Justice Committee

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Written submission from BLM Scotland

Who we are

1. On 1 May 2014, the Scottish law firm HBM Sayers – operating from both Edinburgh and Glasgow – formally combined with the English-based law firm, Berrymans Lace Mawer, creating BLM. BLM now operates from 13 offices across the UK and Ireland.

2. We are the UK and Ireland’s leading risk and insurance law business, with over 200 partners and more than 800 legal specialists. Handling in excess of 65,000 claims at any one time, we act for some of the UK’s largest public sector organisations and corporations as well as 13 of the biggest 15 insurers in the UK.

Introduction to our comments on the Bill

3. We do not comment on every single one of the 23 sections of the Bill as introduced to the Scottish Parliament on 1 June 2017. Lack of a specific comment relating to a particular section should not be taken as endorsement of the proposed provision. Rather, we have focused our comments on areas where we think that our practical experience of litigation in Scotland – and the rest of the UK – can usefully add to the Justice Committee’s and the Scottish Parliament’s consideration of the proposed legislation. In discussions upon the Bill we have often heard it said that it is simply implementing the recommendations of the Taylor Review but we question here whether that common assertion bears a detailed analysis.

Overarching remarks in respect of the Bill as a whole, including its timing

Overarching views on the Bill’s aims and whether it will aid access to justice

4. One of the stated aims of the Bill is to create a more accessible and affordable civil justice system. That aim pre-supposes that there is unmet legal need at present. We have seen no evidence of that in the Taylor Review or in the papers supporting the introduction of the Bill. If anything, the volume of Scottish personal injury claims has been growing since the Taylor Review (in comparison with the statistics in England and Wales) so this suggests no such unmet legal need.

5. Another of the stated aims of the Bill is to create a more equitable civil justice system. That aim pre-supposes that the present general rule that “expenses follow success” is not sufficiently equitable. It should be borne in mind that costs/expenses in Scotland are always, at present, at the discretion of the court, which discretion is exercised to ensure an equitable outcome on a case-by-case basis. We have seen no evidence of that discretion failing.

6. The evidence from England and Wales indicates that the number of claims there has been falling in recent times, after the introduction of qualified one way costs.
shifting ("QOCS") so, in principle, we are unclear why QOCS is seem as a remedy in Scotland to satisfy access to justice for unmet legal need at all.

**Overarching views on whether the Bill strikes the right balance between pursuers and defenders, as well as its impact on the court system and if there are any unintended consequences**

7. In the Foreword by Sheriff Principal James A. Taylor to the Report on the Review of Expenses and Funding of Civil Litigation in Scotland (published 11 September 2013), the Sheriff Principal says (page viii; start of second paragraph): “Several of the recommendations which I have made involve what might be referred to as an incremental approach. For example, I recommend the establishment of pilot schemes. This may be thought to be a rather over-cautious approach. **However, if there is one lesson to be learned in this jurisdiction from the various attempts to reform the issue of legal costs in England and Wales, it is that predicting how lawyers will react when the financial dynamics and incentives are altered is very difficult.**” (Emphasis added).

8. The Sheriff Principal clearly had unintended consequences in mind, so he recommended cautious implementation. The present Bill, including the timing of it, shows a lack of caution. The package of reforms recommended in the Taylor Review include: “Recommendation 71. Only regulated bodies should be entitled to charge a referral fee” and “Recommendation 85. There ought to be a regulator of claims management companies” (‘CMCs’). The Bill, as introduced, is silent on both referral fees and CMCs. On 25 April 2017, the Scottish Minister for Community Safety and Legal Affairs announced an intended 15 month long Review of the Regulation of Legal Services, noting “Additionally, CMCs are unregulated in Scotland. The review will be able to investigate all of these areas”. If QOCS and damages-based success fee agreements were to be introduced in Scotland before regulation of CMCs / referral fees here then a rise in the presence and activity of CMCs in Scotland in the interim seems highly likely. To be in keeping with the Taylor recommendations of a package of reforms to be implemented cautiously, we are of the view that further consideration of the Bill should be delayed until it can be viewed alongside the proposals emanating from the Review of the Regulation of Legal Services. Such an approach would more accurately follow the recommendations of the Taylor Review.

**Part 1 of the Bill as introduced: Success Fee Agreements**

9. We wish to highlight the risk of “damages inflation” should damages-based success fee agreements be introduced. Juries, Judges, Sheriffs and Summary Sheriffs would be aware of the practice of percentage deductions from pursuer’s damages being taken by their agents. That gives rise to a risk in “damages inflation” by way of an upward trend in awards to take account of the known deductions. Civil juries, in particular, give no reasons for their awards, with an appellate court unlikely to interfere unless a jury award is more than double or less than half the award which a Sheriff or Judge is likely to have made.

10. The risk of “damages inflation” is at its highest in the context of future losses. If, say, a pursuer requires a certain amount to cover the cost of future care and if it
is known that a percentage deduction from an award for that head of claim will be taken by the pursuer’s agents then there is a danger of over-compensation to take that into account.

11. If, despite the views expressed above, damages-based success fee agreements are introduced, it stands to reason that any percentage success fee should be less where liability is admitted at an early stage. Where liability is admitted early (e.g. pre-litigation), the true risk to the pursuer’s solicitor in running the case is greatly reduced so any success fee should be limited in those circumstances.

**Part 2 of the Bill as introduced: Expenses in Civil Litigation**

12. If, despite the views expressed above, qualified one way costs shifting is to be introduced in Scotland in personal injury and fatal claims (s.8 of the Bill as introduced) then, to strike the right balance between pursuers and defenders, it is essential that the qualifications to one way costs shifting (or “QOCS exceptions”) are both workable and fair. We set out our views on the presently proposed QOCS exceptions as follows:

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<tr>
<th>Proposed QOCS exception if pursuer:</th>
<th>BLM comments</th>
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<td>makes a fraudulent representation in connection with the proceedings (proof on the balance of probabilities)</td>
<td>There will be an understandable argument for the English legal concept of “fundamental dishonesty” to be used instead of “fraudulent representation” but the Scottish Courts to date have adopted a very particularised approach to submissions based on the English concept. Assuming that the wording in the Bill is to be maintained, it is vital that there is a clear procedural mechanism for the court to find, at the earliest possible stage, that there has been a fraudulent representation.</td>
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<td>behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings</td>
<td>This should be expressly clarified so that failure to accept, within a reasonable time, a Tender which is, either, later accepted or which is not beaten by the pursuer after proof constitutes such behaviour.</td>
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<td>otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process</td>
<td>This should be extended to cover the rare occasions when an action is summarily dismissed, whether as an abuse of process or not.</td>
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13. On s.10 of the Bill as introduced (third party funding of civil litigation), the Bill should:

- make it clearer that a solicitor or CMC who has entered into a success fee agreement or a damages-based agreement with a pursuer are “funders” under the Bill, against whom an award of expenses may be made directly;
- clarify, for the avoidance of doubt, that such “funders” may not benefit from QOCS; and
- make clear that funding disclosure should be made when a pre-action protocol is engaged or at the outset of litigation, whichever is the earlier.

**Part 3 of the Bill as introduced: Auditors of Court**

14. We have no comments to make.

**Part 4 of the Bill as introduced: Group Proceedings**

15. We have no particular comments to make other than a general one that the introduction of an option for multi-party actions in Scotland is to be welcomed in the context of improving court efficiency and anticipated financial savings for all involved.

BLM Scotland
18 August 2017