Introduction

1. On 1 June 2017 the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ("the Bill") was introduced to the Scottish Parliament. The Scottish Parliament’s Justice Committee has issued a call for evidence in respect of that Bill in terms of which it seeks views on the Bill’s general principles and on certain matters in particular. The submission on behalf of Pinsent Masons LLP is set out in this paper.

2. By way of background, Pinsent Masons is a global law firm with offices throughout the UK, in Europe, Asia and the Middle East. In Scotland, we have a litigation & regulatory practice in Glasgow, Edinburgh and Aberdeen and have several solicitor advocates, one of whom is a QC. The majority of our litigation & regulatory clients are business entities (of various sizes) or individuals engaged in business - we rarely represent private individuals. We regularly act in complex reparation claims and also in multiple/bulk cases.

3. We act for clients in the Supreme Court, the Court of Session and all Sheriff Courts (primarily Glasgow Sheriff court). We regularly appear in the Commercial Court in the Court of Session and (where available) in the Sheriff Court. We do some simplified procedure work (particularly in debt recovery) but this forms a small element of our practice.

4. We appear for clients in other forums including employment tribunals, Fatal Accident Inquiries, arbitrations and mediations.

5. We do not have a Legal Aid practice although our clients do occasionally have litigations where the other party is in receipt of Legal Aid.

6. We have responded to the questions of particular relevance to our practice and clients and in relation to which we have view/concerns.

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

7. In general, we welcome the Scottish Parliament's review of funding and group proceedings in Scotland and see this as an opportunity to ensure not only that Scotland's litigation system takes account of the realities of court proceedings in the 21st century but also that it operates in a properly regulated, transparent and efficient manner, better able to meet the expectations and demands of litigators.

8. Subject to the detail in secondary legislation, the Bill offers the prospect of Scotland going from having little specific provision for litigation funding for commercial disputes to a situation where there is greater clarity but also flexibility of terms for litigation funding than there is in England and Wales. The policy
considerations behind the Bill include a welcome focus on Scotland as an attractive place to do business, but care will be required to ensure that one of the cornerstones of the Scottish court system, namely, the flexibility and adaptability of its procedural rules, is not compromised by adding rigid layers of costs rules. There will be concern in some sectors of the consequences of some of the measures introduced, however. For example, insurers will want to be satisfied that the proposal to allow qualified one way cost shifting (“QOCS”) is properly thought through.

Specific provisions in the Bill

9. We welcome the introduction of success fee agreements for Scotland but concerns previously intimated remain:

- the Bill proposes that the success fee is to include all outlays (including expert fees). Expert fees can amount to considerable sums and be a substantial element of the overall cost incurred, particularly in commercial claims. A client’s independent expert cannot, or should not, be acting on the basis of being paid on a contingent basis.

- In commercial claims, particularly in SME claims with damages in the region of £250k to £1m, allowing the solicitor to take both the success fee and costs recovered from the opponent could substantially affect the client’s ‘net’ recovery. For example,
  - suppose the solicitor (S) and client (C) enter into SFA or DBA with a 35% success fee
  - C succeeds in his claim and recovers £600,000 in damages from the Defendant (D);
  - C’s recoverable inter parties costs are assessed at £200,000

  How much will C recover in this scenario?

  Under the current proposal S will be entitled to recover £210,000 (£600,000 x 35%) and in addition £200,000 recoverable costs and C will be entitled to retain £390,000 of the damages recovered. However, if S’s entitlement is for the SFA or DBA success fee only (i.e. £210,000), and C is entitled to retain recovered expenses and outlays, C’s entitlement would increase to £590,000 (£600,000 less £210,000 plus £200,000). Whilst the proposal to retain any expenses recovered from the unsuccessful party in addition to the agreed SFA or DBA success fee may protect solicitors in low value claims and personal injury claims, and so encourage solicitors to take such claims, this may not be the case where the SFA or DBA success fee will be substantial.

10. Whilst personal injuries work does not form a core part of our firm’s focus we have experience in this area and can foresee some difficulties with the provisions intended to provide protection where damages awarded include a future element payable as a lump sum. Secondary legislation will require to be absolutely clear as to the basis for the court’s assessment of the recipient’s best interests if long
and complex argument is to be avoided. Similarly with actuarial certification; clarification is required on the mechanism for appointing the actuary and payment for those services to ensure transparency and accountability and to avoid protracted and expensive argument.

11. In relation to QOCS, we are concerned that unless it goes hand in hand with regulation of claims management companies (as in England and Wales) and there is some protection afforded to defenders, for example by capping pursuers costs, the net result may be to disadvantage consumers. QOCS was developed in a system well-geared for striking out spurious claims and requires the support of a robust means to do that and/or a system which penalises such cases and also those which turn out to be artificially inflated, if the playing field is not to be unduly tilted.

12. In relation to group proceedings, we welcome the introduction in Scotland of a mechanism whereby parties with the same or similar rights of action against a defender(s) flowing from the same set of circumstances can be joined together in one action. However care must be taken where similar rights of action exist against a defender(s) but flow from differing sets of circumstances. In the former case, there is much to be said for allowing a representative case in the collection of cases to proceed whilst the others are sisted awaiting its outcome as that outcome is likely set a precedent for the others and so will avoid duplication, particularly of witnesses, documentation etc. The same cannot be said in the latter scenario, however, where although the legal basis of claim may be the same, the underlying facts are different, perhaps depending on subjective assessments of facts and circumstances at a particular point in time. Here the outcome in one case may have little or no relevance in another; access to justice cannot be said to be improved by sisting such cases, perhaps for years, awaiting an outcome which in any event may not be influential. There is a danger too that little or no attention is paid to individual issues such as causation as the focus is on group issues.

13. As presently worded the Bill does not differentiate between the two scenarios we identify and leaves many questions unanswered. Further, there is no indication as to how the individual cases comprised in the group will be resolved following the determination of the “same” or “similar” or “related” issues of “fact or law” that define the group. If, for example, there are similar issues of law but very different factual circumstances how does the group progress (if at all) once the issue of law is determined. Do the cases continue individually? To ensure clarity and transparency, we consider that the Bill needs to give more detail on the cases to be included in these provisions, and on the framework for their operation, rather than leaving such crucial matters to secondary legislation. This is particularly so if we are to avoid creating a situation where a whole industry is built on arguing whether or not certain actions fall within the provisions.

Pinsent Masons LLP
18 August 2017