Justice Committee
Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Written submission from Maclay Murray & Spens LLP

1. We make the following observations on the terms of the draft Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

Damages Based Agreements (DBAs)

2. We cautiously welcome the introduction of DBAs in Scotland. The allowance of “hybrid DBAs” in particular is likely to be of interest to commercial litigators. The ability to maintain a basic level of cash flow in addition to entering into a risk-sharing agreement should prove attractive in some cases.

3. The introduction of DBAs will inevitably be accompanied by concerns as to both apparent and actual conflicts of interest arising. This is particularly so in relation to the advice solicitors provide to clients at the time of settlement negotiations. Solicitors are likely to be well aware of their firm’s interest in the timing of settlement, level of settlement and the risk of losing the DBA success element if an action proceeds to proof. Our view is that consideration must be given as to the ways in which these concerns could be addressed, including incorporation of provisions on the duties of solicitors when acting pursuant to a DBA within the Solicitors’ Practice Rules and/ or Guidance.

4. In terms of success fee caps, we agree with Sheriff Principal Taylor’s proposal that these should vary dependent on the type of action. For example, a lower cap should apply to pursuers with personal injury claims than commercial entities seeking to share the risk of pursuing complex claims with commercial law firms.

5. We consider that the level of cap proposed by Sheriff Principal Taylor of 50% in respect of “other civil actions” (which encompasses most of the litigation work undertaken at our firm) is appropriate. We suspect it will be largely irrelevant in practice in commercial disputes where market forces will dictate a lower percentage for solicitor fees, particularly in cases where litigation funders are involved.

Qualified One-Way Costs Shifting (QOCS)

6. We have concerns in relation to the proposed introduction of QOCS. The pros and cons of its introduction have been well rehearsed to date. We would add that we query the policy of treating pursuers in personal injury actions as entitled to a special status that is not shared by individuals with claims of a different nature against organisations with greater economic power, for example, consumer claims.

7. We are concerned that QOCS may lead to an increase in claims without merit. The protection afforded to defenders by section 8(4) therefore becomes key.
8. In our view, the reference to the standard of conduct that is "reasonably expected of a party in civil proceedings" in section 8(4)(b), is not clear. There have been differing views through the consultation phase as to when the benefit of costs shifting should be lost. Section 8(4) does not provide a clear answer to that debate. It is not clear whether it is intended to apply when conduct is simply unreasonable (in which case, using the language of reasonableness would appear to be more readily understandable) or whether it is intended to bite only where conduct is significantly more reprehensible than simply unreasonable.

9. We also note that the test in section 8(4) concerns the behaviour of the pursuer in the course of proceedings; and not whether there were reasonable grounds to bring the claim. Section 8(4), as currently worded, does not provide protection from costs shifting where defenders face claims that are without foundation (but fall short of amounting to a fraudulent representation or an abuse of process). Our view is that pursuers should have some reasonable ground for bringing a claim in order to benefit from costs shifting. We note that this concern is acknowledged in the equivalent English Civil Procedure Rules (CPR) provisions, where an exception to costs shifting applies "where the proceedings have been struck out on the grounds that the claimant has disclosed no reasonable grounds for bringing the proceedings" (CPR 44.15(a)).

Litigation Funding

10. The provisions applicable to litigation funders in section 10 could conceivably extend to solicitors entering into DBAs on the face of the current wording of section 10(1). A law firm entering into a DBA has a "financial interest in respect of the outcome of proceedings" and is at least arguably also providing "financial assistance" to its client in the form of agreeing to the deferred payment of fees. Clarity on this point would be welcomed.

11. The requirement set out in section 10(2) on parties in receipt of litigation funding to disclose to the court the nature of the assistance requires clarity. What is meant by "the nature of the assistance"? We do not believe the level of the funding should be disclosed and query what further high level information there would be that would be appropriate to disclose, other than perhaps the fact that the funding will be used to pay e.g. solicitor and counsel fees, experts and disbursements. Clarity on this point would also be welcomed.

12. Section 10(3) provides no guidance to litigation funders as to the circumstances in which funders may become liable for an award of expenses in Scotland. It also provides for no limit on a funder's liability. It is worth contrasting this position with the English "Arkin cap" which operates, in most cases, to limit a funder's liability for an adverse costs order to the level of funding they introduced to the losing party in the litigation. It might be that these are matters that are subsequently developed in secondary legislation or case-law but in the absence of any further information or guidance, we would be concerned that the open ended nature of section 10(3) would make Scotland a less attractive market for litigation funders.

13. Clarity is also needed as to the definition of "intermediary" in section 10(3). We do not consider that brokers and others arranging litigation funding or advising
litigants on litigation funding should potentially face awards of expenses being made against them. From a law firm’s perspective, we are conscious of how easy it is for our activities to fall within the “insurance intermediary”/“insurance mediation” terms of the Law Society of Scotland’s Incidental Financial Business requirements when assisting clients who are seeking After the Event (ATE) insurance. It would not appear appropriate that a law firm that simply offers advice and assistance to a client seeking litigation funding (e.g. to identify an appropriate funder and funding package) could, by doing so, open the firm up to the risk of an award of expenses being made against it should the case ultimately be unsuccessful.

**Group Procedure**

14. We await information on the detail of the group procedure proposal before we are able to comment. In our view, flexibility should be a key feature of the procedure in order to encourage a reasonable uptake.

Maclay Murray & Spens LLP
17 August 2017