Introduction

1. The Educational Institute of Scotland welcomes this opportunity to respond to Courts Reform (Scotland) Bill. The EIS is Scotland’s largest teaching union and represents around 55,000 teachers and lecturers (approximately 80% of the profession) across Scotland, in all sectors of education.

The Bill and the Enterprise and Regulatory Reform Act 2013

2. The current Bill, when taken in conjunction with Section 69 of the Enterprise and Regulatory Reform Act 2013, potentially will have a negative impact for members of the union. Taken together, the Bill and the Act will reduce access to justice and could have a negative impact on the safety of members. The effect of Section 69 of the Enterprise and Regulatory Reform Act 2013 is that employers will no longer be liable in the civil courts for the criminal offence of a breach of the Health and Safety at Work Act (HSWA) regulations. As a result, workers who are injured as a consequence of an employer’s breach of a statutory duty within HSWA regulations will be prevented from enforcing that breach. In every case, rather than be able to rely on the breach of the regulations, the worker will have to prove the employer was negligent.

3. It is our understanding that there will only be 2 specialist Sheriffs appointed to the specialist personal injury court in Scotland. It is hard to see how the 2 specialist Sheriffs will be able to deal with the volume of cases which will be raised in the Sheriff Court if the level of £150,000 is maintained. There is serious concern that members’ claims will be significantly prejudiced by delay and that expenses will increase if proofs require to be discharged due to the unavailability of one of the Sheriffs. More cases are potentially likely to run given the impact which Section 69 will have with members having to pursue claims based only on breach of common law duty of care.

No automatic right to instruct counsel

4. The current Bill will increase the value of cases to be raised in the Court of Session from £5,000 to £150,000. Where claims are to be pursued in the specialist Sheriff Court there will be no automatic right to instruct Counsel. This could be to the detriment of EIS members. The employers’ defenders are likely to instruct Counsel routinely to defend claims. The EIS would wish to support members with the best legal representation available and this includes the right to instruct Counsel when appropriate. If a Sheriff does not sanction the instruction of Counsel then the expense of Counsel being instructed on behalf of a member will not be recoverable from the defenders. This will seriously impact on the fairness of the process.

5. As the main teachers’ union in Scotland with a membership of fifty five thousand, there is a serious concern at the obstacles being placed in the way of
members in pursuing claims which they are fully entitled to do. Members should not lose their rights to have their claims fully and properly presented in the appropriate Court and members must have the right to pursue claims with the benefit of instructing Counsel as otherwise there will be a lack of proportionality and members may then be disadvantaged.

**Lengthy delays**

6. The litigation process which is already lengthy will become an even longer, more convoluted process given the real prospect of the Sheriff Court being unable to cope with the volume of business thus causing more upset to members. The current mechanism for pursuing claims under Chapter 43 at the Court of Session has been very successful and many members’ claims settle either at or shortly after the Pre-Trial Meeting. There is no need to change what is already an effective means of pursuing claims and anything to take its place must be as efficient and serve members as well as the current system.

**Exemption for cases involving disease**

7. Disease cases, such as mesothelioma, pleural plaques and other cases concerning occupational cancers, should be exempt from the proposed changes and should remain in the Court of Session. Although the monetary value may be below the £150,000 in many of these cases, they are complicated cases nonetheless and often have specific difficulties on liability and causation. These cases in particular need the input of both Solicitors and Counsel to ensure claims are properly pursued. To advise a member that Counsel cannot be instructed because a Sheriff has refused to grant sanction is inequitable and prejudicial. These are the types of cases where a member should have Counsel instructed at the outset.

**Summary of concerns**

8. This Bill, if unamended, will
   - Reduce access to justice;
   - Have a negative impact on workers’ safety; and
   - Increase the damage to workers’ rights caused by Section 69 of the Enterprise and Regulatory Reform Act 2013.

**Necessary amendments**

9. This Bill should be amended to ensure
   - Victims of every workplace injury and disease are entitled to have their claims fully and properly presented in the appropriate Court; and
   - Victims of workplace accidents and disease have the automatic right to employ Counsel.

Dave McGinty
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