# Funding Civil Litigation

## The Scottish Legal Action Group's submission to *The Taylor Review of Expenses and Funding of Civil Litigation in Scotland*

The Scottish Legal Action Group (SCOLAG) is a registered charity. It is the publisher of the *SCOLAG Journal*. SCOLAG was formed in 1975 with the aim of explaining the law and promoting legal services and changes in the law and the legal system so as to benefit the disadvantaged members of society. Accordingly, SCOLAG seeks to:

- Promote and advance education and knowledge of the law in Scotland;
- Improve and advance Scots law and the provision of legal services for the benefit of those members of society who are economically, socially, or otherwise disadvantaged; and
- Promote equal access to justice in Scotland.

SCOLAG welcomes the wide ranging inquiry being carried by the Review into issues of expenses and funding. In particular SCOLAG welcomes the focus on the extent to which these aspects of litigation can be considered to hinder access to justice. Whilst the Review raises many important issues, SCOLAG's response is restricted to certain aspects of the Consultation which are of particular concern to the Group, namely Protective Expenses Orders, expenses in pro bono cases, and multi-party actions.

### Response

**Question 25: Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?**

In our view PEO's ought to be available in both environmental cases and all public interest cases. In our view there ought to be a distinction between these two types of cases in respect of the circumstances in which a PEO will apply. SCOLAG considers that as a consequence of the requirements of the Aarhus Convention there are features of the 'Corner House' principles *(R (Corner House Research) v The Secretary of State for Trade and Industry*, [2005] EWCA Civ 192) which are not appropriate to apply at all to those types of cases – in particular the 'no private interest' test, and the relevance of the applicant's lawyers acting on a pro bono basis. In relation to non-environmental public interest cases we can see merit in the absence of a private interest being an additional factor in favour of the granting of a PEO, but would submit that the existence of a potential private interest should only be an aspect of the overall assessment in determining whether a PEO should be granted.

Although this is not within the direct scope of the Review, we would wish to highlight the problems that currently exist concerning the lack of a clear procedure for making an application for a PEO. Where such orders have been granted, it has only been after a lengthy hearing of an opposed motion. The potential expense relating to such motions can in itself be off-putting. In our view such applications ought to be made initially by way of a brief Minute and Answers and initially considered by a single judge on the papers. This type of procedure seems to have been contemplated by Lord Glennie in *McArthur v Lord Advocate*, 2006 SLT 170 but to the best of our knowledge has never been adopted in practice. Once an initial ruling has been made either party could seek an oral hearing, but that hearing ought to be restricted in time (*e.g.* 1 hour) so as to limit the potential liability in expenses if the applicant is not successful. We also believe that in principle the application for a PEO ought to be made at a relatively early stage in the proceedings, so that a respondent is fully aware of the expense consequences involved. There may be circumstances which justify an application further on in the proceedings, but in that case it seems appropriate that an explanation should be required as to why the application was not made earlier.

**Question 26: Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?**

We would agree that the principle of PEO's requires a balance to be drawn between the applicant who is seeking to promote or defend a particular public interest, and the need to protect the public purse which will not be able to recover its full expenses if the respondent is successful in defending their position. Given the wide variety of circumstances in which a PEO application might be made, and the wide variety of circumstances of those making such an application, we believe that there may be a problem in pre-determining a specific limit at which a PEO should be made. Applications may be made by individuals, unincorporated associations, or other bodies. Applicants may have no additional funds beyond their own limited means, or they may have raised funds from within their communities or elsewhere. Experience of the court system also shows that once pre-determined limits are set these limits are not kept under regular review. On balance we would favour this remaining a matter for judicial discretion.

It would be expected that parties are able to advise the court as to what funds have been collected or level of income they have. In practice the requirement on an applicant to disclose their financial circumstances will put off a number of potential applicants for a PEO as they consider such information to be deeply private, and will not want to risk exposing their financial circumstances to wider public scrutiny. It may be that there ought to be developed a particular protocol concerning the confidentiality of such information in order to avoid this from happening.

**Question 56: Should the Scottish courts have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented on a pro bono basis and, if so, to whom should such a payment be made?**

In our view the unsuccessful party in a civil litigation should be found liable in expenses. We see no reason why the unsuccessful party should receive a windfall benefit from the relative impecuniosity of the successful party and the generosity of that party's legal advisers in undertaking the case on a pro bono basis. Given that there is no opposing party's expenses to be considered the options would either be (a) a pre determined sum based on an average cost for that particular type of litigation, or (b) the unsuccessful party should pay the same expenses as they have themselves incurred (as taxed by the auditor of court). We consider that the second of these options would be

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the most appropriate as it will be no more than a mirror of that party's own expenditure.

We believe that there are two potential beneficiaries (in broad terms) for such funding. The first is in the support and promotion of pro bono services. In particular we believe that the support of pro bono services through the law schools of the Scottish universities would be a particularly appropriate beneficiary as this would help foster pro bono work within the ethic of the legal profession. A second potential beneficiary would be any CLAF/SLAS scheme that might be introduced. We consider that this might be a small but useful source of top-up funding.

**Question 62: In the event that DBAs are not otherwise recommended, should they be available for the funding of multi-party actions?**

We would support the allowance of damage based agreements (DBA's) for funding multi-party actions. We believe that the problems in preparing and presenting such claims, and the responsibility involved in such cases, would justify the use of this type of arrangement.

**Question 64: Should the funding arrangements for multi-party actions cover the payment of legal representation and disbursements?**

Yes.

**Question 65: Should the power to apply for a PEO in Scotland extend to multi-party actions and, if so, should there be any restrictions on their availability?**

We anticipate that multi-party actions will essentially be cases involving damage to persons or property interests. In the normal case we would not expect PEO's to be available for litigations of this type. One benefit of DBA's is that the lawyers for the successful pursers would be able (and potentially more willing) to invest some of the expenses recovered into future similar litigations. If DBA's were not available for such cases then we would support the use of PEO's as an alternative means of achieving a balance of interests in the funding of cases of this nature.