1. Clyde & Co LLP is a global law firm with over forty offices across five continents throughout the world. In Scotland it operates as Clyde & Co (Scotland) LLP ("Clyde") which employs over three hundred people comprising approximately eighty qualified lawyers and paralegals with the remainder being support staff. In Scotland Clyde operate principally from offices in Edinburgh, Glasgow and Aberdeen. Clyde’s operation in Scotland resulted from a merger in 2015 between Clyde & Co LLP and Simpson & Marwick which a part of that had existed as an independent partnership for over 125 years. Clyde, and before then Simpson & Marwick, are recognised as one of the leading insurance and dispute resolution law firms across the world, and in Scotland in particular. Insurers are of course a major user of the Scottish courts service principally as defenders in personal injury (and other damages) actions on behalf of their customers. Internal statistics would suggest that Clyde are involved in defending a significant proportion of those actions and that they are therefore, also, a major user of the Scottish court service on behalf of their clients. Having said that, this response is on behalf of Clyde as an independent law firm, and is not a response put forward either in conjunction with, or in support of, any evidence or response which may be put forward by or on behalf of the insurance industry. What follows is an independent response by Clyde to the Committee’s call for evidence. This is based upon Clyde’s own perception of the affected impact which the provisions in the Bill are likely to have on the provision of and access to justice in Scotland – in connection with personal injury and other types of claims.

**Whether the Bill will achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system**

2. Clyde recognise the need to provide access to justice for everyone who requires to make use of the Scottish civil justice system. The decline in legal aid and trade union funding for litigation has inevitably meant that speculative fee and damages based agreements have become necessary. However in our view that has become necessary only in circumstances where third party funding is unavailable to the claimant.

3. In our view what is important is to maintain “equality of arms” in terms of the funding of the claims and litigation process between pursuers and defenders. For many pursuers there is availability of “Before The Event” (BTE) insurance (often provided via a household building & contents insurance policy for example). In addition we believe in the majority of the personal injury cases pursuers have available to them “After The Event” (ATE) insurance. These funding arrangements provide protection against liability for opposition costs. It suggests that there may not be inequality of arms as matters stand. This is also borne out by statistics which appear to suggest that there has been no decrease in the numbers of compensation claims in Scotland in the last five years which one might expect if it is indeed the case that the availability of funding to potential pursuers is currently restricted.
4. The introduction of Qualified One-Way Costs Shifting (QOCS) will undoubtedly reduce the financial risk to a pursuer raising a personal injury claim. However we are concerned about the effect that the introduction of QOCS is likely to have on insurance premiums. It may be that the answer lies in the protections and qualifications that are introduced in relation to the operation of QOCS but as a generality we find it difficult to see the introduction of QOCS as improving the aim of an equitable justice system.

5. We are also extremely concerned about the lack of any provision in the Bill which deals with the regulation of Claims Management Companies as in our view the combination of QOCS and damages based agreements, coupled with a potential legitimisation of referral fees, is likely to increase the numbers of CMCs operating without any regulation. Already it appears that the number of CMCs operating in Scotland has increased significantly in anticipation of the introduction of the provisions for the Bill, all of which creates the perfect condition for an increase in fraudulent claims.

6. All in all, we are not satisfied that the Bill will achieve the stated policy aim, at least without further consideration being given to the detailed provisions within the Bill, and the need for protections to be built around those.

Further comment on specific provisions in the Bill:

(i) Success fee agreements (sometimes called "no win, no fee" agreements) in personal injury and other civil actions, including the allowance for a cap on any fee payable under such agreements

7. Our main concern here centres on the preservation of the principle that a party’s legal representative (whether pursuer or defender), should be receiving a reasonable return for the work that they do on behalf of that party. We accept the proposition that a shortfall in recoverable costs, whether judicial or extrajudicial, deters pursuit of a justifiable claim and therefore is a bar to access the justice. However it is important to guard against the possibility of over rewarding a party’s legal representative – particularly in the context of higher value claims.

8. We strongly support an overall cap on the level of success fee. Subject to the introduction of that necessary cap, the level of a success fee should be a matter of agreement between the claimant and their solicitor. However as we have already commented it is important that the success fee should be proportionate to the value of the claim but also to the risk that is present by the solicitor accepting and undertaking the work in the first place.

9. It should also be borne in mind that in litigated cases, and within the system of recoverable judicial costs, the courts have the power to award additional fees to the representative of the successful party. With the introduction of QOCS in practical terms that would mean that the power to award an additional fee could only ever benefit the claimant’s representatives. There is a risk that a combination of success fee, and additional fee, (in litigated claims) gives rise to over rewarding of the claimant’s representative.
10. On the question of the capping of success fees in relation to future losses, we do not agree with the proposal that success fee agreements should apply to future losses not exceeding £1M. We are concerned about the effect that that is likely to have on the creation of a shortfall for the claimant in respect of the damages attributable to his/her future care. We recognise that there is a balance to be struck here but in our view the availability of the court to award an additional fee in cases where there are substantial future losses provides the necessary opportunity to provide that balance.

11. We think it is important that the question of the capping of success fees is looked at in conjunction with the consultation currently ongoing in relation to the introduction of the power for courts to award Periodical Payment Orders in connection with the compensation of future losses, particularly future care claims. If success fees apply to claims for future loss there is likely to be an incentive for the claimant to accept disposal of any such future losses claim, by way of PPO. There is likely to be an incentive for the claimant’s representative to advise acceptance of that method of disposal in respect of that part of the claim. In other words the combination of success fees and the possible introduction of the courts power to award a PPO will create an inevitable potential for conflict of interest between the claimant and his representative. We do not think addressing that problem by requiring independent evidence from an actuary solves the problem. In the first place the likelihood is that the costs of that will be borne by the compensating party (probably an insurer) and that creates additional cost and unfairness. Particularly given that the need for that independent advice has effectively been a consequence of provisions which create a conflict of interest for the claimant’s representatives in the first place. It would be somewhat ironic that the provisions should create that conflict but then also make the paying party be responsible for the necessary costs that end up being required to resolve the conflict.

(ii) Allow solicitors to enforce damage based agreements

12. As a generality we would simply make the same observations in relation to Damages Based Agreements as we have made above in relation to success fee agreements.

(iii) Introduce qualified one way costs shifting, which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defenders legal expenses even if the action is unsuccessful

13. Our main concerns here are as follows:

(a) Nothing is said here about the protection that a paying party needs to have which enables that party to lodge a tender at any stage of the claim, once litigated. As matters stand if a pursuer rejects a tender lodged by a defender and then fails to secure an award which is higher than the sum tendered, then in exceptional circumstances the defender would be found entitled to expenses from the date of that tender. Sheriff Principal Taylor recommended that the extent to which a claimant, in those circumstances,
should be penalised, in such circumstances should be limited to 75% of the damages awarded. We see no equivalent provision envisaged within the proposed Bill and in our view it would be wholly inequitable for the defender not to be in a position to protect their position by way of a tender which had an effect on the way in which expenses were ultimately awarded. We do not see, at the moment, how that position is protected by the current proposed provisions within section 8(4) of the proposed Bill.

The recent introduction of the pursuer’s offers into the rules of court governing personal injury actions within the All Scotland Personal Injury Sheriff Court makes it all the more necessary that the position with regard to expenses in relation to defenders’ tenders should be protected and preserved.

(b) As a generality we are concerned about a lack of detail around the definition of fraudulent and inappropriate behaviour as defined in section 8(4)(a) and (b). It seems to us that there is much to be said to the introduction of the concept of “fundamental dishonesty”.

14. In short we would favour the introduction of safeguards whereby the benefit of QOCS is withdrawn from the pursuer in circumstances where there is fundamental dishonesty on the part of the pursuer or their representative; where the pursuer fails to beat the defender’s tender, albeit with the costs payable in that situation by the pursuer being limited to a suitable proportion of the claimant’s damages; and where the proceedings have been conducted in a manner which the court considers amounts to an abuse of process.

(iv) Give the courts the power to award a payment be made to a charity where expenses are awarded to a party represented for free

15. We would welcome the inclusion of this provision.

(v) Require a party to disclose the identity of any third party funder and provide the courts with the power to award expenses against that third party

16. We welcome the introduction of this provision. It has long been our view that in Scotland the pursuer should be required to disclose the source of any funding for litigation that is available to them from a third party. This should of course cover BTE and ATE insurers.

17. In our view however there will be a need for the Bill, or any subsequent enactment under section 10(5), to carefully define what is intended by “the funder”. For example it may be necessary to avoid a situation where a claimant’s representative falls to be considered as a “funder” simply because of their obligation or responsibility to meet an outlay in connection with the claim such as the costs of a medical report or meeting the court dues.
(vi) Make legal representatives personally liable for any costs caused by a serious breach of their duty to the court

18. We welcome the inclusion of this provision within the Bill although we are not entirely sure that it is strictly necessary. The court’s inherent overriding discretion in relation to matters relating to expenses has meant that it has always had the power to make legal representatives personally liable for costs where the court deems that appropriate.

(vii) Enable auditors to become salaried posts within the Scottish courts and tribunal service

19. We welcome the inclusion of this provision in the Bill. The present system discourages a paying party from taxing the opposing parties’ costs bill and lacks transparency. We remain of the view that in conjunction with this, the power should be introduced for the paying party to tender or make founding offers in relation to the taxation of costs in the same way as it is currently available in connection with the damages claim itself.

(viii) Allow for the introduction of a group procedure in Scotland which would enable people with similar claims to bring a joint action

20. As a generality we support the introduction of the option for multi-party actions in Scotland. We are concerned however that the one size fits all approach proposed by the Bill may prove unsuitable for some types of group litigation. In other jurisdictions they draw a clear distinction between class actions and group litigations. We accept however that at the end of the day what may matter more here is the detail which will inevitably be contained within the rules envisaged in section 18 of the Bill. However amongst other things it will be necessary to ensure that any such rules have sufficient safeguards within them to prevent “an opportunistic litigation culture” referred to in the consultation paper.

Clyde & Co (Scotland) LLP
17 August 2017