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I am writing to respond to points raised by the Justice Committee in its Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I would like to thank the Justice Committee for its careful consideration of the Bill. I welcome the Committee's support for the general principles of the Bill.

The attached **Annex A** provides detailed responses to the points raised by the Committee and the recommendations made in the Report. I have mainly confined my remarks to the parts of the Report where the Committee has suggested amendments to the Bill or has sought reassurance or clarification, but I have also taken the opportunity to emphasise what the Scottish Government considers to be important issues in the Bill.

The Government's response to the Stage 1 Report of the Delegated Powers and Law Reform Committee is attached at **Annex B**.

I hope that the responses to the issues raised by the Committee are helpful.

**Annabelle Ewing**

**ANNEX A**

## CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) BILL

## SCOTTISH GOVERNMENT RESPONSE TO THE JUSTICE COMMITTEE'S STAGE 1 REPORT

### Access to Justice (paragraphs 27 to 63 of the Report)

I welcome the Committee's recognition that there are problems with access to justice in respect of civil litigation. This is confirmed in the Civil Justice Statistics in Scotland 2015-16[1] (the latest available) which confirm that:

There were 77,721 **civil law cases** initiated across the Court of Session, sheriff courts and the newly established Sheriff Personal Injury Court in 2015-16…[which] represents **a decrease of 41% since 2008-09**. The reasons behind this overall decrease are not known, but possible factors include increasing use of alternative methods of dispute resolution and concerns over costs for litigants should they lose the case. The number of cases initiated in 2015-16 was similar to the previous three years, in contrast to the downward trend observed over the years prior to that.

The statistics indicate in relation to personal injury cases that:

The number of personal injury cases initiated in the civil courts was 5% lower than in 2014-15, but **the number of personal injury cases has fluctuated markedly since 2008-09**. Cases resulting from a road traffic accident made up the majority of personal injury cases (56% in 2015-16).

A continuing decrease in civil litigation of no less than 41% since 2008-09 should be a source of concern for all of those who care about the provision of access to justice in Scotland and indeed the health of a separate Scots civil law jurisdiction.

At present it is believed that some potential litigants with meritorious claims are deterred from raising court actions because:

(a) they don't know – or fear – how much they will have to pay their own solicitor; and/or
(b) they fear what they will have to pay in expenses to the defender if the case is lost.

The aspiration of the Bill is therefore to make it clear to potential litigants that there are methods of funding their claim in which the cost of paying their lawyer is predictable and, in personal injury claims, if the case is lost, they will not become liable for the costs of the defender. The fact that concerns over costs for litigants should they lose a case has been identified in the Civil Justice Statistics as a factor in the overall decrease provides a very clear rationale for the introduction of qualified one way costs shifting in personal injury cases.

*Consumer research*
The Committee has drawn attention to an "absence of up-to-date research on the legal experience of consumers in Scotland" following the publication of "Paths to Justice in Scotland" in 1999.

Esther Roberton, the Chair of the Independent Review of the Regulation of Legal Services, wrote to the Committee on 29 November, acknowledging that, while there has been a lack of

[1] http://www.gov.scot/Publications/2017/03/5915/0

available consumer research in Scotland on those engaging with legal services, the last comprehensive study was carried out by Consumer Focus Scotland in 2013[2].

Ms Roberton indicated that the Review intended to carry out a short qualitative study. This would not be able to cover the ground which a comprehensive baseline survey of consumers would and the Review acknowledged that a comprehensive survey would be a valuable addition to the policy making landscape in Scotland for legal services. It may be that when the new Consumer Scotland body comes into being in due course that this is something which it may undertake in early course. Meantime, the Scottish Government does not propose to commission new research at this juncture.

The Committee will recall the evidence given by Professor Alan Paterson in relation to his major research "Paths to Justice Scotland":

"Paths to Justice Scotland" was based on a large-scale national random sample of people's experience of what we called justiciable problems. We gave people a list of 60-plus possible problems, none of which mentioned the word "law". We asked them, for instance, whether they had had a problem with sick pay or holiday pay after they had fallen down stairs or had some other accident—a driving accident, for example—and what they had done about it. Who, if anybody, had they turned to? Why had they done this rather than that? You will not be surprised to hear that we received evidence that people were being put off by the fear of costs. Although such a fear is not necessarily realistic, sometimes it is. The fact is that litigation is very expensive for an ordinary person. Most lawyers would not advise individuals to embark on it, because the outcome is not always predictable and the process can be very expensive. People are therefore right to have that fear.

Professor Paterson went on: "The research in "Paths to Justice Scotland" has been followed by 35 studies in 26 countries around the world, all of which have produced similar results…. We have no reason to believe that people are not put off by a fear of costs, and they should be."

*Court fees*

The Committee has expressed sympathy to concerns expressed by trade unions that the current "pay as you go" model of court fees can act as a barrier to access to justice and has asked the Scottish Government to take into account this evidence as part of its ongoing consultation on court fees.

The Scottish Government consultation on court fees (which runs until 12 January) provides an opportunity for stakeholders to express their views on court fees and the Scottish Government can confirm that the trade unions evidence will be considered as part of the consultation process. The Scottish Government will be considering the full spread of evidence including Sheriff Principal Taylor's oral evidence that a reasonable fee acts as a deterrent of frivolous claims:

"In my opinion, there are two reasons why frivolous claims will not be brought. One is that you would need to persuade a solicitor to pick up the cost of his [sic] time, the fees and the outlays, with little prospect of recovery.

[2] http://webarchive.nationalarchives.gov.uk/20130103082807/http://www.consumerfocus.org.uk/scotland/files/2012/12/Facing-up-to-legal-problems-Full-report.pdf

… At present, according to the Scottish Courts and Tribunals Service website, there has to be an outlay of £214 to raise an action. Every time that there is a motion, each party has to pay £54 just to enrol the motion. Further, they have to pay £77 per half hour for the proceedings. Under a damages-based agreement, those payments have to come out of the solicitor's pocket. That is before we start looking at the costs of medical reports and experts' reports, all of which will be in the hundreds, if not the thousands, of pounds. That is a pretty strong deterrent for frivolous claims, taken with the knowledge that the defender can come into court and move a summary dismissal or, in the vernacular, "strike out" the action."

Subsequently, in my oral evidence I said to the Committee:

"If court fees are not on a pay-as-you-go basis, somebody else—the Scottish Courts and Tribunals Service and the Scottish taxpayer—will have to pay them. That is something to bear in mind. Sheriff Principal Taylor's report quoted Lord Justice Jackson in England in making the point that 100 per cent cost recovery was never an accepted principle in the law of costs. It was felt that some discipline should be instituted in the system as a deterrent against frivolous claims and to keep costs to a minimum. As I have said, a consultation on court fees is on-going, and I imagine that some of those points will be raised in that context."

**Damages based agreeements (paragraphs 64 to 84 of the Report)**

Like the Committee, the Scottish Government also welcomes the establishment of a working group at the Law Society of Scotland to consider appropriate safeguards to protect pursuers and guard against potential conflicts of interest in damages based agreements. We understand that the working group has no specific timeframe for its work, but will continue to meet, given the importance of the issues at stake for all parties concerned, in order to help members of the Society but equally to protect clients so that there is public confidence in any procedure that is recommended to solicitors to follow.

The Committee has asked that the Scottish Government ensures that Sheriff Principal Taylor's recommendations aimed at protecting a pursuer whose claim is funded by a damages based agreement are implemented. These include ensuring that a pursuer is advised on all of the funding options available to them and that the solicitor gives reasons for recommending a particular funding option. The Law Society has advised that the existing agenda of their working party is focused on preparing a style agreement for use by solicitors so clients can compare the terms being offered to them by competing firms, but they have confirmed that the issue of full disclosure to clients of the available funding options will be added to the agenda for its next meeting.

As the Law Society of Scotland is an independent regulatory body, it would be inappropriate for the Scottish Government to interfere in its development of professional rules and guidance. The Scottish Government is mindful that this is also a topic under the remit of the Review of Regulation of Legal Services in Scotland currently underway under the leadership of Esther Roberton.

**Power to cap success fees (paragraphs 85 to 103 of the Report)**

While the evidence from witnesses before the Committee who actually operate success fee agreements was that clients were not required to pay two success fees from damages obtained, the Scottish Government will consider whether additional legislative provision is required to ensure that caps would apply to the cumulative total of the success fee.

**Damages for future loss (paragraphs 104 to 146 of the Report)**

The Committee has asked the Scottish Government to reconsider whether damages for future loss should be ring-fenced when calculating a solicitor's success fee.

If a person has been injured so severely that they will require lifelong care, the damages payment awarded or agreed upon may include a "future element" to cover the cost of that care. The future element may be paid by periodical payments or as part of a lump sum.

Sheriff Principal James Taylor made some very carefully considered recommendations in his Review in relation to the future element of damages and whether the future element is to be paid by a periodical payment order or by a lump sum payment. The Bill has faithfully followed his recommendations and the Scottish Government is not minded to change its policy on this matter.

*Periodical payment orders*
At present, a Scottish court can make an order for periodical payment of damages, rather than a lump sum payment, but it can only do so with the consent of the parties. Parties may also agree a settlement providing for periodical payments. The Bill does not change the law on periodical payment orders – that is for the separate Damages Bill which will be introduced in early 2018 and which will permit a court to impose a periodical payment order without the agreement of the parties.

The Committee has suggested that the provisions of this Bill should not be brought into force until the court has the power to make a periodical payment order. But the court already has that power – albeit the consent of the parties is required – and the parties may agree on a periodical payment order as part of an agreed settlement. The Damages Bill will simply permit periodical payment orders to be imposed by the court. The Scottish Government does not therefore believe that the benefits of this Bill should be delayed, since periodical payment orders are already part of current law and practice.

Sheriff Principal Taylor recommended that annual payments under a periodical payment order for the future element of an award should be "ring-fenced". This means that there can be no deduction from this part of the award in order to satisfy a success fee agreement. He also recommended that, if an order for periodical payments is made by the court, the success fee should be calculated by reference to the award of damages excluding the periodical payment.

That is what the Bill provides in section 6, so the future element of damages are already ring-fenced if it is to be paid by a periodical payment order.

*Lump sum payments*
The position is different if the future element of the damages is to be paid by a lump sum.

Sheriff Principal Taylor specifically considered the English position where all of the future element of the award is ring fenced, i.e. not eligible to be included in the calculation of the solicitor's success fee under a damages based agreement. He commented that "restricting calculation of the [solicitor's success] fee to past loss may not incentivise professional practice that is in the client's best interest".

He concluded that future loss (which is not to be compensated by periodical payment) should **not** be excluded from the ambit of a damages based agreement and the calculation of the success fee under that agreement. He said that "this has the considerable advantage

of simplicity" since it does not involve agreeing how a principal sum of lump sum damages should be divided between past and future loss. He also argued that requiring parties to stipulate how an agreed lump sum settlement figure should be divided into different heads of loss could be impractical, would pose a barrier to settlement and that "protection for the pursuer should be achieved by other means".

The other means are now set out in section 6(4) to (6) of the Bill.

Sheriff Principal Taylor recommended that there must be independent scrutiny of lump sum damages in which the future loss element exceeds £1 million. He believed that it was rare for periodical payment orders to be used in relation to the future element of damages for claims below £1 million and usually only in cases where the level of damages is expected to exceed £2 million. It will therefore be the court or an independent actuary who will decide if it is in the recipient's best interests that the future element of damages be paid as a lump sum rather than in periodical instalments.

It is also worth pointing out that In cases where the future element of a damages payment is to be paid as part of a lump sum, the lump sum will only be included in the calculation of the solicitor's success fee to the extent of 2.5% of the damages above £500,000 (if Sheriff Principal Taylor's recommendations on the caps on success fees are implemented in regulations, which is the Scottish Government's current intention). This contrasts with the current position where solicitors acting through claims management companies take typically 15% or more of the whole award.

*Actuaries*
In cases where the decision on whether the future element of the damages is to be made by an actuary, the actuary will make that decision according to the professional standards to which he or she is subject.

We understand that at least one of the big firms of solicitors already obtain a report from an independent actuary prior to advising clients to opt for a lump sum rather than periodical payments. This is to protect its position and avoid allegations of conflict of interest. The actuary meets the client in the absence of the solicitor and the client is thus provided with untainted advice. So the process is already possible under existing professional practices.

The Committee has asked for confirmation of who would be responsible for paying for an actuary. Under section 6(2) of the Bill, the recipient of the relevant legal services (ie the client) is not liable to make any payment (including outlays incurred in providing the services) to the provider (ie the solicitor) in respect of the services, apart from the success fee, regardless of whether damages are obtained. Any payment to an actuary will be an outlay incurred in providing the relevant legal services and thus will fall to be paid by the solicitor.

The Scottish Government is considering an amendment to the Bill which will provide an appropriate definition of an actuary.

**Additional fees (paragraphs 147 to 155 of the Report)**

I note that the Committee considers that there is a need to reform the existing rules on additional fees, particularly in light of the provision in section 3 of the Bill which would allow a solicitor to retain both judicial expenses and any success fee.

All of the existing rules on additional fees are contained in rules of court set out in Acts of Sederunt and Sheriff Principal Taylor's recommendations on reforms therefore fall to the

Scottish Civil Justice Council to consider. The Cost and Funding Committee of the Council is already considering the rules on additional fees as part of its implementation process in relation to Sheriff Principal Taylor's recommendations and these will be included in new Civil Taxation Rules.

In relation to Sheriff Principal Taylor's suggestion that, when deciding whether to award an additional fee, the court should be required to consider the extent to which a solicitor is being remunerated by way of a success fee, the Scottish Government has specifically drawn this suggestion to the attention of the Cost and Funding Committee.

**Exclusion for family proceedings (paragraphs 156 to 160 of the Report)**

The Faculty of Advocates pointed out that speculative fee agreements are sometimes used in family proceedings and the Committee has asked the Scottish Government to clarify whether it intended the exclusion for family proceedings in section 5 of the Bill to apply to speculative fee agreements.

In this regard it is notable that it was damages based agreements (only) that Sheriff Principal Taylor had thought inappropriate for family proceedings (paragraph 65 of Chapter 9 of his Review). Section 5 currently prevents any type of success fee agreement from being entered into as regards family proceedings.

The Scottish Government is therefore considering amendments to section 5 of the Bill to ensure that speculative fee agreements may continue to be entered into in connection with family proceedings.

**Section 7(4) (paragraphs 161 to 170 of the Report)**

I note that the Committee has agreed with the concerns expressed by the Delegated Powers and Law Reform Committee in relation to the powers in section 7(4) (form, content, etc of success fee agreements) which allows section 7(3) regulations to modify Part 1 of the Bill. Please see the Scottish Government response to the Delegated Powers and Law Reform Committee in Annex B.

**Qualified one way costs shifting (QOCS) (paragraph 171 to 217 of the Report)**

I welcome the Committee's conclusion that the introduction of qualified one way costs shifting (QOCS) will improve access to justice for pursuers. The Scottish Government does not, however, believe that that there will be unintended consequences including a rise in unmeritorious and fraudulent claims. Sheriff Principal Taylor specifically addressed this point in paragraph 62 of Chapter 8 of the Review and also did not believe that the introduction of QOCS would result in the courts being flooded with unmeritorious claims.

There are a number of factors which will act to discourage spurious court actions:

- Solicitors are unlikely to run cases which have little chance of success since, on a no win, no fee basis, they are unlikely to be paid – Sheriff Principal Taylor was very clear on this point in his Committee evidence;
- The regulation of claims management companies is to be introduced in Scotland via the Westminster Financial Guidance and Claims Bill, subject to a legislative consent motion in the Scottish Parliament;
- A compulsory pre-action protocol was introduced in the sheriff court for actions involving under £25,000 which will front load consideration of a claim. This should

mean that for low value claims it should become apparent at an early stage whether the claim has merit;

- Section 8(4) of the Bill provides means by which the benefit of QOCS may be lost if the pursuer behaves inappropriately.

- there are professional obligations on solicitors and advocates to not burden the courts with unmeritorious or fraudulent claims. Simon Di Rollo QC gave evidence on behalf of the Faculty of Advocates to the Committee that "Counsel have a duty of independence and a duty not to present a case unless it is statable….for a case to be conducted on a speculative basis, there must be reasonable prospects of success."[3];

- control of vexatious pursuers under Chapter 6 of Part 3 of the Courts Reform (Scotland) Act 2014 (replacing the Vexatious Actions (Scotland) Act 1898); and

- the possibility of a defender seeking caution for expenses against the opponent, which may *de facto* pre-empt an ill-founded action.

If there are unmeritious insurance claims being made (as distinct from claims in court), that is not a matter for this Bill and financial services including insurance is of course a reserved issue. The introduction of claims management regulation in Scotland, subject to the legislative consent of the Scottish Parliament, may help deter unmeritious insurance claims.

It is worth noting that QOCS was introduced in England and Wales by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Bill for which was introduced by the Conservative/Liberal Democrat Coalition Government.

The UK Government have published a detailed post-legislative review paper on the 2012 Act and no significant concerns were raised about the introduction of QOCS in England and Wales.

https://www.gov.uk/government/publications/legal-aid-sentencing-and-punishment-of-offenders-act-2012-post-legislative-memorandum

The Committee has asked the Government to consider extending the mandatory pre-action protocol for personal injury claims to £100,000 and the introduction of a pre-action protocol for clinical negligence cases. The monetary limit on the mandatory pre-action protocol for personal injury claims and the possible introduction of such a protocol for clinical negligence cases are matters for the Scottish Civil Justice Council (SCJC) as such protocols are brought forward as rules of court. The Scottish Government has directed the SCJC to the Committee's recommendation.

The Government believes there is a need to take a flexible and proportionate approach to post-legislative scrutiny so that time and resources are targeted effectively. We also note the work currently being carried out on this matter by the Public Audit and Post-Legislative Scrutiny Committee.

**Uninsured defenders (paragraphs 218 to 232)**

The Committee has asked the Scottish Government to consider suggestions as to the application of QOCS where there is no imbalance of resources between the pursuer and the defender, including the restricting the application of QOCS to insured defenders or public

[3] http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&i=101408

bodies or by applying the same approach to awards of expenses as is used when a person is in receipt of legal aid.

Sheriff Principal Taylor recommended the adoption of QOCS on the basis that defenders in personal injury actions are overwhelmingly insurance companies. We note that the possibility of limiting the benefit of QOCS to situations where the defender is uninsured or a public body has been raised by stakeholders including the Faculty of Advocates.

In his evidence, however, Sheriff Principal Taylor stated that if the defender is a man of straw, ie with no resources, the pursuer will simply not bring proceedings, as there is no point obtaining a court award which cannot be enforced.

The difficulty in restricting QOCS is that it removes the certain safeguard which QOCS provides. The aspiration of the Bill is that an individual contemplating raising a personal injury claim should know that if the case is lost, that person will not become liable for the expenses of the successful defender. At present, the solicitor acting for the pursuer has to act responsibily and will tell pursuer of the risk of bankruptcy if the case is lost. The individual may thus be deterred from raising the action.

If QOCS were to be applied only when the defender is insured or a public body, defenders may:

- choose not to be insured when they should be;
- take a larger excess than they should; or
- breach the terms of their policy so that the insurance company will not act on their behalf.

Accordingly, the Scottish Government is not minded to change its policy in this regard.

**Tests to lose protection of QOCS (paragraphs 233 to 265)**

The Scottish Government is considering amendments to section 8(4)(a) and (b) to take into account concerns which have been expressed. In particular, we are minded to amend section 8(4)(a) and (b) along the lines suggested by Sheriff Principal Taylor in his evidence before the Committee. Section 8(4)(b) will be amended so as to ensure that the test of reasonableness to be applied before the benefit of QOCS is lost is more obviously equivalent to that contained in the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.

In relation to section 8(4)(a), we note the point made by the Forum of Insurance Lawyers, but would point out that the use of the phrase “in connection with the proceedings” is intended to cover activity undertaken in pursuit of a claim in advance of any court proceedings (even where the case does not in fact proceed to court).

The Committee has also suggested that provision be added to section 8(4) to make it clear that the benefit of QOCS will be lost where (i) a pursuer fails to beat a defender’s tender and (ii) a pursuer’s claim is summarily dismissed.

In relation to tenders, stakeholders have, in the main, accepted that tenders are largely regulated by the common law and rules of court and it would therefore be inappropriate for the Bill to introduce provision for tenders and QOCS in primary legislation. There is no Tenders Act or other primary legislation about tenders in Scotland. New provision about tenders is therefore eminently suited to rules of court, as has been evidenced by recent acts

of sederunt introducing pursuer's offers. The Scottish Government has proposed to the the Costs and Funding Committee of the SCJC that this matter be dealt with by rules of court under section 8(6) of the Bill.

So far as summary dismissal is concerned, on reflection we take the view that if a case is dismissed on the grounds of summary dismissal then it follows that the test in section 8(4)(c) (abuse of process) will then be met. A case will only be dismissed if there has been an abuse of process (wasting the courts' time with a hopeless claim). We do not therefore believe that an amendment is required. Further, the SCJC is yet to address certain of Lord Gill's recommendations relevant to summary dismissal. Given that the rules on summary dismissal may change in future it would be inappropriate to enact potentially inflexible provision in primary legislation now. If necessary in light of the SCJC Rules Rewrite Project, specific provision for QOCS and summary dismissal could be made in future rules of court under section 8(6).

**Third party funding (paragraphs 266 to 287)**

I can confirm that the Scottish Government is considering amending section 10 of the Bill to make it clear that the power to award expenses against third party funders does not apply to trade unions or similar bodies which represent the interests of workers and solicitors acting under success fee agreements.

We are also considering whether any further amendment to section 10 is required to clearly separate out transparency proposals from liability for an award of expenses.

**Regulation of claims management companies (paragraphs 288 to 329)**

The Committee has asked the Scottish Government to clarify whether it intends that the regulation of claims management companies in Scotland under the UK Financial Guidance and Claims Bill should be on an interim or longer term basis. This is a matter on which the Government expects to be guided by the forthcoming report of the Review of Regulation of Legal Services in Scotland.

The Committee has also expressed the view that the current Bill's provisions should not be brought into force until regulation under the UK Bill is in place.

It is not known when the secondary legislation under the Financial Guidance and Claims Bill which will permit regulation of CMCs in Scotland will come into force. The provisions in the Civil Litigation Bill are likely to be implemented from the summer of 2018. The Scottish Government does not believe, however, that the benefits of this Bill should be delayed until such time as claims management companies are regulated under the regulations to be made under the UK legislation. As I stated before the Committee, even if there were to be a gap between commencement of the Civil Litigation Bill and regulations under the UK legislation, it is unlikely to be unduly long. Furthermore, if any claims management company is contemplating beginning or moving operations to an unregulated Scotland, they will be aware that regulation is imminent.

In relation to Sheriff Principal Taylor's recommendation that only regulated bodies should be able to offer success fee agreements, it would be inappropriate for existing, reputable claims management companies (some of which are attached to firms of solicitors, who are of course regulated by the Law Society of Scotland) to be prevented from taking forward success fee agreements until such time as claims management companies are regulated by means of the UK legislation. This would effectively prevent individuals from raising

meritorious claims. As noted above, if any claims management company is contemplating beginning or moving operations to an unregulated Scotland, they will be aware that regulation is imminent. In future all providers of success fee agreements will either be law firms, alternative business structures under the Legal Services (Scotland) Act 2010 or claims management companies, each of whom (subject to a legislative consent motion for the UK Financial Guidance and Claims Bill) will be regulated by the Law Society or Financial Conduct Authority respectively.

*Nuisance calls*
The UK Government has the responsibility for regulating nuisance calls and texts, but the Scottish Government is still committed to doing what we can to reduce the number and impact of nuisance calls.

This year, £125,000 was provided to fund call blocking units for people identified as particularly vulnerable. A Nuisance Calls Commission was also established, which brought experts from industry, enforcement agencies and regulators together to find practical solutions.

The Scottish Government agrees that the Law Society of Scotland should firm up its guidelines to make it clear that there is a professional duty on a solicitor to satisfy themselves that a case referred to them by a claims management company has not been obtained by means of cold calling. This matter is being considered by the Law Society working group.

**Auditors of Court (paragraph 330 to 350)**

The Committee has asked the Scottish Government to respond to evidence that auditors of court, including the Auditor of the Court of Session, should be public appointments and that further provision is required in the Bill to guarantee the independence of auditors. The Scottish Government can confirm that officials have been in regular contact with officials from SCTS to ensure that the reforms safeguard the continued practical independence and impartiality of auditors. In this regard the Scottish Government is considering amendments at Stage 2 for Part 3 of the Bill.

The Scottish Civil Courts Review (SCCR), headed by the former Lord President of the Court of Session, Lord Gill, raised a number of concerns about the ability of auditors to make a private profit from the performance of a public function and with the current appointment processes for sheriff court auditors, in that these appointments did not conform to standard appointment procedures. The procedures in question are the civil service rules which apply to the appointment of clerks and other officers of court.

Auditors in the sheriff court are currently 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 Auditor of Court of Session is currently appointed by Scottish Ministers.

The appointments of both the Auditor of Court of Session and those sheriff court auditors who are independent practitioners effectively authorise 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.

The SCCR thought it undesirable that a holder of a public office should, by virtue of that office, be able to make a private 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 by the civil court system. To give effect to that, 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. As such, it appears appropriate that all auditors of court are brought within the direction of SCTS and are appointed under the same civil service rules which apply to the appointment of other officers of court.

The Auditor of the Court of Session, the auditor of the Sheriff Appeal Court, and auditors of the sheriff court will become salaried posts within SCTS under the provisions of the Bill. When all auditors become part of SCTS then they will automatically be independent of Scottish Ministers since SCTS is an independent body corporate under the Judiciary and Courts (Scotland) Act 2008.

Auditors will continue to have functional independence as part of SCTS and the auditing process will continue as it has in the past. SCTS is involved in very little litigation but there is in any case precedent for employment by a body being no obstacle to taking decisions affecting that body. Planning reporters for example are employed by the Scottish Government yet take decisions which affect Scottish Ministers. There have always been some sheriff court auditors employed by SCTS and its predecessor bodies and to our knowledge no one has questioned their independence. The Government believes that court rules and SCTS administrative arrangements can provide the requisite independence to support the employment of auditors by SCTS and no further provision is required in the Bill.

Employment by SCTS is also a guarantee of better accountability. For example, as an independent auditor, the current Auditor of the Court of Session is not subject to FOI or other public service legislation. When the post of Auditor of the Court of Session becomes part of SCTS, then it will automatically become subject to the provisions of FOI, Data Protection and the disciplinary procedures of SCTS.

In relation to self-employed sheriff court auditors, I can confirm that it is the intention that auditors who are currently self-employed will continue in self-employment until they retire, though the option will exist for them to apply to be a salaried auditor in SCTS.

The Committee has asked for further details on the transitional arrangments which the Government intends to put in place for auditors of court. The Scottish Government does not propose to include any transitional provisions on the face of the Bill since the delegated power in section 20 of the Bill allows transitional provisions to be made by regulations.

Although it is intended that the present self-employed auditors remain in place until they retire, there are certain aspects of the provisions in the Bill relating to auditors that the Scottish Government wishes to commence as soon as possible.

- Section 15 of the Bill permits the Auditor of the Court of Session to issue written guidance to the other auditors of court about the exercise of their functions. The other auditors of court (as well as the Auditor of the Court of Session) are required to have regard to the guidance which must be published and may be revised as appropriate from time to time. This is intended to make the approach of the different auditors more uniform and to promote best practice.
- Section 16 of the Bill places a duty on the SCTS to publish an annual report of the number of judicial and other taxations carried out by auditors of court during a financial year and the payments received for that work. This is intended to make the work of the auditors more transparent.

It is intended that these sections will be commenced at the earliest opportunity, including for the self-employed auditors. If necessary, transitional provision can be made by regulations to require self-employed auditors to provide information to the SCTS for the purposes of section 16.

**Group proceedings (paragraph 351 to 396)**

The Committee has asked for further explanation of why the option of "opt-out" has been ruled out at this stage.

The Scottish Government position remains that adopting the opt-in only approach gives the courts an opportunity to build up experience of dealing with more straightforward group proceedings cases where there are a defined number of claimants. The opt-in option is simpler and more easily understood than opt-out. The Scottish Government considers that, consequently, opt-in is better for introducing something entirely new to Scots law and practice.

Moreover, it is envisaged that for each particular group contemplating joint proceedings there will be drawn up a document setting out matters such as how parties may opt-in to the proceedings, the authority of the representative party, the scheme of division of the damages and other important matters.

We continue to believe that it is more difficult to introduce an "opt-out" procedure and that it would take the Scottish Civil Justice Council (SCJC) considerably longer to draft the required rules. The Scottish Law Commission, having considered group procedure in the 1990s, recommended opt-in procedure.

The Government has not ruled out opt-out in the future, but consideration would have to be given to:

- The fact that it would be a completely new issue of principle in Scotland that, under opt-out, individuals and bodies might become part of a group litigating a claim without their knowledge or consent.
- Those who do not actively opt out of the procedure (potentially even where they are not aware of them) may have their rights determined without having participated in the procedure;
- Enforcing an adverse award of expenses against a group where some of the members are unknown;
- Dealing with disputes about the distribution of compensation between group members;
- How "aggregate" or "global" damages, ie a lump sum settlement or award, would be determined for a large group, some of whose members may be unknown[4];
- How would damages be distributed without under- or over-compensating individual pursuers;
- What would be done with any residue of damages awarded.

[4] In paragraph 96 of the Policy Memorandum for the Bill the Scottish Government stated that "The Scottish Government considers that changing damages law to introduce a new concept of "global" damages would require specific, additional consultation on how this would work." and no stakeholder has since come up with any proposals.

Incorporating an “opt-out” option could be considered in a future Bill, subject to the successful implementation of the “opt-in” procedure. It will take some time for the SCJC to develop group procedure rules and thereafter it will take more time for there to be reflection on how the rules are working. The Scottish Government will liaise with the SCJC about the introduction of an “opt-in” procedure for group proceedings and when or if consideration might be given to the option of “opt-out”.

The Committee has also urged the Scottish Government to take appropriate steps to ensure that the relevant rules and procedures to facilitate group proceedings are developed through wide consultation and are implemented without delay.

Both the Scottish Law Commission and the SCCR recommended that a group proceedings procedure should be introduced in Scotland by means of rules of court. That is what is provided for in the Bill. The responsibility for the development of new rules for the Scottish civil courts lies with the SCJC, which includes in its membership individuals from consumer bodies, legal experts, etc.

The details of group procedure will therefore be considered by the SCJC and implemented via rules of court. It may be that the SCJC will set up a bespoke working group to consider rules for group procedure as was the case with fatal accident inquiry rules. It would be expected that such a working group would include representatives of consumers and the Scottish Government.

The SCJC operates completely independently of the Scottish Government and is headed by the Lord President of the Court of Session. The Scottish Government is represented on the various sub-committees and the main Council itself and will seek to ensure that appropriate rules and procedures are introduced under the powers in the Bill as soon as reasonably possible. To that end, the Scottish Government will submit a detailed policy paper to the SCJC on how it suggests that group proceedings should work. It should be borne in mind, however, that, as this is a completely new innovation for the Scottish courts, it is desirable that time is taken to ensure that interested parties are consulted and all relevant considerations are taken into account in order that the resultant rules and procedures are efficient, workable and fit for purpose.

The Government will keep the Committee informed as to progress on amending the legal aid rules to enable legal aid to be available for group proceedings.

**Financial Memorandum (paragraphs 397 to 410)**

Finally, the Committee has asked the Scottish Government to undertake more detailed modelling on the likely impact of the Bill.

As noted above in the section on “Access to Justice”, the aspiration of the Bill is to make it clear to potential litigants that there are methods of funding their claim in which the cost of paying their lawyer is predictable and that success fee agreements are “no win, no fee” It is also, in personal injury claims, to make it clear that, if the case is lost, they will not become liable for the costs of the defender.

It is believed that some litigants with meritorious claims are deterred from raising court actions because of fear of the potential costs.

In order to assess how many more people would be likely to raise actions as a result of the Bill, one would have to know how many people are currently deterred from beginning litigation. It is extremely difficult to find out how many such people there are in Scotland.

The fact that concerns over costs for litigants should they lose a case has been identified in the Civil Justice Statistics for Scotland 2015-16 as a factor in the overall decrease in civil litigation in Scotland is, however, significant.

Some representatives of insurers have claimed that if a person has suffered, for example, a catastrophic personal injury, there is no doubt that, even at present, they will be able to access justice either through legal aid or by a speculative fee agreement offered by a solicitor or a damages based agreement offered by a claims management company. Such high value claims will very commonly be brought against either insurance companies or public bodies, but it may be that very few or no extra cases of this type will be raised as a result of the Bill, since they will almost certainly be taken forward under current arrangements.

As I said to the Committee when I gave evidence, however, the Government does not believe that "the possibility of more cases being raised against insurers and public bodies is a justifiable argument against private citizens being more able to exercise their rights against such bodies".

It therefore seems possible that the effect of the Bill may be felt mostly where the civil wrong suffered is not one which is life-changing, where action is unavoidable, but where the potential litigant may simply be deterred by the potential costs.

We do not believe, as has been suggested by some stakeholders, that all extra cases will be spurious, fraudulent or in some other way unmeritorious and Sheriff Principal Taylor also agreed with this view. Reassurance should be taken that claims management regulation will, subject to the legislative consent of the Scottish Parliament, be introduced in Scotland via a Westminster Bill.

It is again worth noting that reforms similar to those contained in this Bill were introduced in England and Wales by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the post-legislative scrutiny of that legislation raised no significant concerns about these issues.

The Committee has recognised the difficulty of estimating any increase in the number of claims which may be brought as a result of the Bill. The number of insurance claims made in Scotland is not monitored centrally since such figures are understandably a matter of commercial sensitivity among insurers. It is therefore difficult to see how the modelling which the Committee has suggested may be carried out. The Government will, however, carefully monitor the levels of personal injury litigation in the annual Civil Justice Statistics for Scotland when these become available after the enacted legislation has been commenced.

**ANNEX B**

**CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) BILL**

**SCOTTISH GOVERNMENT RESPONSE TO THE DELEGATED POWERS AND LAW REFORM COMMITTEE'S STAGE 1 REPORT**

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I am writing to respond to the Delegated Powers and Law Reform Committee's Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I would like to thank the Committee for its careful consideration of the Bill.

I am pleased that the Committee was content with the delegated powers in the Bill, subject to its comments on the power in subsection (4) of section 7 (Form, content, etc of success fee agreements) which allows section 7(3) regulations to modify Part 1 of the Bill. I note that the Committee considers that the scope of section 7(4) has not been sufficiently justified and has asked the Government to explain why the modification of Part 1 of the Bill is necessary and proportionate.

The Scottish Government believes that section 7(4) provides a useful power to augment the current provisions of the Bill in relation to success fee agreements in cases where it is considered to be desirable to have future provision about, say, mandatory terms or the unenforceability of success fee agreements. Such future provision would only be brought forward after careful consultation on the regulation of success fee agreements with interested stakeholders and for that reason cannot be included in the Bill at present. The Government's view is that any such provision should be set out in the primary legislation as amended by regulations, rather than set out in entirely freestanding regulations. That would ensure that all of the mandatory terms relating to success fee agreements can be found in the primary legislation. This would deliver the legislative result that is most clear for the readers and users of the legislation. The Government therefore wishes to retain section 7(4).

However, the Government has taken note of the Committee's concerns about the scope of section 7(4). Accordingly, the Government will bring forward amendments at Stage 2 which will limit the scope of section 7(4).

I hope that this response to the issue raised by the Committee is helpful in explaining the reasons why the Government wishes to retain section 7(4) and satisfies the Committee that we will respond to the concerns about the need to limit the scope of the section.

**Annabelle Ewing**