Introduction

1. Usdaw is one of Britain's biggest Trade Unions with over 429,000 members nationwide. We provide advice and representation to workers in many different workplaces including all major retailers, road transport, warehouse and distribution, food manufacturing, dairies, pharmaceutical and home shopping.

2. A key service to our members is legal advice, support and representation that we provide through Legal Plus and FirstCall. These very important services are free to our members. Each year thousands of Usdaw members use Legal Plus and FirstCall services. They therefore constitute a significant financial cost to Usdaw each year.

3. Accordingly, all legislative reform of civil litigation is of significant importance to Usdaw. We therefore welcome the opportunity to contribute to this call for evidence.

4. In that context, Usdaw broadly support the overall intention of the Bill. We certainly believe that a Bill in this area is required and a Bill dealing with the subject matter in question should be a very positive step in relation to improving access to justice providing a fair balance between pursuers and defenders and providing a fair level of protection to Trades Unions who support our members' claims. However, based upon the current drafting of the Bill those objectives have not been met. At best, the Bill in its current form of drafting may be described as an opportunity lost.

5. In the view of Usdaw, the Bill requires four amendments.

Section 8 – Restriction on pursuer’s liability for expenses in personal injury claims

6. As a matter of generality, the introduction of such a restriction is an extremely welcome one. The problem is that the current drafting of the Bill is such that the bar is set far too low in relation to circumstances where the protection provided by the Bill (the restriction on the pursuer’s liability for expenses) is removed. In particular, Sub-Sections 8(4)(a) and (b) make it too easy for the general protection to be removed. They are an open invitation to a defender to seek to have an award for expenses made against the pursuer.

7. Usdaw are aware that the Bill seeks to follow the recommendations of Sheriff Principal James Taylor. However, Sheriff Principal James Taylor was clear in stating that there was the need for certainty and the need to ensure that the bar for removing the restriction on the pursuer’s liability for expenses to be set high. On the current drafting, the bar is set too low and there will be no certainty because there is little doubt that the wording will positively encourage defenders to seek expenses under Sub-Section 8(4).
8. Sub-Section (a) should be amended to ensure that any fraudulent conduct is material and goes to the heart of the case.

9. Sub-Section (b) should be amended to reflect the Wednesbury test as recommended by Sheriff Principal Taylor.

Section 10 – Third party funding of civil litigation

10. As currently drafted, this section could apply to Trade Union backed cases. That would defeat the purpose of the Bill entirely from the perspective of Trade Union litigation.

11. Like Sub-Section 10(4), which expressly excludes the Scottish Legal Aid Fund, the Bill requires to be amended to expressly exclude Trade Union funded litigation from Section 10.

Court fees

12. The purpose of the Bill, as Usdaw understands the position, is to protect the pursuer in a personal injury claim (or his/her funding trade union) from being faced with a large legal bill in unsuccessful court cases. The defenders' legal costs are however only part of the problem. There are also court fees. Currently a pursuer is required to pay court fees as a case progresses through the court system. Those court fees can mount up to a fairly significant sum. They are extremely large in relation to cases which proceed to a hearing of evidence. Court fees can therefore represent a barrier to access to justice in themselves even if the pursuer's liability for the defender's expenses is restricted. That is particularly true in relation to trade unions representing hundreds, and sometimes thousands of members at any one time.

13. The current 'pay as you go' model in relation to court fees is a substantial cash flow burden for trade unions. This Bill is an opportunity to remove that cash flow burden from trade unions. In any event restricting a pursuer's liability for court fees as part of the overall package of reforms contained in the Bill is entirely logical.

14. Usdaw accordingly submit that the Bill should be amended by introducing a section that restricts the pursuer's liability for court fees in personal injury claims in a similar way to the way Section 8 restricts the pursuer's liability for expenses.

Part 4 – Group proceedings

15. Usdaw believes that group proceedings should all proceed in our highest civil court of first instance – the Court of Session. The current £100,000 cap on cases that may proceed at the Court of Session introduced by the Court Reform (Scotland) Act 2014 requires to be removed as it applies to group proceedings. Accordingly, Usdaw submit that Section 39 of the 2014 Act should be amended to provide that the section does not apply to cases subject to Group Proceedings.
rules. The current Bill should be amended to introduce the appropriate amendment to the 2014 Act.

John Hannett
General Secretary
Usdaw
2 August 2017