1. GMB Scotland is Scotland’s campaigning trades union representing workers in every part of the Scottish economy including manufacturing, commercial and public services.

2. GMB Scotland is fully committed to promoting and expanding access to justice and provides a full range of legal support to all our members covering employment and personal injury claims, through our partnership with the Communication Workers Union, with whom we have created the UK’s first worker-owned law firm, UnionLine. In Scotland, our legal representation operates under the banner, UnionLine Scotland.

3. GMB Scotland and UnionLine Scotland welcome the intention of the Scottish Government to take forward the principles of Sheriff Principal Taylor’s recommendations on expenses and funding of civil litigation to create a more accessible, affordable and equitable civil justice system. GMB Scotland and other trades union organisations have been at the forefront of bringing litigation before the courts, which has sought to challenge dangerous or unhealthy working practices in Scotland, with the aim of achieving recompense for our individual members who have been injured or made ill at work. In so doing, we also seek to make work in Scotland safer and healthier for all workers.

4. GMB Scotland as the union for Scottish ship-building, construction and engineering has, for example, championed the cases of victims of asbestos-related diseases for many years and helped to deliver justice for thousands of workers who have been injured or suffered ill-health, as a result of preventable accidents and poor working practices in many other industries. Action in the courts is the last resort for any trades union which instead seeks to prevent, resolve or remove accidents, issues or risks through representation and negotiation in the workplace. In common with other trades union organisations, GMB Scotland never recoups any element of our members' awards of damages.

5. Despite many positive measures proposed within the Bill we are disappointed at provisions in Section 10 (Third Party Funding) which, it is our strongly held view, misses the opportunity to deliver, for working people, the Scottish Government’s stated objectives in terms of increased access to justice.

6. Trade unions, like other not-for-profit third party funders of litigation, do not deduct monies from members damages awards and thus are unable to avail themselves of the provisions for Damaged Based Agreements (DBAs) under section 1 of the Bill. Such monies can be used by for-profit commercial third party funders of litigation to offset any adverse costs award. This places trade unions at an even greater economic disadvantage, lessening the equality of arms between pursuers and defenders, thus defeating the aims of the reforms.
7. As currently drafted Section 10(3) relating to Expenses against a Third Party or intermediary will have regressive consequences as it excludes trades union legal assistance schemes from the exemption offered in respect the Scottish Legal Aid Fund. The reality is that trades union legal funds provide a much greater proportion of support for less wealthy individuals to pursue legal redress in respect of injury or illness, suffered as a result of dangerous or unhealthy working practices, than that generally provided by the Scottish Legal Aid Board.

8. The simplest remedy to this iniquitous situation would be for the Scottish Government, or if necessary the Committee, to amend the proposals to afford trades unions, as key enablers of access to justice, the same status as provided for under Section 10(4). The Committee should also consider whether there is a case for a category of third party funders who are facilitators of access to justice this may include the Scottish Legal Aid Fund, trades unions and, for example, the Equality and Human Rights Commission.

9. Sheriff Principal Taylor’s Review identified increasing access to justice for those with meritorious claims as a key objective of reform. The introduction of Qualified One-way Cost Sharing (QOCS) should be provided for with the aim of protecting legitimate pursuers from the fear of costs such as to prevent genuine claims being put before the courts. Sheriff Principal Taylor himself highlighted the “David and Goliath” nature of the relationship which currently exists between many pursuers, including workers; and defenders, largely backed by the insurance industry. The result of this relationship is too often inequality of arms and, in our view, this bill should provide for, at least, an improvement in this position for working people pursuing claims against employers who, after all, bear ultimate responsibility for the bulk of unsafe or unhealthy workplaces.

10. Members of the Committee should be aware of the significant proportion of claims heard in Scottish courts which are there only as a result of trades union support from the collective legal funds of workers. The threat of prohibitive legal costs being awarded against trades union legal funds will alter the already delicate balance provided in trades union legal assistance schemes between supporting individual workers to pursue justice and safeguarding funds for the use of other eligible workers in future. No reading of Sheriff Principal Taylor’s recommendations could envisage that this was the intention of his Review.

11. Sheriff Principal Taylor called for wide-reaching reform whereby all individuals and interests in society enjoy their legal rights, not just those with accessible wealth, or access to expensive insurance, or the very poorest reliant upon exceptional assistance from the Scottish Legal Aid Board. Workers and the collective funds that they have contributed to, organised and maintained through trades unions can fairly be placed within what Sheriff Principal Taylor himself called “the excluded middle”.

12. GMB Scotland does not believe in, and does not believe that the Scottish Government support, a system of funding for legal redress which is about cases only being brought in circumstances where success can be commercially judged to be a “near certainty”. Public interest demands a lower test to access justice, which is not dependent upon personal or corporate wealth, or limited and low
levels of public assistance via small numbers of Legal Aid supported pursuers.

13. By way of a timely illustration, the recent ruling of the UK Supreme Court in R v the Lord Chancellor, relating to Employment Tribunals Fees, held that access to justice was such a public good. GMB Scotland would invite the Committee to remember that without the support of the collectivised legal fund maintained by our colleagues in UNISON, this point could never have been won. Attacks on trades union legal funds not only force trades union legal assistance schemes to be reduced in scope but will also increasingly prevent important cases being brought which otherwise can, and regularly do, make progressive case law and deliver a public good.

14. In making provision for the courts to make an award of expenses against a third party funder or intermediary we are also concerned that Section 10(3) is seriously ill-defined. It is simply unclear to whom the section applies. Neither “financial assistance” nor “a financial interest” is defined. This is of crucial importance to trade unions and we support the submission of UnionLine Scotland that the wording of Section 10 should be redrafted to make clear exactly who is at risk of facing a third party costs order being awarded against them.

15. We note that there is no equivalent provision in England and Wales for the award of expenses against third party funders, and we are surprised that the Scottish Government’s proposal seeks to put trades unions, in this regard, in a worse position than that elsewhere. Particularly, as one of the motivators of Sheriff Principal Taylor’s recommendations was, we understand, to ensure that pursuers in Scotland are actually afforded similar protections as claimants outside Scotland.

16. As drafted, Section 10 will not advance access to justice for Scottish workers and it is likely that trades unions in Scotland will carefully consider the case for Judicial Review if the bill is passed by the Scottish Parliament in its current form. This will, of course, be a further, and avoidable, burden on trades union legal funds and ultimately a cost to the tax-payer which could be averted by sensible amendment during the legislative process.

17. Finally, GMB Scotland believes that court fees in personal injury cases should be paid at the case’s conclusion and we regret that this is not provided for in the Bill. The current system represents a real and significant barrier to trade unions in the continuing funding of cases which help to make and shape health and safety law in Scotland. Court fees should be payable only on cessation of a successful case and so we also call for the Bill to be accordingly amended in this regard.

18. The job of GMB Scotland is the protection of our members’ interests. We are not concerned with financial gain arising from litigation but with justice for workers and the improvement of society. Indeed, our own legal assistance model has changed the landscape of trade union legal practice by the establishment of a union, i.e. member or worker, owned law firm in UnionLine. This has been done purely with the intent of maximising the benefit to our individual members of collective legal assistance. It surely cannot be the intention of the Scottish Government, nor the informed will of the Scottish Parliament, to detriment such
an innovation in the way that these reforms are being pursued and GMB Scotland therefore urge the Committee to consider the issues we have brought to your attention carefully.

19. Should it be of assistance to the Committee then GMB Scotland and UnionLine Scotland, we are sure in common with other trades union organisations, would be grateful for the opportunity to provide further evidence to the committee in support of the above points.

Gary Smith
Secretary
GMB Scotland
18 August, 2017