Introduction

1.1 The STUC is Scotland’s trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

1.2 The STUC represents over 632,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as, retired and unemployed workers.

Background

2.1 The STUC and our member unions have maintained a close interest in, and a constructive approach to, the issue of civil court reform since the inception of the Gill Review in 2007 and throughout the period of consideration and consultation which has followed its publication.

2.2 The STUC supports the overall aim of creating a service which is quicker, more efficient and cost effective in all circumstances where this can be achieved without negatively affecting access to justice or impeding trade unions and campaigning organisations in achieving effective redress for our members.

2.3 The STUC recognises that the Civil Court Reform has implications for all citizens and, whilst it is important to consider all aspect of the Bill, our central priority is to ensure that the proposals within the Bill relating to personal injuries occurring in the workplace are fit for purpose and fair.

2.4 We recognise that the priority for many is for the justice system to be accessible and affordable for individuals who have limited resources and who do not benefit from the collective support trade unions are able to offer. The STUC sees no reason why these objectives cannot be met, whilst maintaining access to justice for our members.

2.5 The STUC has long made the case that achieving appropriate redress cannot simply be seen as a matter of justice for the individual, important though that is, but also as part of a system for compensating workplace injury that has a proactive and protective impact on future practice, mitigating against future injury and increasing workplace health. Only half a percent of breaches of health and safety regulations result in any form of enforcement action being taken by the Health and Safety
Executive (HSE). Civil court actions are therefore the only meaningful way of policing and enforcing health and safety breaches.

2.6 It has also long been our experience that whilst the financial value of cases give some indication of their potential complexity, in the case of personal injury, this is very often not the position. We will make a clear case in this submission as to why that situation has been exacerbated by recent changes in Westminster legislation.

2.7 For these and other reasons, STUC has been uncomfortable with the proposition that the minimum financial value of cases that may be brought at Scotland’s most senior court, the Court of Session, should be increased from the current limit of £5000 to £150,000.

2.8 However, in recognising the apparent determination of Government to deliver on this aim, we have confined ourselves in recent years to exploring the basis on which our concerns might be mitigated through the operation of the proposed Specialist Personal Injury Court.

2.9 In this respect, trade unionists in Scotland believed, indeed we would suggest that we were led to believe, that access to the Specialist Personal Injury Court for our members would be a right and that the right to instruct Counsel would continue.

Civil Justice Trade union support for members

3.1 In STUC’s view, the support we provide for our members is a vital aspect of a properly functioning civil justice system, empowering workers to bring cases in circumstances which might otherwise not be heard. The trade union funding model relies on costs recovery. Trade unions cannot fund court outlays such as employing Counsel if that cost cannot be recovered at the end of the day, even if the defenders are using Counsel. There is every reason to believe that insurers will employ Counsel in all cases before the specialist personal injury court, particularly in coming years while the courts require to grapple with the impact of Section 69 of the Enterprise and Regulatory Reform Act 2013

Access to the proposed Specialist Personal Injury Court

4.1 The civil court review, chaired by Lord Gill, said “In our view the Court of Session should deal only with the most complex and important cases and that most routine litigation should be conducted in the Sheriff Court”.

4.2 As far as we are concerned, there is no case more important than a case involving a workplace accident. Thus, all those who have suffered a workplace injury should have the right to have their case heard in the Specialist Personal Injury Court unless it is their choice to do otherwise. This was STUC’s view prior to the passing of the Enterprise and Regulatory Reform Act 2013, but this view has been further strengthened since October 2013 when the Act came into force.
Enterprise and Regulatory Reform Act 2013

4.4 It is entirely clear that during the consultation period and early drafting process of the Courts Reform (Scotland) Bill, no substantive consideration was given to the potential impact of the Enterprise and Regulatory Reform Act 2013 on the Scottish Civil Justice system. For this reason it is entirely appropriate that the Committee should give in-depth consideration to its implications and consider amendments which will improve the Bill in its light.

4.5 The effect of Section 69 of the Enterprise and Regulatory Reform Act 2013 is that, as of October 2013, employers are no longer liable in the civil courts for the criminal offence of a breach of the Health and Safety at Work Act regulations. This part of the Act is currently the subject of an STUC complaint to the European Commission.

4.6 As a result of Section 69, workers who are injured as a consequence of an employer’s breach of a statutory duty within the Act’s 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. This will make it substantially more difficult for every victim of a workplace accident and injury to secure just recompense and many victims who previously would have been able to obtain compensation will have lost that right. It also illustrates the vital importance of retaining the automatic right to Counsel for those pursuing action in the Specialist Personal Injury Court.

Employing Counsel

5.1 Scottish courts have produced a disproportionately large number of leading cases on health and safety. This has been possible because Scottish victims of personal injury have enjoyed a very high level of justice with access to the Court of Session where there are specialist judges, specialist Counsel (Advocates and QCs) and specialist rules. If any damage was done to those key ingredients, this would have a significant retrograde effect on the rights of Scottish workers in terms of access to justice which would have a negative impact upon health and safety throughout the whole of the UK.

5.2 STUC has recognised the drive towards the increase in the Court limits to £150,000 and removing cases from the Court of Session. But that aim should not be pursued at all cost and cannot be achieved at the cost of reducing the rights and access to justice of victims of accident, injury and disease. If the limits are to be increased that must be done in a way that rights are fully preserved.

5.3 As Lord Taylor said, “The Defenders in virtually all personal injury cases are, in reality, insurers. There is thus what Lord Justice Jackson described as an asymmetric relationship between the Pursuer and the Defender. In many cases there is a true David and Goliath relationship.”¹

¹ Taylor Review of Expenses and Funding of Civil Litigation in Scotland
5.4 Experience demonstrates that insurers have the money to do what they want in litigation. In contrast, victims can only take steps that the Rules of Court sanction them to do in terms of cost recovery. Thus, if the Rules do not allow automatic use of Counsel, victims are not able to use them as the costs will not be recoverable. Insurers will not be affected by this limitation.

5.5 This phenomenon was at the heart of a Scottish Government research paper published in 1999 called "In the Shadow of the Small Claims Court". The paper recognised the danger in terms of access to justice that is created where there is an inequality of arms. Victims who were forced, at that time, to pursue cases through the Small Claims court could not get lawyers and had to fight the cases themselves. The insurers on the other hand continued to employ expensive lawyers to fight their corner. That is why in 2007 when the court limits were last changed, Cabinet Secretary for Justice Kenny MacAskill removed personal injury cases from the Small Claims court.

5.6 If victims do not have an automatic right to use Counsel in the specialist Court a similar inequality of arms that existed in the Small Claims Court will be replicated in the new specialist Court. In STUC’s view it is not adequate substitute to provide for the use of discretion.

5.7 Automatic sanction for Counsel does not mean that the cost of the court process will be disproportionate or excessive. The cost of Counsel can be controlled by the Rules setting parameters within which different levels of Counsel may be used. For example, the Rules may say that only Junior Counsel (Advocate as opposed to QC) may be used in cases of a value of less than £50,000. They could also provide that if the value is less than £5,000 Counsel may not be used. STUC is also open to the introduction of a table of fees for Counsel to ensure that Counsel’s fees are sufficiently proportionate.

**Asbestos cases**

6.1 STUC fully supports the approach of Clydeside Action on Asbestos on the treatment of Mesothelioma cases within the Court System and would be happy to expand this during oral evidence.

STUC
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