Justice Committee
Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Written submission from Zurich Insurance plc

1. Zurich is a leading insurer in the UK, employing over 6,000 people. For over 90 years, we’ve been helping people and businesses understand and protect themselves from risk. We offer a wide range of general and life insurance products and services to everyone from individuals to multinational corporations.

2. We welcome the opportunity to respond in relation to this call for written evidence and support the view that fair compensation should be paid where rightfully due without delay. We also believe firmly that the civil justice system in Scotland should be accessible, affordable and equitable for all those involved and it is with this in mind that we have responded.

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

3. Zurich supports the stated aim of improving access to justice in terms of making the Scottish civil justice system more accessible, affordable and equitable. However, we believe that those criteria should apply equally for all parties pre and post-litigation and we have concerns that the proposals within the Bill will not lead to the stated aims being achieved.

4. The Bill has taken the recommendations of Sheriff Principal Taylor in his 2013 Review of the Expenses and Funding of Civil Litigation as a basis for the proposals put forward and we advised Sheriff Principal Taylor at that time that we did not agree with many of his findings.

5. Our practical experience of developments in Scottish civil litigation since that time has reinforced our view that several of the central tenets of the 2013 Review were incorrect and should not be used as a basis for reform.

6. The 2013 Review noted that according to DWP figures, the number of compensation claims registered in Scotland increased at a slower rate than in England and Wales between 2008 and 2011 and that somehow this was the result of there being some form of funding gap for potential claimants in Scotland. A recent freedom of information request showed that in terms of similar DWP measurement criteria, the volume of compensation claims registered in Scotland between 2011 and 2016 rose by 16.6% against a decrease of 4.5% in England and Wales in the same period. There has been no change to funding arrangements in Scotland during that period yet claims volumes are increasing markedly against decreases in other very similar jurisdictions, so we do not accept that claimants in Scotland are or have been prevented from pursuing valid compensation claims.

7. Our position is that individuals with genuine and meritorious claims have always been (and still are) able to find a route by which to pursue their claim and that funding has not been a barrier to them being able to do so.
8. The proposed introduction of Qualified One-Way Cost-Shifting (QOCS) will in our view lead to an increase in unmeritorious claims as there will be no financial risk for an individual to instigate a claim which has little or no substantive foundation yet it will inevitably entail increasing amounts of work and expenditure for Defenders presented with such claims.

9. Our Scottish policyholder customers include local authorities, charitable organisations, major proponents within Scottish manufacturing and service industries as well as private householders and motorists. As their insurer, we have a responsibility to manage their premium contributions appropriately and to investigate all potential claims rigorously to ensure that we pay the appropriate amount to meritorious claimants as soon as we are able and to resist unmeritorious claims robustly.

10. We and other insurers will be faced with increasing claims volumes which by their nature will require more intensive and time-consuming investigation and the resultant operational demand against a framework of finite operational resources will result in slower responses to genuine claims. We anticipate increased operational and indemnity spend costs as a result of this.

11. The lack of rules requiring early disclosure will exacerbate the challenges in getting unmeritorious claims discontinued.

12. Sheriff Principal Taylor asserted that there was no “compensation culture” in Scotland and appeared to support recognition of “referral fees” although that has not been incorporated within current proposals. This mistaken view does highlight a further risk regarding the influx of claims management companies (CMCs) from England and Wales into Scotland which has already begun.

13. There is no doubt that the explosion of claims management companies in England and Wales was driven by the “compensation culture” in that jurisdiction, which the Westminster Government is taking steps to address in terms of whiplash type claims; claimant legal costs and proposals for more effective regulation of CMCs with responsibility for that being transferred to the Financial Conduct Authority (FCA). We note with considerable concern that there is no proposal in Scotland, whether in this proposed legislation or elsewhere to establish robust regulation of CMCs.

14. It appears to us contradictory that the Scottish Government is sufficiently concerned in relation to increasing volumes of nuisance calls to establish a forum to address that issue, yet appears willing to introduce the measures in the current Bill which will encourage an increase in unmeritorious claims which will attract a further influx of CMCs into Scotland which will by their nature seek to maximise their revenues by increasing volumes of nuisance calls.

15. We do not believe that the proposals within the Bill do anything to encourage pursuers’ solicitors or CMCs to seek negotiation of an early settlement and indeed with regard to proposals around Damages Based Agreements (DBAs) it
can be anticipated that this may encourage proceeding to Proof which may unnecessarily delay payment to the Pursuer.

16. Overall our concern is that the Bill as proposed will result in unnecessary increased cost for defenders which has the potential to make Scottish businesses less competitive and result in proportionately higher cost of living for Scottish consumers when compared to other UK counterparts whilst potentially delaying and reducing compensation payments due to meritorious claimants.

The specific provisions in the Bill which:

(i) regulate success fee agreements (sometimes called ‘no win, no fee’ agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements

17. The funding of pursuers’ claims via success fee agreements is an issue for pursuers and their agents. Defenders are not liable to pay or contribute towards success fees. However, we note the risk of damages inflation associated with success fee arrangements, which adds to the overall cost of litigation.

(ii) allow solicitors to enforce damages based agreements (a form of ‘no win, no fee’ agreement, where the fee is calculated as a percentage of the damages recovered)

18. The funding of pursuers’ claims via DBAs is an issue for pursuers and their agents however we do have concerns regarding compatibility with the stated aims.

19. The Bill allows for recovery of DBAs from damages awarded including future losses up to £1M and in excess of that in certain circumstances. This will lead to unfairness and a shortfall in compensation to the pursuer. If the DBA is to be calculated based on the totality of the damages awarded then a pursuer who has been awarded a lump sum to incorporate damages for pain, suffering and past and future losses would end up with less than 100% of the damages which a court has decided is appropriate for the pursuer’s needs e.g. to fund future care, assistance and to compensate for loss of earnings. This does not to us seem in any way equitable.

20. This outcome seems to be manifestly unfair to the pursuer as it militates against the idea that the pursuer should receive 100% compensation for his or her injury and removes vital funding for future support and care. In our view it could cause potential issues when the level of damages is being calculated e.g. by the inflating of the Statement of Valuation of Claim to offset the level of DBA which is eventually to be deducted.

21. Despite the best intentions of the Courts Reform (Scotland) Act 2014 to address the cost of litigation, it remains a fact that pursuer legal costs exceed the actual level of damages awarded to the pursuer in over 40% of litigated cases in Scotland and it seems hard to justify that a pursuer should then be faced with giving further amounts of their damages away.
(iii) Introduce ‘qualified one way costs shifting’, which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender’s legal expenses even if the action is unsuccessful.

22. The primary concern is that QOCS will encourage speculative and spurious claims to be brought. Such claims are already defended resolutely and removing any risk to the pursuer through QOCS will increase the likelihood that more such claims are raised and more will need to be defended. This will not only cost more but will mean more litigated claims causing an increased pressure on court and judicial time.

23. If such a costs system is to be introduced, it must be done in conjunction with an extension of the compulsory pre-action protocol for personal injury claims to deter pursuers from proceeding with claims which have no merit. The compulsory pre-action protocol for personal injury claims was introduced in Scotland in November 2016 and sets out the steps all parties are expected to take before an action is raised in court, including the early exchange of information on the claim to establish liability. The current compulsory pre-action protocol for personal injury claims applies to claims to the value of £25,000. We would propose this threshold is increased to £100,000.

24. The Bill allows for the disapplication of QOCS if the claim is proven to be fraudulent, the pursuer has acted inappropriately or an abuse of process has taken place. However, the bar here is set too high. The requirement to prove fraud even to the civil burden of proof will mean that satellite litigation will be necessary to resolve these issues before the court.

25. We suggest consideration on whether there should be a variation to draft section 8 (4)(a) by changing the wording to include the concept of “fundamental dishonesty” which, if proved, would lead to the pursuer losing all of his or her damages might be preferable. If a pursuer knows that there is a risk of losing all of his or her damages because of such dishonesty, this would contribute towards there being an effective deterrent against spurious and/or speculative claims.

(iv) Give the courts the power to order that a payment be made to a charity where expenses are awarded to a party represented for free.

26. We have no objections to this proposal.

(v) Require a party to disclose the identity of any third party funder and provide the courts with the power to award expenses against that third party.

27. We agree this is a necessary provision and would welcome measures to ensure cost sanction in cases where third party funders are not disclosed until the conclusion of a claim, at which time their costs are sought.
(vi) make legal representatives personally liable for any costs caused by a serious breach of their duty to the court

28. We support this proposed measure. The duties set out in section 8(4) of the Bill envisage that penalties will be imposed for conduct on the part of either party or the parties should their conduct fall short of that which is defined as “appropriate”. It is necessary for penalties to attach to legal representatives should their conduct similarly fall below an acceptable standard – we believe there needs to be further definition as to what constitutes “appropriate” conduct or otherwise.

(vii) enable auditors (who are responsible for determining the amount of expenses due by one party in litigation to another) to become salaried posts within the Scottish Courts and Tribunals Service

29. We welcome the inclusion of this provision in the Bill, as the present system discourages the paying party from using the taxation process and lacks transparency. We suggest clarification on which body will be responsible for the salaries of the Auditors.

(viii) allow for the introduction of a group procedure in Scotland, which would enable people with similar claims to bring a joint action

30. We support the introduction of the option for multi-party actions in Scotland. Such case management should result in better efficiency and minimise expenses in the costs of running several related actions individually. There would be financial savings for pursuers, defenders and their insurers.

Any other matters relating to the Bill, such as any financial impacts or whether there are other provisions which should be included

31. We have already mentioned our concerns at the lack of regulation for CMCs in Scotland and the increasing volume operating in Scotland is of similar concern. We are also aware of some solicitors firms establishing their own CMCs to avoid the prohibition on contingency fees. We believe there should be further regulation of this industry as a whole and certainly statutory controls should apply to anyone offering damages based agreements. Non-compliance or breach of any of the provisions of the agreement should render the agreement void. There should also be potential financial sanctions for non-compliance.

32. Finally we support a ban on referral fees in Scotland to be enforced by the Law Society of Scotland and the Financial Conduct Authority.

Derek Barnes
Head of Technical Centre
Zurich Insurance plc
18 August 2017