Summary

We welcome the Courts Reform (Scotland) Bill as a progressive, forward thinking step which will mean greater access to justice, assist in bringing proportionality and improve the efficiency of the judicial process and consistency of decisions made in the Scottish legal system.

These measures will significantly improve access to justice, the time taken to conclude the judicial process, better manage the costs involved in court action for all parties, and lead to a more informed basis for judgements. It is in the interest of all court users to be able to reach an earlier decision on a strong basis of judicial knowledge than is currently the case.

We would advise caution on the proposal for Civil Jury Trials to be held in the new Scotland-wide Personal Injury Sheriff Court – this is the one element of the Bill we are opposed to.

We also hope that there’s a recognition that the pre-litigation arena needs to be changed to assist and compliment the Courts Reform (Scotland) Bill through the introduction of Compulsory Pre-Action Protocols.

Evidence on Courts Reform (Scotland) Bill

1. We welcome the proposal to increase the exclusive competence of the Sheriff Court to £150,000, giving the Court of Session greater capacity to concentrate on Commercial Actions, higher value Personal Injury Actions where it can add the greatest value and cases where it can shape the development of the law of Scotland. This additional capacity would also allow the Court of Session to attract relevant dispute resolution cases from other jurisdictions.

2. FSCM welcome the introduction of ‘summary sheriff’ to create a hierarchy of judicial office holders where cases can be dealt with at a level which is proportionate to the matter at issue.

3. We support the establishment of a specialist Scotland-wide court to deal with personal injury cases and enhance the reputation of Scotland’s civil courts by creating an environment where consistency of decision making is to the fore.

4. Judicial specialisation is vital to the Court Reform package being delivered and we wholeheartedly support judicial specialisation being integrated into the Sheriff Court structure. The law is complex and it is unreasonable to expect Sheriffs to be able to be expert in all aspects of various branches of law. Specialisation will aid efficiency of the court process as the Sheriff will narrow the issues at an early stage due to their more specialised knowledge, and improve the decision-making
process as Sheriffs (and summary sheriffs) would have the capacity to focus and further develop their knowledge in this field.

5. We support creation of a new Sheriff Appeal Court to assist in creating a proper framework for delivery of the judicial system. We support the view of the Scottish Civil Courts Review that cases should be directed to the lowest level at which they can be competently be dealt and avoid delay and releases pressure on the Court of Session as an appeal court.

6. We support the creation of a new single set of rules for cases of £5,000 or less to be called ‘simple procedure’ and to be dealt with mainly by summary sheriffs. We see this as working in tandem with Compulsory Pre-Action Protocols to create a framework where cases follow a set process prior to litigation, so that when they do litigate, the areas of dispute have been sufficiently identified. It is vital in a developed legal system that pre and post litigation processes compliment one another and parties not complying with the rules receive appropriate sanctions. This goes to the heart of proportionality. We believe it is fundamental that personal injury cases are included in the simple procedure.

7. The one aspect that we oppose is the proposition of Civil Jury trials as they result in a duality of justice or a two tier system of justice which leads to manifest uncertainly and unfairness for pursuers and defenders alike. We would submit that the consistency, efficiency and proportionality that a specialist personal injury court would bring, could be devalued or lost if this duality and manifest unfairness of justice was built in to the new system. For example, a Pursuer could choose to have a jury trial in a case where liability is not disputed and be awarded a large amount on quantum because the jury are sympathetic to the Pursuer because of the injuries sustained. In a very similar case where liability is at issue, a similarly injured Pursuer could feel obliged to opt for a proof before a judge rather than face the uncertainty of a liability trial before a jury with the end result being awarded less by way of damages. Furthermore, Jury trials create an administrative burden on the courts in ensuring sufficient numbers of the public are cited for jury service well in advance and that ultimately, there are sufficient numbers to serve on a jury otherwise trials simply cannot proceed for solely that reason. All of these reasons take civil jury trials away from being a proportionate and efficient route to justice for all parties concerned.

8. Any unintended consequences which result in higher cost being incurred will ultimately be met by the consumer by way of the cost of insurance so it is vital that the court reforms work to modernise the judicial system in Scotland in the way they are intended.

9. We have analysed the cost and volume of our members litigated Personal Injury cases settled since January 2012 – this now numbers over 8,000 cases. Where there was a compensation payment to the Pursuer of £50,000 or less, the payment for the Pursuers legal costs was more than the settlement the Pursuer received in 53% of cases.
10. On this majority of cases where proportionality was lost, £1.56 was paid out in legal costs to the Pursuer's Solicitors and Counsel for every £1 the Pursuer received in damages.

11. This was even more pronounced on cases where the compensation payment to the Pursuer was £5,000 or less. In this instance, the payment for the Pursuer's legal costs was more than the settlement the Pursuer received in over 66% of cases and on these cases, £1.68 was paid out in legal costs to the Pursuer's Solicitors and Counsel for every £1 the Pursuer received in damages.

12. We support that there should continue be a test applied in the Sheriff Court for granting sanction for the employment of counsel in Personal Injury cases, namely, whether the employment of counsel is appropriate by reason of the circumstances of difficulty or complexity, or the importance or value of the claim.

13. Recent comments such as ‘trade unions being outgunned by the massive resources of the insurance industry and the big businesses they represent’ are simply not the case – in the reformed system, there will be equality of arms and representation would be on an equal footing – for an insurer to do otherwise would make no commercial sense and the comment is highly misleading.

In conclusion, the Courts Reform (Scotland) Bill is the biggest overhaul of the civil legal framework in over 100 years and is an opportunity to create a legacy of access to justice for the consumer, introduce true proportionality whilst increasing efficiency and getting a fair level of compensation to the injured party as quickly as possible. These are hallmarks of a developed society and well developed legal system.

Alan Rogerson
Chairman of the Forum of Scottish Claims Managers
14 March 2014

About the Forum of Scottish Claims Managers (FSCM)

The Forum exists as a representative organisation on behalf of its members which works to improve the handling of insurance claims to deliver a better service to claimants, and seeks to promote the interests of the Forum members in civil justice matters covering the handling of insurance claims.

The Forum aims to be actively engaged, with all interested parties, in discussions and debate relating to Third Party claims** in Scotland including Pre and Post-litigation.

A membership list and more information on the Forum is appended below.

** Third Party Claims definition:

Personal Injury or damage to Property arising out of a party’s negligence – be it a personal (Consumer) matter or a Commercial (Business) matter, Road Traffic Accidents and accidents in the Workplace
Further information on the Forum of Scottish Claims Managers

1. The Forum aims to promote improvements to the law to enable consumers easier and quicker access to justice.

2. The forum membership covers a number of major insurers, financial institutions together with claims handling companies and Local Authorities.

3. The individual members of FSCM are all senior professionals– being Claims Managers or equivalent within their respective organisations with a wealth of experience in Insurance claims matters.

4. To provide some context of the size and scale of our membership:
   - We directly employ approximately 5,550 people in Scotland, solely in insurance
   - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums)
   - Solely on claims, we spend £1.257 billion annually in Scotland
   - Glasgow is the largest insurance centre in the UK, outside London and is seen as core pool of talented resources

5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.

Membership:

| ACE European Group Ltd | Pearl |
| AIG Europe Ltd         | Privilege |
| Allianz                | Prudential |
| Aviva Direct           | PSV Claims Bureau Ltd |
| Aviva Insurance        | QBE |
| AXA                    | Quotemehappy |
| Churchill              | RSA |
| Direct Line            | Travelers Insurance |
| Eagle Star Direct      | UKI Insurance |
| Esure                  | Zurich Municipal |
| Equity Red Star        | Zurich Insurance plc |
| General Accident       | Glasgow City Council |
| Halifax                | North Lanarkshire Council |
| Liverpool Victoria     | Motor Insurers Bureau |
| More Than              | |
| NFU Mutual             | |
| NIG                    | |