Government issued its response to the review

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1 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.

2 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).

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

in June 2014[4] 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")[5]. 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:

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[6] 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[7] 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"[8]. 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

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

5 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

6 "Damages" is the term given to the sum of money awarded by a court as compensation for a wrong or injury.

7 "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.

8 "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.

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[9] — 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.

COMMENTARY ON SECTIONS

PART 1 – SUCCESS FEE AGREEMENTS

Section 1 – Success fee agreements

8. This section sets out the definition of a "success fee agreement", a term to be used to cover all types of speculative fee agreements and damages based agreements. The term is used in the Act on the basis that, in both of these types of agreements, there is a fee to be paid in the event of success (the "success fee"), but no fee, or a lower one, if the action is lost. Both speculative fee agreements and damages based agreements are therefore types of "no win, no fee" agreements, entered into in connection with actual or contemplated civil proceedings. Success fee agreements concern "relevant services" which are defined to be one of "legal services" or "claims management services" (both as defined in subsection (2)). The definition of success fee agreements also includes, but is not limited to, speculative fee agreements that fall within section 61A of the Solicitors (Scotland) Act 1980.

Section 2 – Enforceability

9. Section 2 provides that a success fee agreement, and in particular a damages based agreement, is not unenforceable only because it is *pactum de quota litis* (that is, an agreement by a legal provider to accept a share of the proceeds of the litigation if it is successful, which would, but for this provision, otherwise be unenforceable). This means that solicitors in Scotland will be able for the first time to enter into damages based agreements. Damages based agreements can now be arranged between providers and clients regardless of whether the recipient of the services receives them directly from the supplier (where the arrangement is between a client and their solicitor for proceedings in

[9] 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.

the sheriff court) or via services arranged by the provider (a solicitor instructing an advocate on the client's behalf, or a claims management company instructing a solicitor and/or an advocate). Subsection (2) provides that the abolition of the rule against an agreement for a share of the litigation does not affect other grounds under which a success fee agreement may be unenforceable under the law of contract.

Section 3 – Expenses in the event of success

10. This section provides that, where a success fee agreement has been entered into, the provider of the relevant services is entitled to retain any expenses recovered from the unsuccessful party, in addition to the agreed success fee. The agreement may, however, make contrary provision. Subsection (3) qualifies this rule in legal aid cases by providing that this provision is subject to section 17(2A) of the Legal Aid (Scotland) Act 1986, which states that any expenses in favour of any party in any proceedings in respect of which they are or have been in receipt of civil legal aid shall be paid to the Scottish Legal Aid Board, unless regulations under that section provide otherwise[10].

Section 4 – Power to cap success fees

11. Section 4 confers powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 24(2)), to stipulate the maximum amount of the success fee provided for under a success fee agreement. It is intended that the power will be used to set the maximum amount of the success fee as a percentage of the damages, based on a sliding scale dependant on the size of the damages payment. By virtue of section 24(1)(b), regulations may include different provision for different purposes. The regulations created under section 4 can therefore set different caps for different types of civil proceedings.

12. Subsections (3) and (4) provide that, if another enactment provides for the restriction of the amount of the success fee, the maximum fee that is allowed will be the lower of either the amount allowed in accordance with that other enactment or the amount allowed under the regulations under this section. An example of another enactment restricting the amount of a success fee is the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992[11], which allows for a 100% fee uplift in certain cases. More generally, an example of a restriction made in accordance with an enactment would include professional rules made by a legal services or claims management regulator.

13. Subsection (5) provides that a success fee agreement is unenforceable to the extent that it provides for a success fee that is higher than the fee allowed for in regulations made under this section.

Section 5 – Exclusion for certain matters

14. This section sets out that certain types of civil proceedings, which are to be specified by the Scottish Ministers in regulations subject to affirmative procedure (see section 24(2)) may not be the subject of a success fee agreement. Subsection (2) allows different

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10 See regulation 39 of the Civil Legal Aid (Scotland) Regulations 2002.

11 An "Act of sederunt" is a type of delegated legislation passed by the Court of Session to regulate civil procedure in the Court of Session, the Sheriff Appeal Court and the sheriff court.

provision to be made for different types of speculative fee agreements and damages based agreements.

Section 6 – Personal injury claims

15. Section 6 makes provision for success fee agreements in respect of personal injury claims, including death from personal injuries (subsection (1)). Subsections (2) and (3) provide that the recipient of the relevant services (ie the client) is not required to make any payment other than the success fee, except for any sums in respect of insurance premiums in connection with the claim. The provider of the relevant services (usually a solicitor) will be liable to meet the outlays incurred in providing the services (for example, counsel's fees) from any expenses recovered from the defender and the success fee.

16. Subsections (4) and (5) make provision about damages obtained (whether by settlement or by award of the court or tribunal) in respect of future loss. Such damages are not to be included in the amount of damages used to calculate the success fee if they are to be paid by way of periodical payments, but may be included if the damages are paid as a lump sum and the criteria set out in subsection (5) are met.

17. Subsection (5) sets out two circumstances in which a success fee agreement can include a future element of lump sum damages. These are if the lump sum:

- does not exceed £1 million; or
- exceeds £1 million and, first, the services provider has not advised the recipient to accept that the future element be paid in periodical instalments but, second, the condition in subsection (6) is satisfied.

Otherwise, the success fee agreement must provide that any future element will not be included in the relevant amount of damages used for the calculation of the success fee.

18. Subsection (6) sets out the condition referred to in subsection (5)(b)(ii). This is that either the damages are awarded by a court or tribunal which has stated that it is satisfied that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical instalments or, where the damages are agreed, it is certified by an independent actuary that it is the actuary's view that it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical payments. The actuary must have consulted the recipient personally without the provider being present. As the solicitor has a financial interest in whether damages are awarded as a lump sum or a periodical payment, and, as periodical payments can only be ordered with the agreement of the pursuer, the solicitor must not have advised the client to accept a periodical payment and must not be present in any interview with the actuary.

19. Subsection (7) provides that a success fee agreement is unenforceable to the extent that it makes provision contrary to subsections (2) or (4).

20. Subsection (8) confers a power on the Scottish Ministers who may, through regulations subject to the affirmative procedure (see section 24(2)), adjust the sums specified in subsection (5)(a) and (b).

21. Subsection (9) explains what is meant by "personal injuries" in this section. That term includes diseases as well as physical or mental impairment.

22. Subsection (10) defines an "actuary" for the purposes of section 6.

Example

A child has suffered cerebral palsy as a result of clinical negligence. The child will require lifelong care. The damages awarded by the court, or agreed in a settlement by the parties, will be intended to provide for the lifetime care of the child. If it is agreed that the future element of the damages (covering the lifelong care) will be paid by periodical payments, these sums will not be included in the calculation of the solicitor's success fee.

It is, however, apparently rare for periodical payments to be agreed. Sheriff Principal Taylor indicated that periodical payments will only be in contemplation if the level of damages is expected to exceed £2 million. Such cases happen rarely in Scotland.

It is therefore more likely that the future element of damages will be paid as part of a lump sum. This will therefore be liable to be included in the calculation of the solicitor's success fee. The question of whether the future loss is compensated by means of a lump sum or by periodical payments presents a potential conflict of interest as the solicitor will be significantly better remunerated if the pursuer receives a lump sum.

The solution in section 6(4) to (6) is that there should be some form of independent scrutiny of the settlement where the lump sum exceeds £1,000,000 and the solicitor **has not advised** the family of the child suffering from cerebral palsy that the future element of the damages be paid in periodical instalments (in which case it would not be included in the calculation of the success fee).

In terms of the independent scrutiny required, if the child's damages are awarded by a court or tribunal, the court or tribunal must state that it is satisfied that it is in the child's best interests that the future element of the damages should be paid as a lump sum rather than in periodical instalments.

If, however, the child's damages are agreed by settlement of the case, an independent actuary must certify – after consulting the family without the solicitor being present – that, in the actuary's view, it is in the best interests of the child that the future element of the damages covering the lifelong care be paid as a lump sum and not in periodical instalments.

Section 7 – Form, content etc.

23. This section makes provision for the form and content of success fee agreements. Subsections (1) and (2) provide that agreements must be in writing and must specify the basis for determining the success fee. Subsections (3) and (4) confer powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 24(2)), to make further provision about the form and content etc. of success fee agreements, which may include the elements specified in the list in subsection (3). Such regulations may add text to section 7 or modify text that has been added by regulations.

PART 2: EXPENSES IN CIVIL LITIGATION

Section 8 – Restriction on pursuers' liability for expenses in personal injury claims

24. Section 8 makes provision for a qualified one-way costs shifting ("QOCS") regime in Scotland for claims for personal injuries and appeals in civil proceedings for personal injuries, including clinical negligence. Subsections (1) and (2) provide together that the court must not make an award of expenses against the pursuer of the claim or appeal for personal injuries where they have conducted proceedings in an appropriate manner. Subsection (3) makes it clear that this does not prevent the court from making an award of expenses in relation to any other type of claim made in the same set of proceedings. Subsection (4) sets out the tests for considering if the person has acted in an inappropriate manner: these are fraudulent acts (including but not limited to fraudulent representations), manifestly unreasonable behaviour, and other abuses of process. Subsection (5) sets out that the standard of proof for fraudulent actings in subsection (4)(a) is the balance of probabilities. Subsection (6) gives the court the power to restrict the types of claims to which QOCS can be applied by an act of sederunt under section 103(1) or section 104(1) of the Courts Reform (Scotland) Act 2014. Subsection (7) explains what is meant by "personal injuries" in this section. That term includes diseases as well as physical or mental impairment.

Section 9 – Representation free of charge

25. This section makes provision for where a party to civil proceedings is represented for free ("pro bono"), or partly for free. Subsection (2) requires disclosure to the court that there has been free or partially free representation. Subsection (3) allows the court to order that a payment be made to a charity where expenses are awarded to the party benefitting from free or partially free representation. That charity is to be designated under the requirements of subsection (5). Subsection (4) sets out factors that the court is to have regard to in determining whether to make an order and in what terms to make any order. Subsection (5) details that the charity must be designated by the Lord President of the Court of Session and be registered in Scotland, with a charitable purpose of improving access to justice in respect of civil proceedings in Scotland. Subsection (6), however, provides that subsection (3) does not apply where sections 28 and 29 of the Equality Act 2006 apply. Those sections empower the Equality and Human Rights Commission to assist individuals involved in equality proceedings and provide that expenses awarded to a successful assisted person are recoverable by the Commission.

Section 10 – Third party funding of civil litigation

26. Section 10 requires that a party receiving financial assistance from another person who is not a party to the proceedings must disclose to the court the identity of the funder and any intermediary, as well as details of the assistance being provided. In those cases where financial assistance is commercial in nature, or otherwise where a non-commercial funder is to receive a share of any damages, the nature of the funder's financial interest must be disclosed once the dispute has been resolved. The court may then make an award of expenses against the funder and any intermediary. Subsection (4) provides that financial assistance under a success fee agreement or from a trade union or staff association is not to be treated as commercial funding. Subsection (5) is a more extensive exemption for close

family funding of family proceedings[12], with the effect that the fact of financial assistance does not need to be disclosed to the court under subsection (2). Subsection (6) makes clear that payments from the Scottish Legal Aid Fund fall outside of section 10. There is already a requirement for legal aid funding to be disclosed under rule 3 of the Act of Sederunt (Civil Legal Aid Rules) 1987[13]. Finally, under subsection (7), further provision relating to these issues may be made in court rules by means of an act of sederunt.

Section 11 – Awards of expenses against legal representatives

27. This section gives power to the civil courts to make an award of expenses against a legal representative in the proceedings who has committed a serious breach of their duties to the court[14]. Subsection (3) provides that limitations of this rule may be made in rules of court by means of an act of sederunt.

Section 12 – Minor and consequential modifications of the Courts Reform (Scotland) Act 2014

28. This section makes consequential modifications to the Courts Reform (Scotland) Act 2014 in consequence of sections 8 and 11. Subsection (2) aligns the reasonableness test in the 2014 Act for expenses in simple procedure case with section 8(4)(b) of the 2018 Act. Subsections (3) and (4) adjust the core rule-making powers for the civil courts in sections 103 and 104 of the 2014 Act. The modifications clarify that provision may be made in act of sederunt about expenses awarded to or against persons other than the parties.

Section 13 – Meaning of "legal representative".

29. This section provides that legal representation in sections 8, 9 and 11 means representation by solicitors, advocates or others who are authorised to conduct civil litigation on behalf of a party.

PART 3: AUDITORS OF COURT

Section 14 – Auditors of court

30. Section 14 makes provision for the continuation of the offices of the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and auditor of the sheriff court. These are collectively known as auditors of court. The office of the Auditor of the Court of Session currently has a statutory basis in the Court of Session Act 1821 whereas the other auditors of court exist by virtue of commissions issued by the President of the Sheriff Appeal Court and the sheriffs principal of the sheriffdoms, respectively. Section 14 gives all auditors of court a statutory basis.

31. Subsections (3) and (4) provide that the Scottish Courts and Tribunal Service ("SCTS") is responsible for the appointment of individuals to these offices and the terms of appointment. Subsection (5) sets out that all these auditors of court will be members of

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12 For the purposes of this section, family proceedings are defined in Section 10(6) of the Act.

13 Act of Sederunt (Civil Legal Aid Rules) 1987 S.I. 1987 No. 492 (S.46)

14 See Paterson, Alan (2007) Duties to the court. In: Law, practice and conduct for solicitors. University of Strathclyde at http://strathprints.strath.ac.uk/4793/.

SCTS staff[15]. Subsection (6) provides that the Auditor of the Court of Session will continue to be a member of the College of Justice[16]. Subsection (7) gives effect to the schedule of modifications of enactments concerning the auditors of court (as further described in paragraphs 53 to 56).

Section 15 – Temporary Auditor of the Court of Session

32. Section 15 empowers the Lord President of the Court of Session to appoint a person to act as the Auditor of the Court of Session where the office of Auditor is vacant or the office-holder is otherwise unable to carry out the functions of office.

Section 16 – Auditors' functions

33. Section 16 sets out the functions of the auditors of court. Subsection (1) provides that it is their role to carry out judicial taxations[17] and other functions set out for that office in other enactments (the word "enactment" here includes rules of court by virtue of schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010). Subsection (2) makes express provision that an auditor can carry out other taxations. Subsection (3) allows more specifically for sheriff court auditors to tax accounts relating to actions in any of the sheriff courts in Scotland. This is a break from previous practice in terms of which a commission as sheriff court auditor would only cover one sheriffdom.

Section 17 – Auditors unable to tax account

34. Section 17 deals with the situation where none of the employed auditors of court are able to tax a particular account of expenses. The section provides that the account is to be taxed by a person who is not an auditor of court. Such persons might be retired auditors, or experienced solicitors, or law accountants.

Section 18 – Guidance

35. This section confers a duty on the Auditor of the Court of Session to issue written guidance to the other auditors of court about the exercise of their functions. Subsection (2) provides that this guidance may include the types and levels of expenses that may be allowed in a taxation. Subsection (3) provides that guidance is to have the objective of

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15 "Auditors of court" are to become office-holders in the Scottish Administration by virtue of the Scottish Administration (Offices) Order 2018. 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. Extra-judicial taxation is the determination of expenses relating to a litigation which have not been awarded by a court or tribunal but requested by the parties.

16 The judges of the Court of Session are the Senators of the College of Justice. Advocates, Writers to the Signet, Solicitors to the Supreme Courts, Macers and Supreme Courts staff are also all considered to be members of the College of Justice. Membership of the College does not, today, have any practical consequences. Nevertheless, the existence and membership of the College has a symbolic importance, as it reflects the commitment of all the members of the College to the administration of justice in the Supreme Courts of Scotland, and their involvement, through their different roles, in that common endeavour.

17 "Judicial taxation" is the process where the amount properly payable by virtue of an award of expenses is determined. The auditor through the process of taxation adjudicates on disputes as to that amount, applying the law as to expenses to the factual position. The amounts may be significant to the parties.

auditors of court acting consistently and transparently. The other auditors of court (as well as the sheriff court auditors, any Temporary Auditor of the Court of Session and persons dealing with accounts under section 17) are, under subsection 4, required to have regard to the guidance. Subsection 5 details that the guidance must be published in writing and subsection 6 details that it may be revised as appropriate from time to time. It should be noted however that, under section 15(3)(b), a Temporary Auditor of the Court of Session does not have authority to issue or revise guidance.

Section 19 – Reports

36. Section 19 places a duty on the SCTS to publish an annual report of the number of judicial and other taxations carried out by auditors of court during a financial year and the payments received for that work. This includes work done by persons appointed under sections 15 or 17. Subsection (4) defines a 'judicial taxation' for the purposes of the report.

PART 4: GROUP PROCEEDINGS

Section 20 – Group proceedings

37. Section 20 provides for a new court procedure known as "group procedure" that will be available only in the Court of Session. Group proceedings are similar to what is known as "multi-party actions" or "class actions" in other jurisdictions. Group procedure is intended to be available for both private law and public law (judicial review) proceedings.

38. By virtue of subsection (7) and section 21, group procedure rules may provide for group proceedings to be brought on an "opt-in" basis, an "opt-out" basis, or both. These terms are defined in subsection (8). By virtue of section 21(2)(c) group procedure rules may set out in more detail precisely how parties are to opt-in or opt-out of a group, as appropriate. It should be noted that the definition of "opt-out proceedings" provides that where parties are not domiciled in Scotland, they must always opt-in to proceedings even in "opt-out" procedure. Section 22(2)(a) makes provision for domicile to be defined for this purpose.

39. Subsection (2) sets out the circumstances in which a representative party may bring group proceedings. Although there is no upper limit on the numbers in the group, there must be at least two people within the group. Each member must have a separate claim in the proceedings.

40. Subsection (3) provides that the representative party may or may not be a member of the group. In other words, the representative party may be a public interest body that does not directly have a claim in the proceedings. A person must, however, be authorised by the Court as the representative party and further provision may be made about this in rules made by act of sederunt under section 21(1) and (2)(a). Subsection 4 of Section 20 also details that there may only be one representative party.

41. Subsection (5) requires that group proceedings may only be brought with the permission of the Court. Subsection (6) provides that permission will only be given if the claims made in the proceedings are related to each other and all reasonable efforts have been made by the representative party to make potential group members aware of the proceedings (which will include making them aware of their right to opt-in or opt-out as

appropriate). An act of sederunt under section 21(1) may make further provision about circumstances in which permission may be refused. It should also be noted that in the case of opt-out proceedings only, subsection (8)(b) requires the Court to designate a group description.

42. Subsection (9) confers authority on the representative party to represent each member in the group and make decisions in group proceedings on those members' behalf. This is subject to any limiting provision in the agreement between the group or in an act of sederunt under section 21(1).

43. Subsection (10) provides that group proceedings will not be jury actions by virtue of section 11 of the Court of Session Act 1988.

Section 21 – Group procedure: rules

44. Section 21 gives the Court of Session the power to make provision by an act of sederunt about group procedure. By virtue of section 30(1) of the Interpretation and Legislative Reform (Scotland) Act 2010, acts of sederunt are subject to "laid only" procedure in the Scottish Parliament.

45. Subsection (2) gives non-exhaustive examples of things about which provision may be made. This list includes:

- who can bring proceedings on behalf of the group;
- what actions are to be taken by a representative party, for example, whether they must draw up a scheme of division for damages claimed or other documentation;
- the types of claims that are excluded from group procedure;
- rules about refusal of permission to bring group proceedings and appeal against a decision to grant or refuse permission;
- rules about group proceedings not being subject to the exclusive competence limit in the sheriff court, as provided for in section 39 of the Courts Reform (Scotland) Act 2014. Under this section, a case of a value of £100,000 or less must be heard in the sheriff court unless permission is granted for the case to be heard in the Court of Session. As group proceedings are confined to the Court of Session, section 39 may need to be modified or disapplied in relation to them;
- rules about adding claims to or removing claims from group proceedings after they have been commenced; and
- what actions taken by the representative party will need the Court's permission.

46. Subsection (3) ensures that any rules made under an act of sederunt will not contradict the requirements of section 20. Subsection (4) makes provision about ancillary matters which may be incorporated in the rules and allows the rules to modify enactments and to make different provision for different purposes. Subsection (5) clarifies that this section does not affect any other power the Court has to regulate its practice and procedure.

Section 22 – Group proceedings: further provision

47. Section 22 confers powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 24(2)), to make further provision about group procedure. While the delegated power in section 21 provides for the modification of procedural law, the section 22 power allows for the modification of points of substantive law such as those mentioned in subsection (2)(b) and (c). Subsection (3) provides that the power extends to the modification of Acts.

PART 5: REVIEW OF OPERATION OF ACT

Section 23 – Review of operation of Act

48. Section 23 provides for post-legislative review of the Act by means of two reports. Both reports must be prepared, laid before the Scottish Parliament and published. Subsections (2), (3) and (4) specify particular matters that the reports must address. The reports must be prepared, in the case of the review of Parts 1 to 3, after the period of five years beginning with 5 June 2018 (the day of Royal Assent), , and in the case of the review of Part 4, after the period of five years beginning with the day on which the first act of sederunt under section 21(1) comes into force.

PART 6: GENERAL PROVISION

Section 24 – Regulations

49. Section 24(1) allows regulations to include ancillary provision and make different provision for different purposes. Subsections (2) to (4) also make provision about the parliamentary procedure which applies to different sets of regulations. It should be noted that this section does not apply to group procedure rules under section 21 because they are in the form of an act of sederunt rather than regulations.

Section 25 – Ancillary provision

50. Section 25 allows the Scottish Ministers, by order, to make "standalone" ancillary provision in relation to the Act or any provision made under it, including in group procedure rules. It should be noted that by virtue of section 24(3) any ancillary provision amending primary legislation will be subject to the affirmative procedure, otherwise ancillary provisions will be subject to the negative procedure.

Section 26 – Meaning of "court"

51. This section provides that, in relation to proceedings in the sheriff court, references to the "court" in Part 2 and elsewhere in the Act include references to a sheriff. This includes the Sheriff Personal Injury Court established by the All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015.

Section 27 – Commencement

52. This section makes provision in relation to the commencement of the Act. It should be noted that by virtue of section 24(4), commencement regulations made by the Scottish Ministers under section 27(3) are subject to the "laid only" procedure. Section 27(2) also

indicates that Part 5 (review of operation of Act) commences automatically 2 months following Royal Assent.

SCHEDULE – AUDITOR OF THE COURT OF SESSION: MODIFICATION OF ENACTMENTS

53. The schedule is introduced by section 14(7). Paragraphs 1 and 3 repeal the existing legislative provision for the office of the Auditor of Court of Session, namely the Court of Session Act 1821 and certain sections of the Administration of Justice (Scotland) Act 1933.

54. Paragraph 2 amends section 3 of the Court of Law Fees (Scotland) Act 1895 so that provision for taxation of accounts in criminal proceedings includes appropriate provision for criminal proceedings in the Sheriff Appeal Court.

55. Paragraphs 4 and 6 add the auditor of the Sheriff Appeal Court to lists of auditors and other legal figures authorised to make complaints to the Scottish Solicitors' Discipline Tribunal and Scottish Legal Complaints Commission respectively.

56. Paragraph 5 repeals section 36(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which is a redundant amendment to the Legal Aid (Scotland) Act 1986 that has never been brought into force. The Scottish Government does not propose to commence section 36(4) referred to and therefore it should be repealed.

PARLIAMENTARY HISTORY

57. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, and the references to the official report of those proceedings. It also shows the dates on which Committee Reports and other papers relating to the Act were published, and references to those reports and other papers.

PROCEEDINGS AND REPORT	**REFERENCE**
Introduction	
Bill as introduced, 1 June 2017	Bill as introduced
SPICe briefing on Bill as introduced, 24 August 2017	SPICe Briefing
Stage 1	
Finance and Constitutional Reform Committee	

PROCEEDINGS AND REPORT	**REFERENCE**
The Finance and Constitution Committee issued a call for evidence on the Financial Memorandum for the Bill and, after seven responses were received, agreed that it would give no further consideration to the Financial Memorandum.[18]	
Delegated Powers and Law Reform Committee (DPLRC)	
12 September 2017	DPLRC Official Report
3 October 2017	DPLRC Official Report
8 November 2017	DPLRC discussed in private
23 January 2018	DPLRC Official Report
Justice Committee	
21 December 2017	Stage 1 Report
Consideration by Parliament	
Stage 1 debate, 16 January 2018	Stage 1 Debate Official Report
Stage 2	
Justice Committee	
27 February 2018	Justice Committee Official Report
6 March 2018	Justice Committee Official Report

[18] The call for evidence and responses received can be viewed at http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/105196.aspx. There are no minutes of any discussion.

PROCEEDINGS AND REPORT	**REFERENCE**
Bill as amended at stage 2, 8 March 2018	Bill as amended at Stage 2
Delegated Powers and Law Reform Committee	
17 April 2018	DPLRC discussed in private
24 April 2018	DPLRC discussed in private
Stage 3	
Consideration by Parliament	
Stage 3 amendments, 26 April 2018	Stage 3 Amendments Official Report
Stage 3 Debate, 1 May 2018	Stage 3 Debate Official Report
Bill as passed, 27 April 2018	Bill as amended at Stage 3 and as passed
Royal Assent, 5 June 2018	The Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018

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