1. UnionLine is a trade union Law Firm established by the GMB and CWU Unions to provide legal services to their members. In Scotland, UnionLine are represented by UnionLine Scotland. UnionLine Scotland welcomes the introduction to the Scottish Parliament of the proposed Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill and welcomes the opportunity to submit evidence in respect of the same.

2. The Bill seeks to take forward the recommendations of Sheriff Principal Taylor’s Review of the Expenses and Funding of Civil Litigation. Its purpose is to increase access to justice via a more accessible, affordable and equitable civil justice system. The provision of access to justice is a core concern of the GMB and CWU Unions. UnionLine Scotland recognises that obtaining redress for its members who suffer accident, injury or disease is essential in ensuring that the civil justice system in Scotland remains open to all.

3. We fully support the principal aims of the Bill in increasing access to justice in Scotland and in introducing a greater level of equality to the funding relationship, in personal injury actions, between pursuers and defenders. We are supportive of the recommendations of Sheriff Principal Taylor in relation to the introduction of Qualified One-Way Cost Shifting (QOCS) but have concerns in relation to certain provisions of the Bill dealing with same.

4. In relation to Section 8 (4) of the Bill, we would echo the concerns of the Faculty of Advocates regarding the proposal that the costs protection afforded to pursuers in personal injury claims be excluded in circumstances where the conduct of a pursuer falls below the standard reasonably expected within the confines of the proceedings. We agree that the wording of Section 8 should be reconsidered and that the test for the court should be whether a person’s behaviour is so manifestly unreasonable that it would be just and equitable to make an award of expenses against him/her.

5. We express concern in relation to the provision at section 10(3) of the Bill that the court may make an award of expenses against a third party funder or intermediary. There is no equivalent provision in England and Wales, under and in terms of the English Civil Procedure Rules, which would allow the court to make such an award of expenses against a third party funder. The inducement to introduce the provision in Scotland therefore is somewhat puzzling and is at odds with Sheriff Principal Taylor’s purpose behind QOCS, to ensure pursuers in Scotland are afforded the same position in litigation as claimants are in England and Wales.

6. Historically, trade unions have been at the forefront of bringing litigation before the courts which has sought to challenge unsafe working practices. In particular, the GMB has led the field in bringing industrially-related asbestos litigation. Its sole motivation for doing so being the protection of workers’ rights. It has hitherto
largely found a responsive ear in the Scottish Government. We see the provision at Section 10(3) of the Bill to give the courts the discretion to hold a third party funder liable for opposing costs to be a backward step and we seek assurance that litigation funded via any Trade Union Legal Assistance Scheme will be exempt from any such award of expenses. We make call that all trade unions be afforded the same status as that given to the Scottish Legal Aid Fund under Section 10(4) of the proposed Bill.

7. The *raison d'être* of the Taylor Review was to increase access to justice for those with meritorious claims. The Review envisaged that the introduction of QOCS would protect a legitimate pursuer from circumstances of failing to bring a genuine claim before the courts for fears relating to costs. Sheriff Principal Taylor highlighted a “David and Goliath” relationship between pursuers and defenders, largely backed by insurers, which resulted in an inequality of arms. Trade union-backed litigation accounts for a significant percentage of cases heard in the Scottish courts. If they are subjected to the threat of prohibitively expensive costs of litigation then the practical impact of the Bill remains that trade union members will be deterred from exercising their right to seek legitimate legal redress. In short, contrary to the level playing field contemplated by the Taylor Review, defenders, backed by insurers will remain modern day Leviathans and trade union members will be denied, de facto, access to justice.

8. To ensure access to justice reform cannot, and must not, be piecemeal. The Taylor review calls for wide-reaching reform whereby all in society enjoy their legal rights, including that body identified by Sheriff Principal Taylor as “the excluded middle”. We see trade unions and their members as falling within this body. Placing a potential burden of defenders costs on a trade union would have a disproportionately adverse consequence on union members, effectively barring the bringing of genuine litigation on grounds of cost. We assert that it is not in the public interest to bring litigation only in cases of near-certainty. Access to justice is a fundamental civil right. It is a right of access to the court as a public resource and should not be hampered by reasons of cost.

9. We see section 10(3) of the proposed Bill as an indirect attack on trade union members and the trade union movement. A trade union is the sum of its members. Its income is drawn directly from the contributions of its members. Placing the burden of potential costs on a trade union is in fact to place that burden on the individual members themselves: penalising the very people the Taylor Review seeks to protect. As such we see the proposed power of the court to make an award of expenses against a trade union as anomalous with the Bill’s aim of ensuring continued access to justice and seek assurance that trade unions will be exempt from any award of expenses against them.
10. Trade unions are non-profit making organisations which exist solely for the benefit and protection of their members. Their funds are used solely for the benefit and protection of their members. It is well recognised that trade unions have consistently stood behind more litigants in the courts than any other body.\(^1\) They have been at the forefront in bringing landmark cases in personal injury ranging from occupational disease to work related stress via employer’s liability. Indeed, in 2005 the Lord Chancellor noted that “Trade union legal services are the foundation stone to a progressive and fair society.”\(^2\) The primary role of the trade union, in respect of their members’ safety at work, is prevention. Notwithstanding, should prevention fail, then reparation is the only remedy. If their members are prevented from seeking legal redress against an errant employer because of a risk of adverse costs against their union, then access to justice is denied.

11. 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.

12. The recent unanimous ruling of the Supreme Court in R,(on the application of UNISON) v Lord Chancellor [2017] UKSC 51 held that the imposition of Employment Tribunal Fees contravened both UK and European law because they prevented access to justice. The net effect of the introduction of Employment Tribunal Fees made it excessively difficult for British workers to exercise their right to legal redress and resulted in a substantial and consistent fall in the number of claims brought before the Tribunal. The resultant financial pressure on the public purse will be considerable. Section 10(3) of the proposed Bill as it currently stands will have the same consequences for British workers, perversely denying them the very access to justice called for under the Taylor Review. Should the Bill proceed in its current form then UnionLine Scotland will advise the GMB and CWU unions to consider seeking judicial review of the legislation.

13. Section 10 (3) makes provision that the court can make an award of expenses against a third party funder or intermediary. Of considerable concern is that section 10 is ill-defined. At present it is unclear to whom the section applies. Neither “financial assistance” nor “a financial interest” is defined. This is of crucial importance to trade unions. UnionLine Scotland suggests 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.

---

\(^1\) See research conducted by Blackie, Professor J. et al (University of Strathclyde); Funding Issues in Personal Injury Litigation; Legal Studies Research Findings No. 20 (1998); See also TUC Publication; Personal Injury Claims Proposals for Change; Health & Safety; March 2006; See also Lewis, R; Compensation Culture Reviewed: Incentives to Claim and Damages Levels; Journal of Personal Injury Law (4); 2014
\(^2\) See TUC Publication, IBID, p3
14. We have previously stated our view in respect of court fees; that fees in personal injury cases should be paid on conclusion of the case. We are disappointed to note that there is no provision for this in the Bill. We consider that the current system represents a real and significant barrier to trade unions in the continuing funding of cases which historically have helped to make and shape health and safety law in Scotland. We reiterate that court fees should be payable only on cessation of a successful case and seek assurances that the Bill will be amended in such terms.

15. The trade union movement has at its core, the protection of its members’ interests. It is concerned not with financial gain arising from litigation but with being a progressive force in ensuring its members rights and interests, including their legal rights and interests, are accessed. As such we seek assurance that trade unions, and indeed all not-for-profit organisations, will be exempt from that class of third party funders set out in section 10(3) of the proposed Bill. To not do so will be to render the civil justice system in Scotland neither accessible, nor affordable, nor equitable for Trade Union members.

UnionLine Scotland
18 August 2017