

## **EXPENSES AND FUNDING OF LITIGATION BILL**

### **AUDITOR OF COURT PROVISIONS**

#### **Introduction**

As part of implementing the recommendations made by Sheriff Principal Taylor on the Costs and Funding of Civil Litigation in Scotland, the Scottish Government aims to introduce primary legislation in the next Parliament. In the public consultation on proposed provisions, views were sought on the recommendation made by the Scottish Civil Courts Review on the Auditor of Court appointment.

The greater proportion of responses supported the proposal to take forward the recommendations made by the SCCR as part of the primary legislation that responded to the Taylor review.

This paper sets out the key provisions that are being considered as a consequence of the consultation responses.

#### **Background**

The office of Auditor of Court of Session was established by Act of Sederunt on 6 February 1806 and the Auditor made a Member of the College of Justice by virtue of the Court of Session Act 1821. The Auditor is appointed by Scottish Ministers under section 25 of the Administration of Justice (Scotland) Act 1933, on nomination by the Lord Advocate and the appointment is made by Scottish Ministers after consultation with the Lord President.

The post operated as a salaried position and the only fees retained were from extra-judicial work. It has operated on a self-employed basis, where all fees were retained, since 1998. The duties of the Auditor of Court of Session are as follows:

#### Judicial Audits

The auditor (on the remit of the court) is expected to tax accounts of expenses incurred in civil litigation, and fix the remuneration of receivers and liquidators. He also taxes accounts which the Scottish Legal Aid Board has been unable to agree with either the solicitor or counsel, or both.

#### Extra Judicial Audits

The auditor (on the remit of parties, arbiters or the accountant of court) may also tax extra-judicial accounts, as well as Executries and Trusts.

#### Scottish Civil Courts Review

The Scottish Civil Courts Review (SCCR) raised a number of concerns with the current appointment processes for sheriff court auditors, in that these appointments did not conform to standard appointment procedures. The Auditor of Court of

Session is appointed by Scottish Ministers. Auditors in the sheriff court are appointed by sheriffs principal and the appointment process does not include a formal assessment of skills to carry out the role of the auditor.

The SCCR raised a number of concerns about whether sheriff clerks in particular have the necessary skills and training. It also considered the inconsistency of approach between the Auditor of Court of Session and sheriff court auditors and between individual sheriff court auditors to be a further issue. Further concerns about a lack of transparency, consistency of taxing decisions and conflicts of interest were also raised.

It noted that the appointments of both the Auditor of Court of Session and those sheriff court auditors who are independent practitioners effectively authorised them to carry on a private business as they are entitled to retain the fees charged for carrying out judicial and extra-judicial taxations and private assessments. It thought it undesirable that a holder of a public office should, by virtue of that office, be able to make a profit from undertaking what should be a public service.

As a consequence the SCCR considered that the taxation of judicial accounts should be part of the service provided for by the civil court system. To give effect to that, the SCCR recommended that the offices of the Auditor of Court of Session and the sheriff court auditors should be salaried posts and that the fees payable for extra-judicial taxations and assessments should be paid into public funds to support the cost of paying for that service.

The SCCR made a number of further recommendations, including some that would address issues of quality and consistency.

### **Expenses and Funding of Litigation Bill**

The above Bill may provide an opportunity to implement the recommendations made by the SCCR, allowing for that to be taken forward in an incremental fashion. Arrangements in respect of auditors for sheriff court business do not require primary legislation, however those relating to the Auditor of Court of Session would. The immediate activity will focus on improving the quality, consistency and future sustainability of sheriff court auditors by moving those posts to salaried positions with the Scottish Courts and Tribunals Service. Also, during this time, provisions will deliver more transparency on the role and workload of the Auditor of the Court of Session that will allow for planning and preparation for the transfer of these functions to the SCTS, again as a salaried position.

The outcome of both the change in approach and legislative change would deliver the following changes:

SCTS to have the powers to;

- Appoint auditors for all sheriff court business
- To determine the qualification, skills and developmental needs of auditors of sheriff courts.

- To determine the qualification, skills and developmental needs of auditors of Court of Session.
- Levy such fees and charges as determined by Fee Order.

SCTS to have the responsibility to;

- To appoint a senior officer with responsibility for ensuring the quality and consistency of all audits and the professional development of the court audit function.
- As part of its annual report provide an annual review of the audit function service.

The Bill team would welcome comments on the proposals set out above, and would be happy also to discuss these further if that would be helpful.