Published 21 December 2017
SP Paper 253
24th Report, 2017 (Session 5)

The Scottish Parliament
Pàrlamaid na h-Alba

Justice Committee
Comataidh a' Cheartais

Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
http://www.parliament.scot/abouttheparliament/91279.aspx

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx

justicecommittee@parliament.scot

0131 348 5047

Committee Membership

Convener
Margaret Mitchell
Scottish Conservative and Unionist Party

Deputy Convener
Rona Mackay
Scottish National Party

George Adam
Scottish National Party

Maurice Corry
Scottish Conservative and Unionist Party

Mary Fee
Scottish Labour

John Finnie
Scottish Green Party

Mairi Gougeon
Scottish National Party

Liam Kerr
Scottish Conservative and Unionist Party

Fulton MacGregor
Scottish National Party

Ben Macpherson
Scottish National Party

Liam McArthur
Scottish Liberal Democrats

Executive Summary

1. The principal policy objective of the Bill is to increase access to justice by creating a more accessible, affordable and equitable civil justice system. The Committee heard conflicting views on whether there is an access to justice problem in Scotland. However, on balance, the Committee considers that there are problems with access to justice in respect of civil litigation. It therefore recommends to the Parliament that it approve the general principles of the Bill. Nonetheless, this report highlights a number of areas where the Bill could be improved.

2. Part 1 of the Bill is concerned with increasing the funding options available to people bringing a civil court action. It also aims to make the costs that they will pay to their own solicitor more predictable. It does this by regulating what the Bill calls "success fee agreements", often known as "no win, no fee" agreements. Overall, the Committee heard support for the provisions regulating success fee agreements. However, the Committee considers that the Scottish Government must ensure that there are sufficient safeguards in place to protect pursuers and guard against conflicts of interests for solicitors. This is particularly important where a solicitor is acting under a damages-based agreement, where they will receive a percentage share of the damages awarded to their client if the case is successful.

3. In relation to personal injury claims, the Committee is concerned about the provisions in the Bill which would allow damages for future loss to be included when calculating a solicitor's success fee. The Committee heard that this approach could lead to a reduction in damages available to the pursuer to pay for future care and medical support. The Committee asks the Scottish Government to reflect on this evidence and to reconsider whether damages for future loss should be ring-fenced when calculating a solicitor's success fee.

4. While Part 1 of the Bill is concerned with what is paid by a client to their own solicitor, Part 2 deals with expenses in civil litigation. In a civil action, one party can be ordered to pay another party's legal expenses. The normal rule is that the losing party pays the winning party's expenses. The Bill introduces qualified one way costs shifting (QOCS) for personal injury claims. Under QOCS, a pursuer is not liable for the defender's expenses if they lose, but can still claim their own expenses from the defender if they win.

5. The Committee heard starkly opposing views on the introduction of QOCS. Those in support of the introduction of QOCS argued that it is necessary to redress the "David and Goliath" relationship in personal injury cases between pursuers (who tend to be individuals with little experience of the legal system) and defenders (who tend to be insurance bodies). Those against the introduction of QOCS argued that it could have unintended consequences and, in particular, could facilitate a "compensation culture" in Scotland.

6. On balance, the Committee is persuaded that QOCS could improve access to justice for pursuers. However, it is important that its introduction is balanced by other safeguards to prevent a rise in unmeritorious or fraudulent claims. The Committee also asks the Scottish Government to commit to post-legislative scrutiny of the Bill, in particular to review the impact of QOCS.

7. One vital safeguard would be to regulate claims management companies in Scotland. The Committee heard evidence of the negative impact that the practices of some companies had on consumers, particularly through the use of cold calling. During the Committee's scrutiny of the Bill, amendments were made to the Financial Guidance and Claims Bill currently going through the UK Parliament, to extend to Scotland the regulation of claims management companies by the Financial Conduct Authority. The Committee considers that the provisions in this Bill should not be brought into force until such regulation is in place.

8. The Bill provides for rules of court to be introduced to allow one set of court proceedings to be brought on behalf of two or more people with similar claims - referred to as "group proceedings" in the Bill. This is a welcome development which the Committee heard would improve access to justice.

9. However, the Bill would only allow group proceedings to be brought on an opt-in basis, where the pursuer must expressly consent to be part of the action. This is opposed to an opt-out system, where the court agrees a definition of those affected by the proceedings. Anyone covered by the definition is deemed to consent to court action on their behalf unless they expressly opt out. The Committee heard that an opt-out approach could bring greater benefits for those with low value claims, for example, for consumer problems. The Committee notes that the Scottish Government has chosen to start with an opt-in system for pragmatic reasons, but asks for further clarity as to why an opt-out approach has been ruled out at this stage.

10. This report makes a number of other recommendations about the more detailed aspects of the Bill. The Committee expects discussion around these matters to continue should the Bill progress further.

11. The Committee also considers there is a need for up-to-date research on the consumer experience of legal services in Scotland, including the use of cold calling.

Glossary

Act of sederunt	A form of secondary legislation made by the Court of Session to regulate civil court procedure.
Additional fee	An increase in the amount which can be claimed as judicial expenses from the losing party, on the basis that the case was unusually complex or time-consuming.
After the event insurance	Insurance to cover against the risk of having to pay the opposing party's judicial expenses in a court action, where the insurance policy is taken out after the event giving rise to court proceedings.
Auditor	An officer of the court responsible for independently reviewing the fees charged by a solicitor for legal work.
Before the event insurance	Insurance that was in place before the occurrence of the event giving rise to the court proceedings. The insurance covers the legal fees of the insured and may also cover an opponent's expenses (in the event of the insured being ordered to pay their opponent's judicial expenses).
Claims management companies	Companies which handle legal claims from individuals, usually on the basis of charging a percentage of the compensation awarded if the case is won. Claims management companies do not employ solicitors and must pass a claim on (sometimes for a referral fee) to a solicitor if representation in court is needed.
Damages-based agreements	A form of no win, no fee agreement where a lawyer gets a percentage share of the damages awarded if the case is successful.
Defender	The party defending a court action.
Judicial expenses	Judicial expenses are paid by the losing side to the winning side in civil court action (although the court has discretion to alter this rule). They cover costs such as lawyers' fees and commissioning expert evidence. The sums which can be claimed in solicitors' fees are set out in regulation.
Outlays	These cover various expenses, such as the costs of expert reports and witnesses and the costs of engaging an advocate. These are usually paid by the solicitor, who can then bill these costs to the client (although there may be a delay between the solicitor paying the outlay and getting reimbursed).
Pro bono	The phrase used to describe when a lawyer provides their services for free.
Pursuer	The party bringing a court action.
Qualified, one way costs shifting (QOCS)	A departure from the normal rule that the loser pays the winner's judicial expenses. Under QOCS, a pursuer is not liable for the defender's judicial expenses if they lose, but can still claim their expenses from the defender if they win. It is qualified in certain circumstances, such as where the pursuer acts unreasonably.
Referral fees	Solicitors may be referred cases by a variety of bodies including employer and trade organisations, trade unions, Citizens Advice Bureaux, and claims management companies. The arrangement will sometimes involve the payment of a fee by the solicitor, known as a referral fee.
Speculative fee agreement	Another form of no win, no fee agreement, where the lawyer will be paid an uplift on their fees if the case is won.
Success fee agreement	A term used in the Bill to cover all types of agreements to pay a lawyer based on the outcome of the action. It covers damages-based agreements and speculative fee agreements. Such agreements are commonly referred to as no win, no fee agreements.
Success fee	The additional sum the client pays under a no win, no fee agreement where the case is successful. The success fee can be looked on as the premium paid to the lawyer for taking on the risk that the case could be unsuccessful.
Taxation	The process for independently reviewing the fees charged by a solicitor. Judicial taxation deals with the expenses to be paid by the losing party in litigation to the winning party. Taxation is carried out by an auditor of court.

Membership changes

Maurice Corry and Liam Kerr replaced Oliver Mundell and Douglas Ross on 29 June 2017.
George Adam replaced Stewart Stevenson on 26 October 2017.

Introduction

1. The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ("the Bill") was introduced in the Scottish Parliament on 1 June 2017. It is a Scottish Government Bill.

2. The Policy Memorandum accompanying the Bill states:

> The principal policy objective of this Bill is to increase access to justice by creating a more accessible, affordable and equitable civil justice system. The Scottish Government aims to make the costs of court action more predictable, increase the funding options for pursuers of civil actions and introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.
>
> Source: Policy Memorandum, paragraph 4.

Background to the Bill

Scottish Civil Courts Review

3. In 2009, Lord Gill published his Report of the Scottish Civil Courts Review. Lord Gill's remit was to "review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods". His Report contained over 200 recommendations designed to improve the efficiency and effectiveness of Scotland's civil court system.

4. As is set out in the Bill's Policy Memorandum, the Scottish Government broadly accepted Lord Gill's recommendations and a range of work was taken forward to implement them. This included establishing the Scottish Civil Justice Council with the remit of preparing draft rules of procedure for the civil courts and advising the Lord President of the Court of Session on the development of the civil justice system in Scotland. [1]

5. During the course of Lord Gill's Review, Lord Justice Jackson was appointed to undertake a Review of Civil Litigation Costs in England and Wales. Lord Gill recognised that this review could have implications for civil litigation in Scotland. He therefore recommended that a separate working group should be established to review judicial expenses in Scotland. [2]

Review of Expenses and Funding of Civil Litigation in Scotland

6. In 2011, the Scottish Government established the Review of Expenses and Funding of Civil Litigation in Scotland, to be chaired by Sheriff Principal Taylor. His remit was to review the costs and funding of civil litigation in the Court of Session and sheriff court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review. In undertaking the review, Sheriff Principal Taylor was to consult widely, gather evidence, compare the expenses regime in Scotland with those of other jurisdictions and have regard to

research from previous inquiries into costs and funding, including the Civil Litigation Costs Review of Lord Justice Jackson.

7. Sheriff Principal Taylor published his Report in October 2013. The Scottish Government published its response to Sheriff Principal Taylor's Report in June 2014. This set out the Government's intention, in principle, to implement the recommendations. The Government's response identified the recommendations which would require primary legislation. These included recommendations on speculative fee agreements and damages-based agreements (sometimes called no win, no fee agreements) and qualified one way costs shifting (QOCS) in personal injury actions and appeals.

8. The Scottish Government consulted on the proposals now being taken forward in the Bill between January and April 2015. There were 40 responses to the consultation. An analysis of responses was published in August 2015. Overall, there were mixed views as to whether the package of measures struck the right balance between the interests of pursuers and defenders in civil litigation.

9. Further information on the background to the Bill can be found in the SPICe briefing.

Overview of the Bill

10. The Bill provides the legal framework to implement a number of Sheriff Principal Taylor's recommendations. The Bill also implements a small number of outstanding recommendations from Lord Gill's Scottish Civil Courts Review relating to group proceedings (sometimes known as multi-party or class actions) and auditors of court.

11. The Policy Memorandum describes the situation as follows:

> Sheriff Principal Taylor presented his Review of Expenses and Funding of Civil Litigation in Scotland report to the then Cabinet Secretary for Justice, Kenny MacAskill MSP, in September 2013. The report contained 85 recommendations aimed at delivering greater predictability and certainty in relation to the cost of litigation, thereby increasing access to justice. Approximately half the recommendations do not require primary legislation and will be mostly implemented by rules of court drafted by the Scottish Civil Justice Council … The other recommendations require further primary legislation and most will be implemented through this Bill. The main exceptions are regulation of the claims management industry and referral fees which will be considered in the recently announced review of legal services.
>
> Source: Policy Memorandum, paragraph 11.

12. The Bill is split into five parts.

13. Part 1 regulates "success fee agreements"; i.e. agreements between legal representatives and their clients under which no fee, or a reduced fee, is payable if the client is unsuccessful in a claim, with a fee, or higher fee, being payable if the client is successful. These are sometimes known as no win, no fee (or no win, lower fee) agreements. Part 1 removes the legal rule preventing solicitors from enforcing

damages-based agreements, which are a particular form of success fee agreement. It allows Scottish Ministers to make regulations capping the amount of fees to be paid under success fee agreements. Part 1 also makes various other provision to regulate success fee agreements, including particular provision for personal injury claims.

14. Part 2 deals with various aspects of expenses in civil litigation. In particular, it introduces qualified one way costs shifting (QOCS) in personal injury cases and appeals. This is a departure from the normal rule that the loser pays the winner's judicial expenses. Under the QOCS provisions in the Bill, an unsuccessful pursuer will not be liable for the defender's expenses, provided that the pursuer has conducted the proceedings in an appropriate manner. Part 2 also makes provision in relation to third party and pro bono funded litigation, and for awards of expenses to be made against legal representatives who have seriously breached their duties to the court.

15. Part 3 makes provision for auditors of court (who are responsible for quantifying expenses due by one party in litigation to another) to become salaried positions within the Scottish Courts and Tribunals Service (SCTS). It places a duty on the Auditor of the Court of Session to issue guidance to auditors of court about the exercise of their functions. The SCTS will also be required to publish details of auditors' work and the fees received.

16. Part 4 empowers the Court of Session to make court rules providing for "group proceedings". Group proceedings will allow one person (known as a "representative party") to bring proceedings on behalf of two or more people who have similar claims.

17. Part 5 makes general provision including in relation to regulations, ancillary provision and commencement.

Related policy developments

18. The Bill is aimed at increasing the options available for pursuers to fund their actions privately. The Bill therefore does not make provision in respect of civil legal aid, which may be available to people on low and moderate incomes to bring a civil action. In the Policy Memorandum, the Scottish Government states that it is committed to maintaining the scope of civil legal aid in Scotland. [3] An independent review of legal aid in Scotland is currently ongoing, and is due to report in February 2018.

19. In April 2017, the Scottish Government also announced an independent review of the regulation of legal services in Scotland, chaired by Esther Roberton.[i] The Policy Memorandum stated that this review would cover recommendations from Sheriff Principal Taylor's Report on the regulation of claims management companies and referral fees. [4] This review is due to report in summer 2018.

---

i Esther Roberton is current chair of NHS 24.

20. As is discussed further below, during the Committee's scrutiny of the Bill it heard concerns that consideration of the regulation of claims management companies had been deferred to Esther Roberton's review, rather than being addressed in the Bill. At the same time, the Financial Guidance and Claims Bill was being considered by the UK Parliament. This Bill would strengthen the regulatory regime for claims management companies in England and Wales.[ii] Following representations from the Committee to the Scottish Government, the Financial Guidance and Claims Bill has been amended by the UK Government (at the request of Scottish Ministers) to extend regulation to claims management companies in Scotland. At the time of publication of this Report, the Financial Guidance and Claims Bill has completed its passage through the House of Lords, and had its First Reading in the House of Commons on 22 November 2017.

Justice Committee consideration

21. The Justice Committee was designated as lead committee for Stage 1 consideration of the Bill on 13 June 2017. The Committee issued a call for evidence on the 13 June, with a closing date of 18 August 2017. The Committee received 40 responses to its call for evidence, as well as six further written submissions during the course of its Stage 1 scrutiny of the Bill. Responses are published on the Committee's webpage.

22. The Committee took formal evidence on the Bill at six meetings (see further Annex A):

- on 5 September 2017, the Committee heard from Scottish Government officials assisting Ministers in taking the Bill through Parliament ("the Bill team");
- on 19 September 2017, the Committee heard from representatives of the Association of Personal Injury Lawyers, the Motor Accident Solicitors Society, and Thompsons Solicitors;
- on 26 September 2017, the Committee heard from two panels of witnesses. The first comprised representatives of the Faculty of Advocates, the Glasgow Bar Association, and the Law Society of Scotland. The second panel comprised representatives of the Association of British Insurers, the Association of British Travel Agents, the Forum of Insurance Lawyers, and the Medical and Dental Defence Union of Scotland;
- on 31 October 2017, the Committee heard from Sheriff Principal Taylor, author of the independent report that preceded the Bill, and Elaine Samuel, Honorary Fellow at the University of Edinburgh and formerly the researcher for the Taylor Review team;
- on 14 November 2017, the Committee heard from representatives of Accident Claims Scotland Ltd, the Legal Services Agency, Quantum Claims, and Which?, as well as Professor Alan Paterson from the University of Strathclyde;

---

ii Claims management companies have been regulated in England and Wales since 2007 by the Ministry of Justice, via the Claims Management Regulator.

- on 21 November 2017, the Committee heard from the Minister for Community Safety and Legal Affairs, Annabelle Ewing;

23. As ever, the Committee is grateful to all those who provided evidence which helped to inform the Committee's scrutiny of the Bill.

Consideration by other Committees

24. The Finance and Constitution Committee issued a call for evidence on the Financial Memorandum for the Bill, with a closing date of 31 July 2017. Seven responses were received, following which it agreed that it would give no further consideration to the Financial Memorandum.

25. The Bill contains a number of delegated powers provisions. The Delegated Powers and Law Reform (DPLR) Committee published its report on the Delegated Powers Memorandum on the Bill on 9 November 2017. In that report, the DPLR Committee concluded that it was content with the delegated powers in the Bill except in respect of the provision in section 7(4), which enables amendments to be made to Part 1 of the Bill relating to success fee agreements. It concluded that this provision was "unusually wide" in scope and had not been sufficiently justified by the Scottish Government.

26. The costs associated with the Bill and the findings of the DPLR Committee have formed part of this Committee's scrutiny of the Bill and are considered further below (see paragraphs 160-169 and 396-409).

Access to justice

Is there an access to justice problem?

27. The principal policy objective of the Bill is to improve access to justice. However, the Committee heard conflicting views on whether there is an access to justice problem in Scotland in respect of civil litigation.

28. In the foreword to his Report, Sheriff Principal Taylor stated:

> One of the main themes which emerged from the consultation process in this Review could be summarised as the impact which expenses have on access to justice. That impact manifests itself in a variety of ways. From the evidence available to the Review, one of the main concerns for potential litigants is what the cost will be to them should they lose the action. Not only will they require to pay their own legal costs but also those of their opponents. While they may be able to come to an arrangement with their own lawyers, any adverse award of expenses is almost impossible to predict with any accuracy. I considered this to be a reasonable and genuine concern which I have sought to address in a number of ways.
>
> Source: Taylor Review, Foreword page iii.

29. This echoes evidence the Committee heard from pursuer and trade union representatives. The Association of Personal Injury Lawyers, for example, argued that "the fear of swingeing expenses awards … currently results in cases not being brought or routine under-settlement in our jurisdiction". [5] UNISON Scotland similarly stated that the "risk of being exposed to that legal bill is a real barrier to access to justice even to members supported by their trade union". [6]

30. However, evidence from defender and insurer representatives questioned whether there was an access to justice problem in Scotland. In particular, this evidence highlighted recent figures from the Department of Work and Pensions (DWP), as showing an increase in the number of personal injury claims in Scotland (see paragraph 33 below).

31. The DWP is able to recover sums paid in social security benefits from the compensation paid to personal injury claimants. The system for doing this requires those receiving personal injury claims to lodge details with the DWP's Compensation Recovery Unit. Figures from the Compensation Recovery Unit therefore provide the closest estimate to the number of personal injury claims.

32. In his Report, Sheriff Principal Taylor noted that, between 2008 and 2011, the number of claims registered by the Compensation Recovery Unit in Scotland had increased by 7%, in comparison to 23% in England and Wales. He also noted that there were significantly fewer claims by number in Scotland, in proportion to the number of claims in England and Wales. He concluded that the existence of a "compensation culture" was not evidenced in Scotland. [7]

33. Written evidence to the Committee from defender and insurer representatives pointed to more recent figures from the DWP (obtained through a Freedom of

Information request). These show that, between 2011 and 2016, there was a 4% decrease in claims registered by the Compensation Recovery Unit in England and Wales, in comparison to a 16% increase in claims in Scotland.[iii]

34. The Scottish Government's Scottish Civil Justice Statistics 2015-16 gives information on the number of personal injury cases initiated in the Scottish courts.[iv] Using these figures, defenders and insurers pointed to a 25% increase in the number of personal injury court actions raised in Scotland since 2008/9.

35. On the basis of both the DWP data and the Scottish Civil Justice Statistics, the Forum of Insurance Lawyers argued that "there is no current evidence to support the proposition that genuine personal injury claimants are deterred from making claims, or raising court actions, in Scotland". It suggested that data relied upon by Sheriff Principal Taylor "is now considerably out of date". [8]

36. Similar points were made by the Association of British Insurers, which argued that the data "demonstrates that Scotland does not have a problem with access to justice for personal injury claims and challenges the premise of the Bill". [9] DWF LLP argued that the data showed that a "compensation culture" had now reached Scotland. [10]

37. In oral evidence, Ronnie Conway of the Association of Personal Injury Lawyers accepted that the number of personal injury claims in Scotland had increased in the past few years. However, he emphasised that this has been from "a very low base", and that the rate of claims in Scotland per head of the population remained well below that of England. [11]

38. Brian Castle from the Motor Accident Solicitors Society agreed, stating that "the suggestion that we have something progressing towards full access to justice is not necessarily borne out by those figures". [12] He added:

> The main driver of the Bill, which is to increase access to justice for valid claimants and allow an increasing proportion of them to assert their rights and get the full and proper compensation to which they are entitled, is good.
>
> Source: Justice Committee, Official Report 19 September 2017, col.17.

39. Sheriff Principal Taylor told the Committee that the more recent data obtained from the DWP did not change his view on the conclusions he made in his report. [13] He also stated that he had "no doubt … that the fear of an adverse award of costs inhibits people from exercising their legal rights". [14]

40. A similar point was made by the Minister for Community Safety and Legal Affairs, Annabelle Ewing, when giving closing evidence to the Committee. The Minister emphasised that while the number of claims recorded by the Compensation Recovery Unit had risen, the number of cases actually initiated in the Scottish

---

iii See e.g. written submissions from the Forum of Insurance Lawyers (paragraph 15) and DWF LLP (paragraph 4).

iv Only a small proportion of personal injury claims actually end up in court. Most reach a negotiated settlement without the need to raise a court action.

courts had remained more or less the same since 2009-10. She therefore stated that she was "not necessarily convinced that the world is very different now from when Sheriff Principal Taylor was conducting his two-and-a-half-year review". The Minister also noted that the Scottish Government had consulted on the Bill's proposals in 2015 and that she felt the Government had "as reasonable a picture as we can get". [15]

41. The table below sets out the number of personal injury cases initiated in the Scottish courts by year between 2011/12 and 2015/16, broken down by category.

Case type	2011-12	2012-13	2013-14	2014-15	2015-16	% change since 2014-15	% change since 2011-12
Road traffic accident	4,613	5,106	4,770	5,143	4,897	-5%	+6%
Accident at work	1,750	1,758	1,797	1,817	1,721	-5%	-2%
Clinical negligence	222	203	262	629	388	-38%	+75%
Asbestos	294	436	320	458	300	-34%	+2%
Other	931	1,190	1,138	1,163	1,460	+26%	+57%
Total	7,810	8,693	8,287	9,210	8,766	-5%	+12%

Source: Scottish Civil Justice Statistics 2015-16

42. Data obtained from the NHS Central Legal Office shows that the number of claims made against NHS health boards in Scotland has fluctuated each year between 2012-13 and 2016-17. The data refers to all claims made, regardless of whether those claims were ultimately resolved or litigated in court.

43. A number of witnesses also made reference to research undertaken by Professor Hazel Genn and Professor Alan Paterson, "Paths to Justice Scotland", which was a national survey of people's experiences of civil justice problems. In oral evidence, Professor Paterson told the Committee that this research found evidence that people were put off litigation by the fear of costs. He went on to say:

> Although such a fear is not necessarily realistic, sometimes it is. The fact is that litigation is very expensive for an ordinary person. Most lawyers would not advise individuals to embark on it, because the outcome is not always predictable and the process can be very expensive. People are therefore right to have that fear.
>
> Source: Justice Committee, Official Report 14 November 2017, col. 24.

44. However, "Paths to Justice in Scotland" was published in 1999. Thomas Docherty, giving evidence on behalf of Which?, argued that there was a need for up-to-date research on the legal experience of consumers in Scotland. He suggested that this research could be used to inform the ongoing independent review of the regulation of legal services. [16]

45. The Committee wrote to that review's chair, Esther Roberton, to ask whether consideration had been given to such research. In her reply, Esther Roberton stated that the review had commissioned specific research into unregulated providers of legal services. However, she noted that there was an absence of consumer research in Scotland on those engaging with legal services. She told the Committee that the Scottish Government has provided limited funding available for a qualitative study, but this would not be able to cover the same ground as a comprehensive

baselines survey of consumers. She concluded by saying that the review's panel "acknowledge that such a survey would be a valuable addition to the policy making landscape in Scotland for legal services".

Will the Bill improve access to justice?

46. The Committee also heard conflicting views on whether the measures in the Bill would improve access to justice. The Scottish Government believes that the Bill will improve access to justice "by creating a more accessible, affordable and equitable civil justice system". [17] In oral evidence to the Committee, the Minister emphasised that the Bill would make the cost of civil litigation in Scotland more predictable and therefore increase access to justice. [18]

47. Pursuer and trade union representatives broadly supported the Bill. Subject to their concerns about the current drafting of the provisions relating to qualified one way costs shifting (section 8) and third party funding (section 10), they considered the Bill would improve access to justice. In particular, they thought that the Bill would redress what Sheriff Principal Taylor referred to as the "David and Goliath" relationship between pursuers and defenders in personal injury actions.[v]

48. Patrick McGuire, representing Thompsons Solicitors, told the Committee:

> I have absolutely no doubt that the provisions that are in the Bill will enhance access to justice. … Equally important, it will also do what Sheriff Principal Taylor said was his prime focus and what I see as the mischief of the Bill, which is redressing the imbalance in the asymmetrical relationship … between pursuers of personal injury claims and the extremely large, powerful and wealthy insurers.
>
> Source: Justice Committee, Official Report 19 September 2017, col.5.

49. In its written submission, the Law Society of Scotland stated that the Bill had the "potential to significantly increase access to justice". However, it went on to comment that it was "difficult to gauge the full impact of the Bill, as many of the details of the provisions will be made at a later stage, through regulations". [19]

50. Defender and insurer representatives, on the other hand, argued that the Bill would have unintended consequences and ultimately hinder access to justice. The Association of British Insurers, for example, argued:

> The measures proposed in this Bill would mean major changes to personal injury litigation in Scotland which are not in the best interests of all parties and will not improve access to justice.
>
> Source: Association of British Insurers, written submission, paragraph 4.

51. The Forum of Insurance Lawyers, while supporting the "broad policy aims of the Bill", were concerned that the Bill, as currently drafted, "might not only fail to

---

v See e.g. written submissions from the Association of Personal Injury Lawyers,the STUC and UNISON Scotland.

achieve those aims, but that the unintended consequences of the Bill could be seriously detrimental to those aims". [20]

52. The concerns expressed by defender and insurer representatives related primarily to the introduction of qualified one way costs shifting (QOCS). They thought that, without additional safeguards, the introduction of QOCS would lead to a rise in the volume of litigation in Scotland, including unmeritorious and fraudulent claims, which would ultimately lead to a rise in insurance premiums and costs for the Scottish taxpayer.[vi] The introduction of QOCS is discussed in more detail below.

53. Scottish Environment LINK commented that the Bill was a missed opportunity to tackle ongoing non-compliance with the UNECE Aarhus Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters. [21]

Protection from court fees

54. Responses to the Committee's call for evidence from trade unions, and Thompsons Solicitors, called for the Bill to provide an unsuccessful pursuer with protection from having to pay court fees.

55. Currently, court users must pay court fees each time they use court services – referred to as a "pay as you go" model. They are recoverable as judicial expenses from the losing party.

56. A union would usually pay court fees on behalf of its member. If the case is won, those fees will be recovered from the other side. If the case is lost, then the member would be responsible for meeting them. The union could choose not to enforce payment – but this could reduce the funds available to carry out other work.

57. Evidence to the Committee argued that the "pay as you go" model for court fees was as significant a barrier to access to justice as the pursuer's potential liability for the defender's expenses.[vii] Further, evidence suggested that court fees presented a significant cash flow burden for trade unions[viii].

58. Thompsons Solicitors, along with a number of trade unions,[ix] suggested that court fees should be treated the same way as expenses are under the QOCS provisions of the Bill. [22] This would mean that the pursuer's court fees would only be paid at the end of the case – and then only when they could be recovered from an unsuccessful defender. Thus the pursuer would always be protected from liability: if the case was won, the defender would pay the pursuer's court fees; if the case was lost, the pursuer would not have to pay court fees.

---

vi See e.g. written submission from the Association of British Insurers.
vii See e.g. written submissions from Thompsons Solicitors (paragraph 30) and the STUC (paragraph 18).

viii See e.g. written submission from the STUC (paragraph 18).
ix See e.g. written submissions from Usdaw (paragraph 1), FBU (paragraph 21), PCS Union (paragraph 12), Unite Scotland (paragraph 14), UNISON Scotland (paragraph 16).

59. The written submission from the STUC suggested that “court fees should only be paid at the end of the case by the unsuccessful party”. STUC argued that this approach would “strike a fair balance” and “allow the Scottish Courts Service to continue to receive an income from court fees but in a way that will not cause significant disadvantages to Trades Unions”. [23]

60. When giving oral evidence, the Minister told the Committee that the Scottish Government was currently consulting on court fees and that these points could be raised in that context. [24]

Conclusions on access to justice

61. The Committee notes the conflicting views it heard on whether there is an access to justice problem in Scotland. While some data suggests that there has been a rise in the number of personal injury claims, the Committee recognises that this presents a limited picture of access to justice. On balance, the Committee is persuaded that there are problems with access to justice in respect of civil litigation.

62. The Committee heard views that there is currently an absence of up-to-date research on the legal experience of consumers in Scotland. The most comprehensive research in this area - "Paths to Justice in Scotland" - was published in 1999. The Committee asks the Scottish Government to consider commissioning research in this area to properly inform future policy.

63. The Committee notes and is sympathetic to the concerns expressed by trade unions that the current “pay as you go” model of court fees can act as a barrier to access to justice. The Committee asks the Scottish Government to take into account this evidence as part of its ongoing consultation on court fees.

Success fee agreements

64. Part 1 of the Bill provides for the regulation of no win, no fee agreements – referred to in the Bill as "success fee agreements".

65. There are two main variations on the no win, no fee agreement:

- agreements where a lawyer gets an uplift in their fees if the case is won (known as speculative fee agreements); and
- agreements where a lawyer gets a percentage of the compensation award if the case is won (known as damages-based agreements).

66. The Committee heard that under both types of agreement, a lawyer generally receives no fee (or occasionally a lower fee) from their client if the case is lost.

67. The definition of a success fee agreement in the Bill (section 1) is wide enough to cover both speculative fee agreements and damages-based agreements.

68. The Policy Memorandum recognises that there has been a rise in the use of no win, no fee agreements in recent years:

> Traditionally in Scotland, civil litigation has been funded in three ways – through private funding, civil legal aid, or trade union funding. In the last 20-30 years this situation has changed. Increased pressure on public funding for legal aid and a decline in trade union membership has resulted in a decline in those types of funding for civil cases. In turn this has led to the rise of speculative funding – in the form of speculative fee agreements and damages-based agreements to fill the void.
>
> Source: Policy Memorandum, paragraph 13.

Damages-based agreements

Existing law and practice

69. Traditionally, lawyers were prevented from entering into any form of no win, no fee agreement, as such agreements were considered to give them an undue interest in the outcome of the litigation. Since 1992, solicitors have been able to enter into speculative fee agreements, where the success fee is calculated as an uplift of their fees.

70. However, solicitors cannot currently enforce a damages-based agreement on the basis that they are "pactum de quota litis" – in other words, an agreement for a share of the litigation. Advocates are also expressly forbidden by the Faculty of Advocates from entering into damages-based agreements.[x] The Bill would not change this professional requirement. The Faculty has previously said that it would consider re-visiting this rule if the proposals in the Bill become law.[xi]

---

x See the Faculty of Advocates Guide to Professional Conduct rule 8.3.10.

xi Faculty of Advocates response to the Scottish Government's 2015 consultation.

71. Claims management companies in Scotland are able to offer damages-based agreements. Some firms of solicitors run their own claims management companies to take advantage of this.

Enforceability of damages-based agreements by solicitors

72. The Bill would allow damages-based agreements to be enforced by solicitors (section 2). The Policy Memorandum states that the policy objective of allowing damages-based agreements to be used "is to ensure that litigants have access to a wide choice of funding methods". It notes that claims management companies in Scotland have been offering damages-based agreements for a number of years and that "a significant proportion of litigation is already funded by them with clients attracted by their apparent simplicity." [25]

73. Evidence to the Committee broadly supported the enforceability of damages-based agreements by solicitors. Patrick McGuire, of Thompsons Solicitors, told the Committee that the change would provide simplicity and clarity for practitioners and pursuers. He argued that there is currently an "unlevel playing field" between claims management companies and solicitors which would be addressed by the Bill. [26] Ronnie Conway, of the Association of Personal Injury Lawyers, similarly thought that the Bill was a "substantial improvement" on the current position, noting that "existing rules on speculative fees are byzantine and incapable of being understood by the public". [27]

74. In its written submission, the Law Society of Scotland stated that the enforceability of damages-based agreements was a "positive" change which would allow the public to pursue claims "using a solicitor who they can trust and who works in a regulated environment rather than using claims management companies, which are not". [28] In oral evidence, Kim Leslie told the Committee that the Law Society "welcome the simplicity of a damages-based agreement and hope that it will enable clear communication with the public, so that they can understand what they are getting and what they will pay at the end of the day." [29] Similar views were expressed by the Faculty of Advocates and the Glasgow Bar Association. [29]

75. On the whole, representatives of defenders and insurers thought that the funding of claims via damages-based agreements was a matter for pursuers and their agents. Andrew Lothian, from the Forum of Insurance Lawyers (FOIL), told the Committee that FOIL's members were "comfortable, in principle" with damages-based agreements being available for solicitors, subject to specific concerns around damages for future loss. [30] (Damages for future loss are discussed further below).

76. In its written evidence to the Committee, the Association of British Insurers (ABI) suggested that the use of damages-based agreements could lead to the inflation of damages awards and noted that there were no safeguards in the Bill to address this. [31] However, in oral evidence, Calum McPhail representing the ABI told the Committee that "in principle" the ABI had no objections to damages-based agreements, again subject to concerns about damages for future loss. [32]

77. Other written evidence from defender and insurer representatives highlighted a risk of damages inflation, particularly in the context of damages for future loss. The

issue of damages inflation is therefore explored in further detail in the section on damages for future loss below.

Conflicts of interest

78. As was noted above, no win, no fee agreements, and in particular damages-based agreements, have traditionally been thought to create conflict of interests by giving lawyers a direct interest in the pursuer's damages. As the Policy Memorandum recognises, it was thought that such agreements "could create adverse incentives for lawyers by encouraging them to settle cases early in order to minimise their own costs and increase their profits". [33] The written submission from the Sheriffs' Association noted that acting professionally includes "giving advice without regard to one's own interests". It expressed concern that the Bill might create "an unintended conflict of interest" for solicitors with the professional duties. [34]

79. In his report, Sheriff Principal Taylor, while recommending that damages-based agreements should be enforceable by solicitors in Scotland, observed that such agreements "will not always be the best form of funding for a pursuer". He added that "it will be necessary for the solicitor to fully advise the client on all alternative forms", including legal aid, speculative fee agreements, and legal expenses insurance, and that a solicitor should give reasons for recommending a particular funding option. [35]

80. Sheriff Principal Taylor also recommended that, prior to entering into a damages-based agreement with a client, a lawyer or claims management company should be obliged to write to the client with clear information on a number of matters including the percentage that will be deducted by way of a fee from the damages awarded, and how conflicts of interest would be managed should they arise. [36] Section 7 of the Bill provides that a success fee agreement must be in writing and must set out the basis on which the amount of the success fee is to be determined. Section 7(3) gives Scottish Ministers the power to introduce, by regulation, further requirements on the form and content of success fee agreements.

81. In oral evidence, Professor Paterson told the Committee that damages-based agreements had to be subject to appropriate protections. He suggested that in some cases there may be a need for a client to obtain advice from another solicitor, independent from the client's original solicitor, on the terms of a damages-based agreement, particularly if the agreement covers damages for future loss. He considered that this independent advice would protect both solicitors and clients. [37]

82. The Committee also heard support for a review of the Law Society's Professional Practice Rules and Guidance to address potential and actual conflicts of interest for solicitors acting under damages-based agreements.[xii] The Committee understands that the Law Society has set up a working group to consider professional practice and ethical issues arising from the Bill, including in relation to damages-based agreements.[xiii]

---

xii See e.g. written submission from Maclay Murray & Spens LLP (at paragraph 3) and Brian Castle of the Motor Accident Solicitors Society (Justice Committee, Official Report 19 September 2017, col. 4)

83. If damages-based agreements are to be enforceable by solicitors, the Committee considers that it is important that appropriate safeguards, such as independent advice, are in place to protect pursuers and guard against potential conflicts of interests for solicitors. The Committee welcomes the establishment of a working group at the Law Society of Scotland to consider these issues and requests a time frame for this work.

84. Sheriff Principal Taylor made a number of recommendations aimed at protecting a pursuer whose claim is funded via a damages-based agreement. These included ensuring that a pursuer is advised by their solicitor on all the funding options available to them, and the solicitor gives reasons for recommending a particular funding option. The Committee asks the Scottish Government to ensure that these recommendations are implemented, working with the Law Society where appropriate.

Power to cap success fees

85. Currently, there is no cap on the amount of damages that can be paid by way of a success fee in a damages-based agreement. For speculative fee agreements, a solicitor can charge up to a 100% uplift on their fee.

86. A core aspect of Sheriff Principal Taylor's Report was his recommendation that there should be a cap set on the maximum success fee which can be charged in any speculative fee or damages-based agreement.

87. Sheriff Principal Taylor recommended that this cap be set as a percentage of the damages recovered. For personal injury cases he recommended that this cap should be on a sliding scale as follows:

- 20% on the first £100,000 of damages
- 10% on damages between £100,001 and £500,000
- 2.5% on all damages over £500,000. [38]

88. Should success fee agreements be entered into in employment tribunal cases, Sheriff Principal Taylor recommended that the cap should be 35% of any monetary reward recovered. For all other civil actions it should be 50%. [39]

89. Other parts of the Bill make specific provision in relation to success fee agreements in personal injury actions (discussed further below). Part 2 of the Bill will also restrict the pursuer's liability to pay an award of expenses to their opponent, in a personal injury case, if they lose their claim (discussed further below). The Bill, however, does not make any further provision in relation to employment tribunal cases, or

---

xiii See Professor Paterson (Justice Committee, Official Report 14 November 2017, col. 15) and the Minister for Community Safety and Legal Affairs (Justice Committee, Official Report 21 November 2017, col. 40)

other civil actions. Therefore, the only changes for such actions will be (i) to allow solicitors to enter into damages-based agreements (discussed earlier) and (ii) should the caps recommended by Sheriff Principal Taylor be introduced, to cap the success fee payable under any success fee agreement for employment tribunal cases and other civil actions.

90. Section 4 of the Bill gives Scottish Ministers the power, via secondary legislation, to cap the success fee which may be charged under all forms of success fee agreements. The Bill provides that the current maximum uplift allowed for speculative fee agreements (100%) would be subject to any cap set by regulations under section 4.[xiv]

91. The Policy Memorandum states that the introduction of caps "will provide the clarity and transparency so as to increase the attractiveness of success fee agreement to clients". [40]

Evidence on the power to cap success fees

92. The Committee heard broad support for the introduction of a power to cap success fees. For example, Which? welcomed the proposals as a way of reducing the costs to consumers of using claims management companies. [41]

93. Evidence from defender and insurer representatives noted that it would be important to collect and publish data on the level of damages taken as a success fee on an ongoing basis to ensure that the any caps remain appropriate.[xv]

94. Some evidence suggested, however, that the level of the caps should be specified on the face of the Bill rather than left to secondary legislation.[xvi] Other evidence, including the written submission from the Law Society, suggested it would be helpful if the Scottish Government could clarify whether the caps would be in line with Sheriff Principal Taylor's recommendations. [42]

95. The Policy Memorandum states that that it is "expected" that the power in section 4 will be used to set caps that follow Sheriff Principal's recommendations. [43] This was confirmed by Scottish Government officials at the outset of the Committee's oral evidence sessions on the Bill. [44] It was also reiterated by the Minister when giving closing evidence to the Committee. [45]

96. The Delegated Powers Memorandum explains the reason for the delegated power in section 4 as follows:

---

xiv For example, if regulations under section 4 provided that the success fee could not exceed 20% of damages, a solicitor would be able to charge able to charge a 100% uplift on their fee only to the extent that it is not more than 20% of the client's damages award.

xv See e.g. written submissions from the Association of British Insurers (paragraph 14), the Forum of Insurance Lawyers (paragraph 19), and DWF LLP (paragraph 11).

xvi See e.g. written submission from the Association of British Insurers (paragraph 19), DAC Beachcroft Scotland LLP (paragraph 22), and the Sheriffs' Association (paragraph 5).

> The power will allow Scottish Ministers to deal with new eventualities or to adapt to changing circumstances in relation to success fees in order that the proportion of the success fee will always remain proportionate and predictable. The Scottish Government considers that it would be unduly flexible if the caps could be changed by further primary legislation.
>
> Source: Delegated Powers Memorandum, paragraph 16.

97. The Delegated Powers and Law Reform Committee did not raise any concerns about this delegated power, which will be subject to the affirmative procedure.

98. Sheriff Principal Taylor also told the Committee that it was appropriate that the caps would be placed in secondary legislation. [46]

Possibility of multiple success fees

99. In its written submission, the Association of British Insurers (ABI) suggested that sometimes a client may have to pay two separate success fees from any damages award – one to a claims management company and the other to a solicitor. The ABI argued that the Bill should make express provision to prevent this. [47] A similar point was made by DAC Beachcroft Scotland LLP. [48] Andrew Smith QC, an advocate, also suggested that a solicitor and an advocate could enter into separate agreements for the payment of a success fee thus doubling the amount that would be recovered from the client. He suggested that it be made clear that the cap is an overall cumulative cap on the percentage deducted from a client's damages. [49]

100. In oral evidence, representatives of Thompsons Solicitors, the Association of Personal Injury Lawyers, and the Motor Accident Solicitors Society, told the Committee that they were not aware of any examples of clients being required to pay two separate fees from award of damages – one to a claims management company and one to solicitor. However, they went on to say that if this was a concern it could be addressed in regulations under section 4. [50]

101. Martin Haggarty from claims management company Accident Claims Scotland Ltd also told the Committee that he was also not aware of clients being charged two success fees. He explained:

> We charge success fees only in the instance of cases that we settle without the need for court proceedings. We have a mechanism whereby the solicitor can thereafter take over the litigation aspect of the case, and in recognition of the additional work that the solicitor will have to put in, they take the success fee rather than our keeping it.
>
> Source: Justice Committee, Official Report 14 November 2017, col. 13.

102. However, the Business and Regulatory Impact Assessment prepared by the Scottish Government for the Bill suggests that claims management companies can charge a fee "which is excluded from the 'no win no fee' agreement for referral to a solicitor". [51]

103. The Committee considers that it is unclear from the evidence it heard whether there would be circumstances when a pursuer would have to pay more than one success fee – for example, a separate fee to a claims management company and a solicitor. The Committee seeks confirmation from the Scottish Government whether regulations made under section 4 would ensure that caps would apply to the cumulative total of the success fee.

Success fee agreements in personal injury claims

104. Section 6 of the Bill makes specific provision for success fee agreements for personal injury claims.

Damages for future loss

105. Personal injury claims may contain a claim for compensation for losses and expenses expected to arise in the future. These elements of a claim are referred to as "future loss". Future loss can cover things like lost earnings while an injured person is off work recovering, or travel expenses for expected future hospital appointments. In more serious personal injury cases, it could cover loss of all future earnings, as well as the costs of future care and specialist equipment which may be needed.

106. Where a pursuer has entered into a success fee agreement for a personal injury claim, the Bill allows any damages obtained for future loss to be included when calculating a solicitor's success fee, provided certain conditions are met (see sections 6(4) to (6) of the Bill).

- Firstly, damages for future loss can only be included in the calculation of a success fee if they are to be paid in a lump sum. If damages for future loss are to be paid by way of periodical payments (i.e. by instalments), then the solicitor will not be able to include those damages when calculating their success fee.

- Secondly, if damages for future loss are for a lump sum of more than £1 million, then the Bill provides additional protections. Such damages will only be included if (i) the solicitor has not advised the client to accept periodical payments and (ii) either the court (where damages are awarded by the court) or an independent actuary (where damages are obtained by settlement) has confirmed that it is in the client's best interests that payment be in a lump sum.

107. These provisions in the Bill implement Sheriff Principal Taylor's recommendations. [52] His reasons for recommending that damages for future loss should be included in the calculation of the success fee are set out in detail at paragraphs 92 to 103 of Chapter 9 of his Report. For example, Sheriff Principal Taylor highlighted that the vast majority of personal injury cases do not require a court hearing. Instead, an offer of settlement is made at some stage in the process. This offer may be a general sum, not broken down into different types of loss. Requiring the future care element to be identified – by negotiation between the parties or through the courts – would build in unnecessary work and delay.

108. However, Sheriff Principal Taylor did recognise that some protection was needed for pursuers, particularly where awards for future loss are very large and intended to pay for future care and medical costs. He considered that protection was provided, to an extent, by the fact that he had recommended that the percentage a solicitor could deduct from damages in high value cases (over £500,000) was limited to 2.5%. He accepted there would be an element of future loss in cases where damages are less than £500,000. However, he noted that in most cases where the award is greater than £500,000, the excess over £500,000 will be future loss. He also suggested that very few damages awards would be accurate to 2.5%. Sheriff Principal Taylor therefore concluded:

> From the information before me, the ability of an award of damages to provide future care for an injured pursuer will not be jeopardised by the deduction of 2.5%. On the other hand, by virtue of the proposals which I make in this Chapter, some claimants may be able to pursue an action in court which they may not be able to do under the present funding regimes.
>
> Source: Taylor Review, Chapter 9 paragraph 105.

109. Sheriff Principal Taylor also recommended that damages paid by way of periodical payments should not be included when calculating the success fee (recommendation 63). However, he recognised that this would create a potential conflict of interest for a solicitor, as they would be "significantly better remunerated should the pursuer receive a lump sum". [53] He also noted that pursuers may want a lump sum payment although their best interests would be served by periodical payments. They may also come under pressure from family members to opt for a lump sum.

110. He therefore proposed that, where damages for future loss are paid in a lump sum and exceed £1 million, either a court or an independent actuary must certify that a lump sum is in the client's best interests (recommendation 64). He recommended that the client should meet the actuary outwith the presence of their solicitor (recommendation 65). Finally, he recommended that if the solicitor had advised the client to accept a periodical payment but the client had nonetheless chosen a lump sum, the solicitor could not include that lump sum when calculating their success fee (recommendation 66). This safeguarding mechanism is reflected in section 6(6) of the Bill.

111. The Policy Memorandum notes that responses to the Scottish Government's 2015 consultation were "divided" on Sheriff Principal Taylor's recommendation not to ring-fence damages for future loss when calculating the success fee. However, it goes on to state that it agreed with the view of Sheriff Principal Taylor "that it might not be feasible to separate future to past loss" and that the safeguards recommended by Sheriff Principal Taylor had been included in the Bill. [54]

Evidence on damages for future loss

Arguments in support of ring-fencing damages for future loss

112. Evidence from defender and insurer representatives strongly argued that damages for future loss should be ring-fenced from the calculation of a solicitor's success fee.

They therefore disagreed with the approach taken in the Bill. For example, the Association of British Insurers argued:

> In particularly high value claims this could lead to a significant loss of damages to the pursuer which is meant to pay for their care and support. There is no reason a pursuer's solicitor should benefit from future loss payments when they have carried out no further work to justify such a payment.
>
> Source: Association of British Insurers, written submission, paragraph 18.

113. Similarly, the Forum of Insurance Lawyers (FOIL) stated that damages for future loss:

> are carefully calculated to ensure severely injured pursuers have the care, accommodation and equipment they need for the rest of their lives … To apply a crude percentage deduction from such huge sums could result in an enormous windfall for the solicitor and a funding gap (and significant anxiety) for the injured pursuer.
>
> Source: Forum of Insurance Lawyers, written submission, paragraphs 20-21.

114. FOIL went on to suggest that there was no risk that the pursuer's solicitor would be underpaid by ring-fencing damages for future loss. In particular, it noted that the pursuer's solicitor will recover judicial expenses from the defender, including in some cases an "additional fee". An additional fee is an extra amount in judicial expenses that a judge can award where the case has been particularly complex or time-consuming. FOIL suggested that this additional fee could be a multiple of three or four times the judicial expenses. [55]

115. FOIL also argued that the "complex" safeguarding mechanism proposed in the Bill could be "avoided entirely by ring-fencing future losses". [56]

116. In oral evidence, Andrew Lothian representing FOIL recognised the practical difficulties highlighted by Sheriff Principal Taylor in ring-fencing future losses where a case is settled out of court. However, he suggested that in such cases a threshold could be set, above which no deduction from damages could be made. This would operate as a means of protecting damages which likely have been paid for future loss. Where the award is made by the court, it will be possible to identify future losses and these should be ring-fenced. [57]

117. Defender and insurer representatives also argued that not ring-fencing future loss could lead to damages inflation.[xvii] Calum McPhail of the Association of British Insurers told the Committee that not ring fencing-future losses potentially "raises a driver or an expectation that the pursuer will be aware that an element of their damages is not going to be paid to them and that, therefore, they might seek a higher amount than they would ordinarily." [58]

---

xvii See e.g. written submissions from the Association of British Insurers (paragraph 18), the Forum of Scottish Claims Managers (paragraph 17), Aviva (paragraphs 15-16), Zurich Insurance plc (paragraphs 19-20), and BLM Scotland (paragraphs 9-10).

Arguments against ring-fencing damages for future loss

118. Pursuer representatives, on the other hand, argued against ring-fencing damages for future loss. They suggested that Sheriff Principal Taylor had given careful consideration to the issue. In their view his recommendations, and therefore the Bill, struck the right balance between protecting the pursuer and ensuring that a solicitor is paid fairly for the work involved, including the risk of taking on a high value case on a no win, no fee basis.

119. Patrick McGuire, representing Thompsons Solicitors, told the Committee:

> The overall purpose is to achieve a fair balance with appropriate safeguards for the victim … Solicitors will be paid fairly for the extremely hard work that is put into these extremely trying and difficult high-value cases, but in a way that means that the victim is properly protected. The Bill just strikes that balance correctly.
>
> Source: Justice Committee, Official Report 19 September 2017, col. 8.

120. Brian Castle, of the Motor Accident Solicitors Society, argued:

> The bulk of the work in these big-value cases goes into the claim for future damages and continued care costs. Those are hotly disputed and the vast majority of the solicitor's time examining such cases would be focused on calculating and putting forward the future element. Taylor did not want to discourage solicitors from doing that work or from doing it properly.
>
> Source: Justice Committee, Official Report 19 September 2017, col. 7.

121. Ronnie Conway, of the Association of Personal Injury Lawyers, emphasised that, if Sheriff Principal Taylor's recommended cap of 2.5% applied to damages above £500,000, this would prevent solicitors from being over-rewarded. [59]

122. Moreover, evidence from pursuer representatives argued awards of additional fees were not as common as defender and insurer representatives had suggested. For example, Ronnie Conway suggested that there was not a "great deal of consistency throughout Scotland in the application of additional fees". [60] Brian Castle emphasised that an award of an additional fee was at the discretion of the court and would be the "exception rather than the norm". [61]

123. The Law Society also supported the approach taken in the Bill. In particular, Kim Leslie told the Committee that:

> Frankly, with any future loss, there is always going to be a range. The pursuer is going to have a value for it and the opponent is going to have a value for it, and those are not necessarily going to be the same—it is not a fixed amount; there is always going to be a range. The reality is that the margin between those two figures is unlikely to be as little as 2.5 per cent.
>
> Source: Justice Committee, Official Report 26 September 2017, col. 16.

124. In oral evidence to the Committee, Sheriff Principal Taylor explained his reasons for not ring-fencing future loss:

> I have included future loss in the calculation of the success fee because to do otherwise provides an in-built incentive to solicitors to delay proceedings. The longer someone waits to get their decision, the greater their past loss will be and the smaller the future loss will be. We do not need incentives for delay.
>
> Further, it is usually the tricky cases that proceed to court. Very often, future loss is the sticking point that prevents a settlement from occurring. It is at that point that the solicitor and the lawyer—counsel are usually involved if it is in court at that level—start to earn their corn. I think that they are entitled to be rewarded for that work.
>
> The vast majority of claims settle. They usually settle on a lump sum, because a broad-brush approach is taken to the negotiation. There is no definition of past loss and future loss. If a case settles at the door of the court, you can bet your bottom dollar that there is no consideration of past and future loss—there is just the lump sum that the insurer is prepared to pay, and the pursuer is prepared to accept, in order to get rid of the claim. …
>
> Few if any judges would claim that their awards for future loss are accurate to 2.5 per cent. They are not. Furthermore, few care plans are implemented to the letter, and it is the care plan upon which the future loss is predicated. The care plan ends up not being followed for a whole raft of reasons. Those might be social reasons—the family circumstances change or they have to move house; sometimes, there are medical improvements that make life much simpler for the particular handicap for which an award is being made. The 2.5 per cent is not going to make a material difference to the manner in which a pursuer is cared for post-accident, and one ends up with a balance. It is a loss of 2.5 per cent, but it provides access to justice—97.5 per cent of something is better than 100 per cent of nothing.
>
> Source: Justice Committee, Official Report 31 October 2017, cols. 5-6.

125. On the issue of damages inflation, both pursuer representatives and Sheriff Principal Taylor argued strongly that they did not consider that there was a risk of damages inflation as a result of the proposals in the Bill. Patrick McGuire, of Thompsons Solicitors, told the Committee:

> I will give an absolutely black-and-white, no-holds-barred answer—no, I do not think that there is any prospect of the judiciary somehow deciding to work around the years and years of precedents that set the parameters of damages. There is a very clear basis on which judges look at cases and make awards and they will continue to follow those precedents. I think that the prospect of them taking it upon themselves to increase damages in some sort of noblesse oblige fashion is negligible.
>
> Source: Justice Committee, Official Report 19 September 2017, col. 12.

126. Both Brian Castle from the Motor Accident Solicitors Society and Ronnie Conway from the Association of Personal Injury Lawyers agreed. [62]

127. Sheriff Principal Taylor similarly considered that there was "zero chance of there being damages inflation as a consequence of the proposals". He added that the judiciary knew damages-based agreements were already being used by pursuers,

and therefore that a percentage of damages would go to pay a success fee, but there had not been any inflation of damages to date. [63]

128. This reflects the evidence given to the Committee by Scottish Government officials, who emphasised that the court would be required to award damages-based on the law of damages. [64]

129. In oral evidence to the Committee, the Minister stated that she thought the approach to future loss "struck the right balance", and emphasised that safeguards had been included to protect pursuers. [65]

Practical issues with the Bill's approach to future loss

130. Aside from the question of whether or not damages for future loss should be ring-fenced, evidence to the Committee also raised a number of practical issues about the Bill's approach to future loss. These concerns were raised by both those who thought damages for future loss should be ring-fenced and those who did not.

Periodical payments

131. In particular, evidence questioned how the Bill's proposals would work alongside proposed rules on periodical payment orders. Currently, it is up to the parties to a court action to agree to payments in instalments, rather than a lump sum. In his Report, Sheriff Principal Taylor noted that periodical payments were usually only agreed to in very high value cases (over £2 million) and that these happened rarely. [66] Therefore, while the Bill would protect periodical payments from being included in the calculation of a success fee, in practice this protection would only apply in a small number of cases.

132. The Scottish Government has recently consulted on draft legislation to give courts the power to impose a periodical payment order for damages for future loss. The consultation closed in September 2017. The Law Society commented that the Bill's provisions on future loss needed to run concurrently with these proposed rules, and that clarity was needed on whether the court would have the power to order periodical payments. [67]

133. Simon di Rollo QC, representing the Faculty of Advocates, told the Committee that one of the problems with the Bill was that it required a court to certify whether it is in the client's best interests that damages for future loss be paid by way of a lump sum rather than the periodical payment, but does not itself have the power to order a periodical payment. [68]

134. In her closing evidence, the Minister told the Committee that, as set out in the Scottish Government's Programme for Government 2017-18, a Damages Bill would be brought forward which would contain provision to enable courts to impose periodical payment orders. [69]

Involvement of an actuary

135. The Committee also heard concerns about the safeguarding mechanism provided for in section 6(6) of the Bill, which would require, in high value cases settled out of court, an independent actuary to meet with the client outwith the presence of their solicitor and to certify that a lump sum was in the client's best interests.

136. Simon di Rollo QC told the Committee that the Faculty of Advocates was concerned that "section 6(6) carries with it the statutory suggestion that there is a conflict and that the lawyers cannot be trusted". He added that in such cases a client would invariably have independent advice from an advocate and a financial guardian, and it was not clear "how an independent actuary will be able to assist" . [70] He went on to say:

> The Taylor proposal created a conflict and then sought to resolve it. I suggest that the way around the problem is to avoid the conflict by allowing the solicitor to charge a fee when there is a periodical payment order. That would mean that there was no conflict between a lump sum and a periodical payment order.
>
> Source: Justice Committee, Official Report 26 September 2017, col. 11.

137. In its written submission, the Faculty suggested that "a tapered percentage limit on the total capitalised value of the claim would be the simplest, most straightforward solution". [71]

138. Kim Leslie of the Law Society also questioned whether the involvement of an actuary was "strictly necessary" but said that the Society understood the reasoning behind it and "if the provision gives comfort that there is no taint to the advice, the Law Society will accept it". [72]

139. Evidence to the Committee also highlighted that the Bill did not make clear who would meet the cost of any independent actuary.[xviii]

140. Defender representatives argued that the cost should be borne by the pursuer's solicitor as an expense necessitated by their professional position.[xix] Evidence from Scottish Government officials also suggested that the cost would be borne by the pursuer's solicitor as an outlay. [64] Ronnie Conway of the Association of Personal Injury Lawyers similarly said that he understood that the cost would fall on the pursuer's solicitor. [73] However, Brian Castle from the Motor Accident Solicitors Society argued that the cost should be recoverable from an unsuccessful defender as part of an award of judicial expenses. [73]

141. In oral evidence to the Committee, Sheriff Principal Taylor explained that his proposal to involve an independent actuary "came from the profession": he had heard from one firm of solicitors that sometimes they will send a pursuer to an actuary to obtain advice on whether to accept a lump sum or periodical payment, particularly where the pursuer is being put under pressure from family members to receive a lump sum. He also clarified that the cost of the independent actuary should be paid by the pursuer's solicitor, but did not have a view on whether that

---

xviii See e.g. written submission from the Law Society of Scotland (paragraph 21).
xix See e.g. written submission from Clyde & Co (Scotland) LLP (paragraph 11)

cost should then be recoverable from the defender. Finally, he suggested that the Bill be amended to include a definition of an actuary as a chartered actuary or member of the Institute and Faculty of Actuaries. [74]

Conclusions on damages for future loss

142. The Committee is concerned about the provisions in the Bill which would allow damages for future loss to be included when calculating a solicitor's success fee. The Committee heard that this approach could lead to a reduction in damages available to the pursuer to pay for future care and medical support.

143. The Committee asks the Scottish Government to reflect on this evidence and to reconsider whether damages for future loss should be ring-fenced when calculating a solicitor's success fee.

144. Should damages for future loss not be ring-fenced, then the Committee considers that the court must have the power to make a periodical payment order. The Committee notes that the Scottish Government intends to introduce such a power in its forthcoming Damages Bill. The Committee considers that the provisions of this Bill should not be brought into force until such time as the court has the power to make a periodical payment order.

145. The Committee also has concerns about the proposed safeguarding mechanism in section 6(6) of the Bill, which would necessitate the involvement of an independent actuary. The Committee notes the views expressed by some giving evidence that the inclusion of this mechanism in itself suggests that the independence of a solicitor is compromised by not ring-fencing damages for future loss.

146. Further, it is not clear from the provisions in the Bill who would be responsible for paying for the actuary, although the Committee notes the suggestion that it should be the pursuer's solicitor. Nevertheless, it remains unclear whether the payment could be recovered from an unsuccessful defender as part of an award of judicial expenses. Nor does the Bill provide a definition of an actuary. These matters must be clarified by the Scottish Government.

Other provisions on success fee agreements

147. The Bill contains a number of other provisions that would regulate how success fee agreements operate for civil claims.

Expenses in the event of success

148. Section 3 of the Bill implements Sheriff Principal Taylor’s recommendation that solicitors should not be required to offset any judicial expenses received against their success fee (recommendation 56). In other words, it will enable the solicitor to keep both their success fee and judicial expenses, unless the success fee agreement provides otherwise.

149. Some evidence to the Committee raised concerns about this approach. For example, the Forum of Insurance Lawyers argued that "in some cases the success fee will be very substantial and the pursuer should be given allowance for recovered expenses". [75] The Equality and Human Rights Commission similarly considered that it would be "unreasonable" for a sum to be taken from a pursuer's damages, which are intended to restore the injured party to the position they were in before the injury, in addition to an award of expenses. [76]

150. Concerns were also raised by the Medical and Dental Defence Union of Scotland (MDDUS), which argued that the provision in section 3 meant that existing rules on additional fees needed to be modified. The MDDUS noted that without such modification, a pursuer's solicitor would potentially be entitled to judicial expenses, a success fee, and an additional fee. It argued that "in a case where there are few or inexpensive outlays, this potentially amounts to triple counting and cannot be said to be in the interests of justice". [77]

151. The MDDUS suggested that section 3 be amended to provide that when determining whether to allow an additional fee, the court or the auditor should take account of the extent of any success fee agreement in place. The MDDUS also noted that the Bill was an opportunity to implement Sheriff Principal Taylor's recommendations on additional fees. [77] This included his recommendation that the maximum percentage increase for an additional fee should be 100% (recommendation 9).

152. In his Report, Sheriff Principal Taylor set out a number of reasons for recommending that a solicitor should not have to offset any judicial expenses against the success fee. [78] For example, he noted that this approach provides simplicity and would allow clients to easily compare funding arrangements. He goes on to state:

> Since it will always provide solicitors with greater remuneration than an offsetting model, it may facilitate access to justice for those cases in which solicitors would otherwise have been unwilling to act.
>
> Source: Taylor Review, Chapter 9 paragraph 75.

153. It is also clear that his recommendations on the caps that should apply to success fees took into account his recommendation that there should be no offsetting. [79]

154. In oral evidence to the Committee, Sheriff Principal Taylor noted that there are a number of factors that a court is required to take into account when deciding whether to award an additional fee. He suggested that this should include consideration of the extent to which a pursuer's solicitor is being remunerated by way of a success fee. [80]

155. The Committee considers that there is a need to reform the existing rules on additional fees, particularly in light of the provision in section 3 of the Bill which would allow a solicitor to retain both judicial expenses and any success fee. The Committee agrees with Sheriff Principal Taylor's suggestion that, when deciding whether to award an additional fee, the court should be required to consider the

extent to which a solicitor is being remunerated by way of a success fee. The Committee seeks confirmation that the Scottish Government will take this suggestion forward.

Exclusion for family proceedings

156. Section 5 of Bill would prevent the use of any form of success fee agreement in family actions – such as divorce or child contact cases.

157. Both the Faculty of Advocates [81] and the Law Society [82] noted that speculative fee agreements (where a lawyer gets an uplift in their fees) are currently used (albeit only occasionally) for family proceedings. While they agree that damages-based agreements should not be allowed for family proceedings, they consider that the Bill should be amended to enable speculative fee agreements to continue to be available. The Faculty of Advocates also noted that Sheriff Principal Taylor only recommended an exclusion for family proceedings in the context of damages-based agreements. [83]

158. The Policy Memorandum, at footnote 9 on page 9, states that the Scottish Government concurred with Sheriff Principal Taylor's recommendation and "the Bill excludes family actions from the provisions about damages-based agreements". Further, the Delegated Powers Memorandum notes at paragraph 18 that "the use of success fee agreements in which the success fee is calculated by reference to the amount of damages awarded or settled on is therefore inappropriate in relation to family actions".

159. It is not clear, therefore, whether the Scottish Government's policy intention is for this exclusion to apply to speculative fee agreements, as the Bill currently provides.

160. The Committee heard that speculative fee agreements are sometimes used to fund family actions. It therefore asks the Scottish Government to clarify whether it intended the exclusion for family proceedings in section 5 of the Bill to apply to speculative fee agreements and, if so, its justification for this exclusion.

Power to make further provision

161. As was noted above, section 7 of the Bill provides that a success fee agreement must be in writing (subsection (1)) and must specify the basis on which the amount of the success fee is to be determined (subsection (2)).

162. Section 7(3) contains a delegated power which provides:

> The Scottish Ministers may by regulations make further provision about success fee agreements including in particular provision about—(a) their form and content (including their terms), (b) the manner in which they may be entered into, (c) their modification and termination, (d) the resolution of disputes in relation to such agreements, (e) the consequences of failure to comply with the requirements of subsection (1) or (2) or the regulations.

163. Section 7(4) provides that "regulations under subsection (3) may modify this Part."

164. The Delegated Powers and Law Reform (DPLR) Committee raised concerns about the provision in section 7(4) in its report on the delegated powers in the Bill.

165. The Scottish Government's position, as set out in the Delegated Powers Memorandum at paragraphs 30 to 31, is that section 7 is intended to support the policy intention of enhancing the certainty, predictability and transparency of success fee agreements. It states that details relating to the form and content of success fee agreements may require to be prescribed in more detail than is provided in the Bill. Furthermore, the content of success fee agreements may require regular amendment to deal with new eventualities or to adapt to changing circumstances. Whilst key matters are set out in primary legislation (subsections (1) and (2)) the Scottish Government considers that there should be flexibility to make further detailed provision if that is considered necessary.

166. The DPLR Committee asked the Scottish Government to explain why the power to amend Part 1 of the Bill, as provided for in section 7(4), was necessary and proportionate.

167. In response, the Scottish Government stated that it did not consider that the powers in subsections (3) and (4) were unjustified or unduly wide. It argued that provision made in terms of subsection (4) would be limited to the matters permissible in terms of subsection (3). The Scottish Government also argued that amendments to Part 1 of the Bill may become necessary in the future depending on the experience of the operation of success fee agreements in the years ahead. This would allow the Scottish Government to react to any anomalies or abuses concerning success fee agreements that may emerge and that could hinder the policy objective of certainty, predictability and transparency of success fee agreements.

168. The DPLR Committee was content that, in principle, the power in section 7(3) was necessary to regulate the technical detail relating to success fee agreements. However, it concluded that the "unusually wide scope" of section 7(4), which would allow modification to be made to any section within Part 1 of the Bill relating to success fee agreements, had not been sufficiently justified by the Scottish Government. It recommended:

> Unless specific examples can be provided by the Scottish Government to explain why the modification to Part 1 of the Bill is necessary and proportionate, the Committee cannot see why the power in subsection (3) alone to make further provision about success fee agreements in regulations is insufficient.
>
> Source: Delegated Powers and Law Reform Committee, 52nd Report, 2017 (Session 5): Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at Stage 1, paragraph 28.

169. In oral evidence to this Committee, the Minister was asked to provide such specific examples. She undertook to write to the Committee with further details. [84] By letter dated 23 November, the Minister reiterated the points made in the Scottish Government's response to the DPLR Committee. She added that the DPLR Committee had recognised that those offering success fee agreements may seek to work around the constraints placed on such agreements in Part 1 of the Bill. It was therefore "difficult to predict how and where provision under section 7(3) and (4) might be required in the future". The Minister stated that her officials were, however, exploring whether the power in section 7(4) could be restricted, in light of the DPLR Committee's report.

170. The Committee agrees with the concerns of the Delegated Powers and Law Reform Committee that the provision in section 7(4), which would enable amendments to be made to Part 1 of the Bill by regulations, is "unusually wide" in scope and has not been sufficiently justified by the Scottish Government. The Scottish Government has not yet provided any specific examples as to why this power is necessary and proportionate. If the Scottish Government cannot provide such specific examples, then the Committee calls on the Scottish Government to amend section 7(4).

Expenses in civil litigation

Overview of Part 2 of the Bill and the evidence received

171. While Part 1 of the Bill is concerned with what is paid by a client to their solicitor, Part 2 deals with expenses in civil litigation. In a civil action, one party can be ordered to pay another party's legal expenses. These expenses can cover costs such as lawyers' fees and commissioning expert evidence.

172. The normal rule in a civil action is that "expenses follow success". This means that the losing party pays the winning party's expenses. Section 8 of the Bill introduces qualified one way costs shifting (QOCS) for personal injury claims. Under QOCS, a pursuer is not liable for the defender's expenses if they lose, but can still claim their own expenses from the defender if they win. The introduction of QOCS was a key focus of the Committee's scrutiny of the Bill at Stage 1 and is discussed further below .

173. The Committee also heard considerable evidence on section 10 of the Bill, which makes provision in relation to third party funders. This issue is also discussed in more detail below.

174. Part 2 of the Bill contains two other provisions relating to expenses in civil litigation.

175. Section 9 allows a payment to be made to a designated charity, where expenses have been awarded to a party which has been represented for free (pro bono). A charity will be designated by the Lord President of the Court of Session if it has a charitable purpose of improving access to justice in respect of civil proceedings. The Policy Memorandum, at paragraph 48, gives Citizens Advice Scotland and Justice Scotland as examples of such charities. Most evidence to the Committee did not express a view on section 9, or simply expressed support. The Equality and Human Rights Commission, however, suggested that there may be unintended consequences for providers of free representation. It also argued that any payment should be to a not-for-profit organisation which provides free representation. [85] Paul Brown, representing the Legal Services Agency, told the Committee that there needed to be consultation on which charities would be designated by the Lord President for the purposes of section 9. [86]

176. Both the Sheriffs' Association [87] and the Scottish Courts and Tribunals Service (SCTS) [88] questioned the necessity of the provision in section 9. The SCTS also suggested that there was uncertainty about the approach that would be taken, for example, in calculating any payment to be made. [89]

177. Section 11 gives the court the power to make an award against a legal representative in the proceedings who has committed a serious breach of their duties to the court. Again, most evidence to the Committee did not comment on this provision unless to express support. The Law Society (at paragraph 34), the Equality and Human Rights Commission (at paragraph 15) and Clyde and Co LLP (at paragraph 18) all noted that the power already existed at common law and

questioned the necessity of placing it on a statutory footing. However, the Law Society went on to say that this is "unlikely to be a significant issue for solicitors in practice as this sanction already exists". [90]

Qualified one way costs shifting (QOCS)

The provisions in the Bill

178. As was noted above, section 8 of the Bill introduces qualified one way cost shifting (QOCS) for personal injury claims and appeals, including clinical negligence. Section 8 provides that the court must not make an award of expenses against the pursuer, as long as they have conducted the proceedings "in an appropriate manner".

179. This will mean that a defender in a personal injury court action will not be able to recover their expenses, even if the pursuer loses the action. On the other hand, a successful pursuer will still be able to recover their expenses from the defender.

180. Section 8(4) sets out the tests for considering whether a person has conducted proceedings in an appropriate manner. Under section 8(4), QOCS protection will be lost if the person:

(a) makes a fraudulent representation in connection with the proceedings,

(b) behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

181. Section 8(5) provides that, for the purposes of section 8(4)(a), the standard of proof is the balance of probabilities.

182. Section 8(6) provides that further exceptions to QOCS may be introduced by an act of sederunt.

The justification for introducing QOCS

183. The introduction of QOCS shifting for personal injury litigation was a central recommendation in Sheriff Principal Taylor's Report (see Chapter 8). In the foreword to that Report, Sheriff Principal Taylor suggested that the risk of an adverse award of expenses could operate to prevent access to justice. He considered that QOCS was the best way to address this problem. [91]

184. In particular, Sheriff Principal Taylor considered that there was a "David and Goliath" - or "asymmetric" – relationship between the pursuer and defender in a personal injury action. This was because "defenders in virtually all personal injury actions are, in reality, insurers". [91]

185. The Policy Memorandum accompanying the Bill states that the policy objective for introducing QOCS "is to protect the legitimate pursuer in a civil litigation from the possibility of bearing the defender's costs". [92] It goes on to note that nothing in Part 1 of the Bill limits the potential liability of the unsuccessful pursuer to pay the expenses of the successful defender. This potential liability, it suggests, could deter pursuers "from making use of the courts for a meritorious claim". It also suggests that most defenders in personal injury actions "have the strength of an insurance company behind them". [93]

Evidence on the introduction of QOCS

186. The Committee heard starkly opposing views on the introduction of QOCS.

Arguments in support of introducing QOCS

187. Evidence from pursuer representatives argued that the introduction of QOCS was necessary to facilitate access to justice, as it would ensure that those with a legitimate claim were not put off by the risk of an adverse award of expenses. They suggested that the current expenses system accentuates the "David and Goliath" relationship identified by Sheriff Principal Taylor and that QOCS was necessary to redress the balance between pursuers and defenders.

188. For example, the Association of Personal Injury Lawyers argued that QOCS:

> provides the pursuer with the certainty that he will not be expected to meet the defender's expenses. This addresses directly Taylor's concerns about the 'David and Goliath' situation where an individual with very limited resources, and usually little or no knowledge of the legal system is required to make his case against the defender's insurer, who will always be well-resourced and experienced in personal injury law.
>
> Source: Association of Personal Injury Lawyers, written submission, paragraph 7.

189. In a supplementary written submission, it added that without QOCS there is a "fear factor which permeates litigation and leads to a culture of under settlement". [94]

190. Similar points were made by the Motor Accident Solicitors Society [95] as well as a number of trade unions.[xx] UNISON Scotland, for example, argued that the introduction of QOCS was the "cornerstone" of Sheriff Principal Taylor's Report and would rebalance the scales away from "the financial might of the insurance industry". [96]

---

xx See e.g. written submissions from the STUC (paragraph 6) and Unite Scotland (paragraph 3).

Arguments against introducing QOCS

191. In direct contrast, defender and insurer representatives opposed the introduction of QOCS or, at the very least, thought that additional safeguards would be required to prevent a rise in fraudulent or spurious claims.

192. As was discussed earlier in this report, defender and insurer representatives suggested that there was no evidence of an access to justice problem in Scotland. They argued that this undermined, in particular, the justification for introducing QOCS.[xxi]

193. Of particular concern to defender and insurer representatives was that the introduction of QOCS would facilitate a "compensation culture". Indeed, they argued that QOCS in conjunction with damages-based agreements would remove any risk to pursuers in bringing personal injury actions.

194. The Association of British Insurers argued:

> The measures in the Bill offer no incentive for pursuers or their agents to agree an early settlement in a personal injury claims. Instead, the provisions in the Bill for success fees, damages-based agreements and QOCS make it more attractive to run claims to proof when a pursuer will not need to pay costs if they are unsuccessful.
>
> Source: Association of British Insurers, written submission, paragraph 8.

195. FOIL similarly suggested that the introduction of QOCS:

> will remove a very significant incentive for a pursuer to settle a claim, and will likewise remove a major disincentive against making a dishonest or fraudulent claim.
>
> Source: Forum of Insurance Lawyers, written submission, paragraph 7.

196. The Glasgow Bar Association also argued against the introduction of QOCS, on the basis that:

> Section 8 removes or significantly diminishes the risk faced by someone who is considering bringing a personal injury claim. This may encourage the bringing of weak claims, because a pursuer will have far less to lose if the case does not go his way. That cannot be reasonable or prudent.
>
> Source: Glasgow Bar Association, written submission, paragraph 21.

197. Some evidence suggested that the introduction of QOCS would force defenders to settle actions based on business considerations rather than the merits of the case.[xxii]

198. In a supplementary response, the Association of British Travel Agents (ABTA) drew attention to paragraph 59 of the Financial Memorandum. This states:

---

xxi See e.g. written submissions from DAC Beachcroft Scotland LLP (paragraph 34), the Forum of Insurance Lawyers (paragraph 20), DWF LLP (paragraph 8), the Forum of Scottish Claims Managers (paragraph 12).

xxii See e.g. written submission from the Association of British Travel Agents (paragraph 22).

> The fact that defenders will no longer be able to recoup their expenses from the pursuer may lead to more cases being settled out of court. Defenders will have to balance the cost of going to court with the risk of losing a case. For example, if the expenses in a case exceed the expected payout, insurers may settle rather than go to court even if they consider it likely that they will be successful in the case.
>
> Source: Financial Memorandum, paragraph 59.

199. ABTA argued that the Financial Memorandum

> accepts that the Bill, as drafted, will incentivise settlement of some cases even where there may be no merit to a case. ABTA does not regard this as the basis for good policymaking
>
> Source: Association of British Travel Agents, Supplementary written submission, paragraph 7.

200. The Committee heard that, if QOCS was to be introduced, further safeguards would be necessary. Otherwise, it was argued, the Bill would have a number of adverse consequences including an increase in activity by claims management companies in Scotland (including nuisance calls), a rise in unmeritorious or fraudulent claims, and higher insurance premiums.[xxiii]

201. Suggested safeguards included the regulation of claims management companies, a ban on referral fees (where the solicitor pays a fee, for example to a claims management company, to be referred a case), and the reduction of pursuer's judicial expenses for low value claims.[xxiv] Issues around the regulation of claims management companies and referral fees are discussed in more detail later in this report.

202. This evidence emphasised that similar safeguards had been put in place in England and Wales, where QOCS currently applies to personal injury claims. A supplementary written submission from the Forum of Insurance Lawyers sets out in detail the steps that have been taken in England and Wales to guard against spurious claims.

203. The Association of British Insurers also suggested that the mandatory pre-action protocol for personal injury claims, which currently applies to claims up to the value of £25,000, should be extended to claims up to the value of £100,000 in line with the jurisdiction of the All-Scotland Personal Injury Court. [97] The Medical and Dental Defence Union of Scotland argued that QOCS should not be implemented for clinical negligence cases until a pre-action protocol for clinical negligence cases was introduced. [98]

---

xxiii See e.g. written submissions from the Association of British Insurers (paragraphs 8, 25), the Forum of Insurance Lawyers (paragraphs 7, 33), DWF LLP (paragraphs 6, 14-15).

xxiv See e.g. written submissions from the Forum of Insurance Lawyers (paragraph 34) and DWF LLP (paragraph 16).

Response to the concerns about introducing QOCS

204. Pursuer representatives disputed that the introduction of QOCS would lead to a rise in unmeritorious or fraudulent claims.

205. In a supplementary submission, the Association of Personal Injury Lawyers stated that while the Bill may lead to a slight increase in the level of genuine claims "this will simply mean that people will have access to the courts which they do not have at present, thereby addressing an imbalance in the system". [99]

206. It went on to state:

> Solicitors who take on cases on a 'no win no fee' basis have nothing to gain by bringing unmeritorious claims. If a pursuer's representative loses too many cases he will no longer be able to maintain a business because of the volume of wasted work and the level of financial outlay with no income to offset it.
>
> Source: Association of Personal Injury Lawyers, Supplementary written submission, paragraph 19.

207. A similar argument was made by Patrick McGuire of Thompsons Solicitors when giving evidence to the Committee:

> I do not think that the Bill will lead to an increase in spurious claims. .... The protection is—if I dare say it—us and our colleagues in the profession, because even though the claimant will not at the end of the day lose out and be required to pay legal fees to the other side, we will not pursue spurious claims, because we have a duty to the court.
>
> Source: Justice Committee, Official Report 19 September 2017, col. 20.

208. He added that there is also a "financial imperative":

> Although the claimant will not lose out, we most certainly would if a claim were spurious, because we would have wasted our money and our time. Running a spurious case might involve court fees, expert fees, fees for reports and so on, which we would simply lose.
>
> Source: Justice Committee, Official Report 19 September 2017, col. 21.

209. He also argued that if there were more claims, the "vast majority are likely to be meritorious. If they increase, that is a good thing. That is what the Bill is there to do and that is what we should encourage". [100]

210. Pursuer representatives suggested there were sufficient safeguards in the Bill to prevent an increase in spurious claims, particularly as QOCS protection would be lost if the pursuer brought a fraudulent claim. [101]

211. These safeguards were emphasised by other witnesses, including Paul Brown of the Legal Services Agency, and Professor Alan Paterson, who considered that this would protect against spurious claims. [102] The evidence the Committee heard from claims management companies also disputed that there would be a sudden rise in claims as a result of the Bill. [103]

212. Sheriff Principal Taylor also told the Committee that he did not think the Bill would lead to more frivolous claims being brought. This was because solicitors would be

liable for their own costs and outlays, with little prospect of recovery. Further, he emphasised that the court had the power to summarily dismiss actions brought without merit. [104]

213. The Policy Memorandum accompanying the Bill responds to any suggested risk of a rise in fraudulent or unmeritorious claims as follows:

> The Scottish Government considers that the introduction of pre-action protocols for claims of under £25,000 in the sheriff court as well as the risk assessment by a solicitor when considered whether to act in a case will be mitigating factors. The provision in the Bill setting out the circumstances where the benefit of QOCS would be lost will be an additional safeguard.
>
> Source: Policy Memorandum, paragraph 46.

214. In closing evidence to the Committee, the Minister reiterated these points, noting that it would be open to the Scottish Civil Justice Council to extend the mandatory pre-action protocol. [69]

Conclusions on the introduction of QOCS

215. On balance, the Committee is persuaded that the introduction of qualified one way costs shifting (QOCS) could improve access to justice for pursuers. However, the Committee notes concerns that this could have unintended consequences including a rise in unmeritorious and fraudulent claims.

216. It is important that sufficient safeguards are in place to prevent such consequences. Recommendations relating to the regulation of claims management companies and a ban on referral fees are discussed later in the report. The Committee asks to the Scottish Government to consider other safeguards, such as extending the mandatory pre-action protocol for personal injury claims to £100,000 (to reflect the current jurisdiction of the All-Scotland Personal Injury Court), and the introduction of a pre-action protocol for clinical negligence cases.

217. The Committee also asks the Scottish Government to commit to post-legislative scrutiny of the Bill (within five years of its provisions coming into force), in particular to review the impact of introducing QOCS.

Uninsured defenders

218. The Committee heard specific concerns about the application of QOCS in cases where there is no “David and Goliath” relationship between the pursuer and defender.

219. For example, in its written submission, the Faculty of Advocates stated that it was

> concerned at the lack of protection for defenders who are uninsured and of limited means – the "David v David" (rather than "David v Goliath") scenario … this could result in such persons being held to ransom if they have no prospect of recovering the cost of a successful defence.
>
> Source: Faculty of Advocates, written submission, paragraph 14.

220. The Faculty suggested that QOCS should only be available in claims against public bodies and insured defenders. [105]

221. The Forum of Insurance Lawyers similarly suggested that not all defenders would be insured. It added that "many pursuers enjoy the support of a well-funded accident management company or solicitors' firm standing behind them, acting on a no-win no-fee basis". It therefore considered that QOCS should only apply where the defender is a public body or is insured in respect of the claim. [106]

222. The Glasgow Bar Association also argued that not all defenders will wish to rely on insurance, for example, because the value of the claim is low relative to the policy excess. [107] In oral evidence, Andrew Stevenson told the Committee that QOCS was predicated on everyone having insurance but that was "simply not the case". He argued that if QOCS was not restricted to situations where the defender has insurance covering the litigation then it will give rise to unfairness. [108]

223. The Association of British Travel Agents emphasised that, in the travel industry, the vast majority of claims would not be backed by insurance as larger tour operators often had significant deductible values (excesses) within their insurance policies. [109]

224. There was some debate as to the likelihood of a pursuer bringing a claim against an uninsured defender. For example, Patrick McGuire of Thompsons Solicitors told the Committee:

> The scenario in which any of us, or any of our colleagues in the profession, would bring a personal injury claim against an ordinary person is virtually impossible. It is very unlikely because we have to be conscious of the fact that if we are successful, our clients must be able to get the money to which the court says they are entitled.
>
> Source: Justice Committee, Official Report 19 September 2017, col. 19.

225. Ronnie Conway, representing the Association of Personal Injury Lawyers, added that the Bill should not be legislating for "fanciful examples" but should reflect "the litigation landscape as it is". [110]

226. Kim Leslie, representing the Law Society , suggested that "it is not impossible for a case to arise where someone is suing an individual". However, she went on to say that the primary consideration would be whether that individual would be able to pay out should the case be successful. [111]

227. Simon di Rollo QC, representing the Faculty of Advocates, told the Committee that cases against an uninsured individual would be rare but they did occur "from time to time". He noted that the Bill could place similar restrictions on QOCS as are

provided for in rules on provisional damages – so that QOCS would only be available where the defender is insured in respect of the claim or has the backing of the Motor Insurer's Bureau, is a public authority, or has the means and resources to enable them to make a payment of expenses. [112]

228. Andrew Stevenson of the Glasgow Bar Association suggested that an alternative approach to QOCS would be to mirror the approach used when making an award of expenses against a person receiving legal aid. This is that the liability of a legally assisted person "shall not exceed the amount (if any) which in the opinion of the court or tribunal making the award is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute" (section 18(2) of the Legal Aid (Scotland) Act 1986). He argued that this test is well understood and works in a fair way. [113]

229. Sheriff Principal Taylor, however, argued that restricting QOCS to insured defenders could risk parties deciding not to insure themselves when they ought to, or taking on a much higher excess. He also emphasised that proceedings would not be brought against a defender who is "a man of straw" (i.e. a person without adequate means to pay any compensation). He considered that a scenario in which a claim would be brought against an uninsured defender (for example, because they had considerable assets), while not impossible, was "de minimis". [114]

230. The Minister emphasised that the fundamental purpose of QOCS was to provide "predictability to the cost equation for a person who is considering taking an action and enforcing their rights". [115]

231. A number of defender and insurer representatives also argued that QOCS should not apply where the pursuer has the financial support of a third party, including a solicitor acting under a success fee agreement. This point is related to section 10 of the Bill on third party funders and is discussed further below.

232. The Committee notes the concerns it heard about the application of qualified one way costs shifting (QOCS) where there is no "David and Goliath" relationship between the pursuer and defender. The Committee heard different suggestions as to how these concerns could be resolved, including by restricting the application of QOCS to insured defenders or public bodies, or by applying the same approach to awards of expenses as is used when a person is in receipt of legal aid. The Committee asks the Scottish Government to consider and respond to these suggestions.

Tests to lose QOCS protection

233. Section 8(4) of the Bill provides for three circumstances in which a pursuer will be considered not to have conducted proceedings appropriately and therefore lose QOCS protection. The Committee heard from pursuer, defender and insurer representatives that the tests set out in the Bill were insufficiently clear and would result in satellite litigation.[xxv]

234. However, on the question of whether the threshold for losing QOCS protection was set at the right level, pursuer and defender and insurer representatives were once again divided.

235. Pursuer representatives thought that the bar was set too low and would result in too many people losing QOCS protection. The Association of Personal Injury Lawyers, for example, argued that the current drafting of section 8(4) would "dilute" Sheriff Principal Taylor's recommendation "that losing the protection of QOCS should be the exception rather than the rule". [116]

236. Thompsons Solicitors emphasised the need for certainty:

> If a pursuer does not have confidence that the bar is set sufficiently high, the current levels of litigation and therefore access to justice will remain the same.
>
> Source: Thompsons Solicitors, written submission, paragraph 10.

237. Similar arguments were made by a number of trade unions.[xxvi]

238. The Law Society also considered that "QOCS was proposed as a means of increasing certainty for parties and that the number of exceptions to that general principle should be minor". [117]

239. In particular, this evidence suggested that the tests in section 8(4)(a)[xxvii] and 8(4)(b)[xxviii] did not reflect Sheriff Principal Taylor's recommendations.

240. In stark contrast, defender and insurer representatives suggested that the current drafting of section 8(4) set the bar too high and would not, for example, deter unmeritorious claims.[xxix]

The test in section 8(4)(a)

241. Pursuer representatives and trade unions argued section 8(4)(a) should be amended to ensure that QOCS protection was only lost where the fraudulent representation related to a material matter, as opposed to something incidental or peripheral to the proceedings.[xxx] For example, Thompsons Solicitors suggested:

---

xxv Further court action which flows from an initial case – for example, about who is liable to pay legal expenses.

xxvi See e.g. written submissions from Usdaw (paragraphs 6-7), UNISON Scotland (paragraph 9), the FBU (paragraphs 8-9), Unite Scotland (paragraph 7), ASLEF (paragraph 5).

xxvii Section 8(4)(a) provides that QOCS protection will be lost where a person "makes a fraudulent representation in connection with the proceedings".

xxviii Section 8(4)(b) provides that QOCS protection will be lost where a person "behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings".

xxix See e.g. written submissions from the Association of British Insurers (paragraph 26), the Forum of Scottish Claims Managers (paragraph 20), Zurich Insurance plc (paragraph 24), the Forum of Insurance Lawyers (paragraph 42).

xxx See e.g. written submissions from the Association of Personal Injury Lawyers (paragraph 12), the Motor Accident Solicitors Society (paragraph 16), the STUC (paragraph 14), Usdaw (paragraph 8), the FBU (paragraph 11), BFAWU (paragraph 8).

> The drafting is such that the bar for removing the protection of QOCS could be very low indeed … a single comment or representation in an otherwise meritorious case could result in the removal of QOCS. Representations relating to matters quite peripheral to the main subject matter of the litigation could also result in the removal of the protection of QOCS.
>
> Source: Thompsons Solicitors, written submission, paragraph 15.

242. The Fire Brigades' Union argued that the current drafting of section 8(4)(a) would mean that a pursuer could "over egg" a part of their claim "in relation to a fairly peripheral issue and the benefit of QOCS could be removed. That test is far too low ... the benefit of QOCS should only be removed if there is fraudulent conduct on the part of the claimant that is both material and goes to the heart of the case". [118]

243. The Faculty of Advocates suggested that QOCS protection should only be lost where the pursuer had "conducted the proceedings fraudulently". [119] Kim Leslie, representing the Law Society, suggested that section 8(4)(a) could be amended to read "makes a materially fraudulent representation which is designed to materially increase the value of the claim". [120]

244. Defender and insurer respondents, on the other hand, suggested replacing the test of "fraudulent representation" with one of "fundamental dishonesty", as is used in England and Wales. They argued that test this was already well understood.[xxxi]

245. The Forum of Insurance Lawyers (FOIL) also argued that the test in section 8(4)(a) needed to be amended to make it clear that it covered any fraudulent representation made prior to litigation. [121] In oral evidence, Andrew Lothian representing FOIL noted that section 8(4)(a) related to fraud in connection with the proceedings. He argued:

> Given that the majority of claims never reach court, that test should perhaps relate to claims rather than proceedings; otherwise, there will be no incentive for people to tell the truth in the majority of cases that are never litigated.
>
> Source: Justice Committee, Official Report 26 September 2017, col. 41.

246. In a supplementary submission, the Association of British Insurers (ABI) stated that it did not agree with pursuer representatives that fraudulent representations should be restricted to "material fraud" and exclude other fraudulent elements of a claim. The ABI argued that "pursuers should not benefit or be protected if any element of fraud exists in their claim". [122]

247. Sheriff Principal Taylor told the Committee that, in his view, section 8(4)(a) did not implement his recommendations . He suggested that it be amended to provide that QOCS protection would be lost where the pursuer "has acted fraudulently in connection with the proceedings". His concern was that "fraudulent representation"

---

xxxi See e.g. written submissions from the Association of British Insurers (paragraph 27), the Forum of Insurance Lawyers (paragraph 42), the Forum of Scottish Claims Managers (paragraph 21), DAC Beachcroft Scotland LLP (paragraph 40), Clyde & Co (Scotland) LLP (paragraph 13), Brodies LLP (paragraph 19).

may limit the test to only what the pursuer had said, rather than any other form of fraud. [123]

The test in section 8(4)(b)

248. Pursuer and trade union representatives argued that section 8(4)(b) should be amended to properly reflect the Wednesbury unreasonableness test, as recommended by Sheriff Principal Taylor (recommendation 54). Wednesbury unreasonableness refers to a decision so unreasonable that no reasonable person could have reached it.[xxxii] Pursuer and trade union representatives considered that the test in section 8(4)(b) creates a much lower standard at which behaviour will be judged unreasonable.[xxxiii]

249. The Faculty of Advocates suggested that the section 8(4)(b) could reflect the Wednesbury unreasonableness test by providing that a pursuer would lose QOCS protection "if in the opinion of the court that person's behaviour is so manifestly unreasonable that it would be just and equitable to make an award of expenses against him". [124]

250. Some defender and insurer respondents, including the Association of British Insurers, [125] suggested that the Bill would benefit from greater clarity as to the standards of behaviour expected.

251. As with section 8(4)(a), Sheriff Principal Taylor did not think the test in section 8(4)(b) implemented his recommendations. He suggested similar wording as the Faculty of Advocates, so that QOCS protection would be lost "if, in the opinion of the court, the pursuer's decision to raise proceedings, or their subsequent conduct, is so manifestly unreasonable that it would be just and equitable to make an award of expenses against the pursuer". [123]

Tenders

252. The Committee heard concern that the provisions in the Bill on QOCS did not take account of the tender process.

253. At present it is possible for either side in a personal injury action to offer a sum in writing to settle the claim. This is known as a tender. Where a pursuer does not accept a defender's tender, they must beat the offer at the conclusion of the action. Otherwise, they will be liable for the defender's judicial expenses from the date of the offer. The tender process is seen as encouraging the early settlement of claims.

254. Sheriff Principal Taylor made recommendations about the tender process and QOCS. These recommendations were complex, in that they depended on how the law developed in this area.[xxxiv] To simplify, he recommended that a pursuer should

---

xxxii *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

xxxiii See e.g. written submissions from Thompsons Solicitors (paragraph 19), STUC (paragraph 15), Usdaw (paragraph 9), FBU (paragraphs 12,14), BFAWU (paragraph 9).

lose QOCS protection from the date of a tender if they failed to beat it. However, their liability for the defender's expenses should be limited to 75% of their compensation award.

255. The Association of British Insurers argued that if QOCS protection was not lost where a pursuer fails to beat a defender's tender, this would "seriously undermine" the tender process. [126] The Forum of Insurance Lawyers added that this would mean a "dilution of the current incentive to resolve cases early to the benefit of both parties and the court system". [127] Similar points were made in several other written submissions to the Committee.[xxxv]

256. Scottish Government officials told the Committee that the intention was to deal with the issue of tenders through court rules [128] (section 8(6) of the Bill would allow an act of sederunt to be made to add further exceptions to QOCS). However, a number of witnesses, including representatives of the Law Society and the Glasgow Bar Association, suggested that some provision relating to tenders should be on the face of the Bill. [129]

257. In a supplementary written submission FOIL stated:

> It may be that the Scottish Government intends that the Scottish Civil Justice Council should consider this matter, but as this was a recommendation in the Taylor Report upon which the recommendation to implement QOCS was predicated, we would expect to see it in the Bill, especially when any decision on this matter by the Scottish Civil Justice Council is presently unknown.
>
> Source: Forum of Insurance Lawyers, Supplementary written submission, paragraph 7.

258. Sheriff Principal Taylor told the Committee that he thought it was appropriate for the detail of his recommendations on tenders to be dealt with via court rules. However, he said that "one line could be added to the Bill" which would provide that QOCS protection would be lost where the person fails to beat a tender. [130]

Summary dismissal

259. Some evidence to the Committee suggested that section 8(4) should be amended to provide that QOCS protection would be lost when the pursuer's case was summarily dismissed by the court.[xxxvi] A case may be summarily dismissed if it seems improbable that it will succeed – for example if there is a lack of evidence for the claims it contains.

---

xxxiv See recommendation 50 and paragraphs 66, 72 of Chapter 8.

xxxv See e.g. written submissions from Medical and Dental Defence Union of Scotland (paragraph 17), DAC Beachcroft Scotland LLP (paragraph 39), Brodies LLP (paragraph 26), Clyde & Co (Scotland) LLP (paragraph 13), BLM Scotland (paragraph 12), Andrew Smith QC (paragraph 70).

xxxvi See e.g. written submissions from Medical and Dental Defence Union of Scotland (paragraph 23), BLM Scotland (paragraph 12), Association of British Insurers (paragraph 25), Maclay Murray & Spens LLP (paragraph 9).

260. Sheriff Principal Taylor recommended that QOCS protection should be lost in such circumstances (recommendation 53). In oral evidence to the Committee, he said that he would add provision in section 8(4) to make it clear that QOCS protection would be lost where a case was summarily dismissed. He suggested this would be a key protection against frivolous claims being brought. [104]

Scottish Government response to the evidence on the tests to lose QOCS protection

261. The Minister told the Committee that the Scottish Government was considering amendments to section 8 in light of the evidence received. She accepted that clarity could be improved. While she could not give detail on the amendments proposed, she stated that their "general thrust" would be to implement Sheriff Principal Taylor's recommendations. This included giving consideration to his recommendation on summary dismissal. [131]

262. On the issue of tenders, the Minister stated:

> Tenders are normally dealt with as a matter of court rules. I understand that the costs and funding committee of the Scottish Civil Justice Council has been reflecting on the matter … we will be interested to see what it proposes
>
> Source: Justice Committee, Official Report 21 November 2017, col. 43

Conclusions on the tests to lose QOCS protection

263. The Committee heard a range of concerns about the drafting of section 8(4) of the Bill, which sets out the circumstances in which a pursuer will lose the protection of qualified one way costs shifting (QOCS). The Committee therefore welcomes the Scottish Government's commitment to amend this provision to ensure greater clarity.

264. The Committee asks the Scottish Government to ensure that these amendments properly reflect Sheriff Principal Taylor's recommendations and take into account his suggestions in oral evidence to the Committee as to how sections 8(4)(a) and 8(4)(b) should be drafted. This includes amending section 8(4)(b) to reflect the test of Wednesbury unreasonableness. The Committee also notes the suggestion made by the Forum of Insurance Lawyers that the test in section 8(4)(a) should relate to claims rather than proceedings, in order to cover the majority of claims which are never litigated in court.

265. The Committee also considers that provision should be added to section 8(4) to make clear that QOCS protection will be lost where (i) a pursuer fails to beat a defender's tender and (ii) a pursuer's claim is summarily dismissed. Again, such provision would be in line with Sheriff Principal Taylor's recommendations and his evidence to the Committee.

Third party funding

266. In civil litigation, a third party with no pre-existing interest in the litigation can provide funding for that litigation, usually for a share of any compensation recovered.

267. Section 10 of the Bill makes provision in respect of third party funding of civil litigation. It applies "where a party to civil proceedings receives financial assistance in respect of the proceedings from another person (whether directly or through an intermediary) who is not a party to the proceedings but has a financial interest in respect of the outcome of the proceedings ("the funder")".

268. Section 10 of the Bill does two things:

- it allows the court to make an award of expenses against "the funder and any intermediary" (section 10(3)); and
- it requires a party receiving financial assistance to disclose to the court the identity of the funder, the nature of the assistance being provided and, once the issues in dispute have been decided, the funder's financial interest.

Who would be caught by the definition of a funder?

269. The Policy Memorandum states that the Bill "will make provision for commercial third party funders of civil litigations to be liable for judicial expenses with the funded litigant". [132]

270. However, the Committee heard evidence that, as currently drafted, the Bill could catch a wide variety of funding arrangements including: trade union funding, insurers, solicitors and claims management companies offering success fee agreements, or solicitors paying for the cost of outlays. This would make them potentially liable for an award of expenses.

271. Pursuer and trade union representatives argued that the Bill conflated two separate recommendations from Sheriff Principal Taylor's Report: that a "professional funder" should be potentially liable for the judicial expenses of the opposing party (recommendation 77); and that all parties in civil litigation should disclose the means by which the litigation is being funded (recommendation 78).

272. The Association of Personal Injury Lawyers suggested that this meant that there was a "very real danger" that trade unions, as well as pursuers' solicitors acting under damages-based agreements, could be liable for defenders' judicial expenses "when this was never Taylor's intention". [133] It argued that this "completely contradicts the purpose of QOCS and profoundly undermines the purpose of the Bill". [134] The Motor Accident Solicitors Society also argued that "the practical effect of such an interpretation would be that QOCS would not be available to pursuers in the vast majority of cases" and that "cannot be compatible" with the declared aims of the Bill to increase access to justice. [135]

273. The Law Society similarly considered that the current drafting of section 10 could mean that QOCS would "almost never apply" and called for "a more specific and accurate definition of "funder". In particular, the Law Society thought the definition should exclude solicitors and after the event insurers. [136] In oral evidence, Kim

Leslie representing the Law Society suggested that if solicitors offering damages-based agreements were caught by the definition of funder, this could put them off taking cases. [137]

274. Evidence from trade unions argued that section 10 should be amended to make it clear that the power to award expenses against third party funders did not apply to trade union funded litigation. The STUC, for example, stated:

> The use of the words "financial interest in respect of the outcome of the proceedings" in section 10(1) of the Bill may be sufficient to ensure that Trades Union funding is not caught by section 10. However, if it is the intention of the Scottish Government to exclude trade union funding from the provisions then we would submit that that should be stated expressly on the face of the Bill.
>
> Source: STUC, written submission, paragraph 16.

275. Similar points were made in all the other written submissions from trade unions.

276. Both the Law Society [138] and the Family Law Association [139] also suggested that family proceedings should be excluded from section 10. The written submission from the Family Law Association appears to suggest that this exclusion should also apply to the disclosure requirements. [140]

277. Defender and insurer representatives appeared to accept that the power to award expenses against a "funder" should not include trade unions, who do not act under damages-based agreements and therefore do not take a proportion of their members' damages in successful cases. [141]

278. However, they argued that it should include solicitors or claims management companies offering damages-based agreements. The Forum for Insurance Lawyers, for example, argued:

> The Financial Memorandum states at paragraph 67: "This would include success fee agreements provided by claims management companies". This should be reflected clearly in the Bill. It should be made clear that any third party which enters into a success fee agreement or a damages-based agreement with the pursuer is both providing "financial assistance" and has a "financial interest" in the proceedings. For the avoidance of doubt, "financial assistance" should be defined to include deferring payment of a fee, agreeing not to charge a fee if the claim is unsuccessful, or upfront payment of any outlays (which in effect are a loan to the pursuer). All of these constitute a third party providing financial assistance to a pursuer. Where a pursuer is backed by a third party in this way, and a defender is backed by an insurance company, it is not equitable or proportionate for one party to enjoy the benefit of QOCS while the other does not.
>
> Source: Forum of Insurance Lawyers, written submission, paragraph 45.

279. FOIL went on to suggest that, in addition to being included in the Bill as a stand-alone provision in section 10, third party funding should be an exception to QOCS and part of section 8. [142]

280. DAC Beachcroft Scotland LLP similarly suggested that where a pursuer discloses that they are in receipt of third party funding, as envisaged in section 10 of the Bill, QOCS protection in section 8 should not apply. It stated:

> We can see no reason in principle why an external funder such as another insurer, whether before or after the event, or the funds of a claims management company, including those operated by or behalf of firms of solicitors, should not be liable for a successful defender's expenses.
>
> Source: DAC Beachcroft Scotland LLP, written submission, paragraph 38.

281. When this issue was raised with Sheriff Principal Taylor, he stated that his intention was that "only the venture capitalist that comes in to fund a commercial action could find itself liable for the adverse costs in a litigation. A trade union should not be caught and neither should a solicitor who provides a damages-based agreement". He agreed that the description at paragraph 57 of Chapter 11 of his Report – "a funder, motivated by a desire to make a profit, who effectively purchases a stake in the outcome of the litigation" – would capture that point. [143]

282. Sheriff Principal Taylor also confirmed that he intended the requirement to disclose how an action is being funded to apply to all parties to a civil court action, and not just third party funders. [144]

283. In closing evidence, the Minister told the Committee that the Scottish Government would lodge amendments at Stage 2 to address the issues that had been raised. On trade unions, the Minister considered that they would not be caught by the current drafting of the Bill but said that the Government would reflect further on the points made. She also acknowledged that there was "an obvious lack of clarity in the Bill in respect of legal service providers" which would be looked at. The Minister went on to say:

> It is absolutely not the Government's intention to catch trade unions or legal service providers in the third-party funding provisions. We want to ensure that the provisions will apply only to venture capitalist and commercial third-party funders
>
> Source: Justice Committee, Official Report 21 November 2017, col. 47.

284. The Minister also told the Committee that she was aware of the concern that section 10 of the Bill conflated two separate recommendations from Sheriff Principal Taylor's Report. She said that the Government "hoped to make it absolutely clear" that the disclosure requirements applied to all funders, whereas liability for expenses applied only to the commercial funders or venture capitalists. [145]

285. The Committee welcomes the Scottish Government's commitment to address the concerns it has heard about the current drafting of section 10. It is important that the Bill provides a more specific and accurate definition of the third party funders that will be potentially liable for an award of expenses.

286. The Committee also considers that the Bill should explicitly provide that the power to award expenses against third party funders does not apply to (i) trade

unions and staff associations and (ii) solicitors acting under a success fee agreement.

287. The Committee also welcomes the Scottish Government's commitment to address the drafting of section 10 so that it is clear that the requirements on all parties to disclose the details of how the action is being funded are separate from the power to make an award of expenses against third party funders.

Regulation of claims management companies

288. As was noted earlier in the report, claims management companies are currently able to offer damages-based agreements whereas solicitors are not. As a result, the Policy Memorandum notes that activities of claims management companies have become more common in Scotland. [146] Solicitors have also set up their own claims management companies in order to offer damages-based agreements.

289. Claims management companies are therefore a central part of the civil litigation landscape in Scotland. Indeed, in his evidence to the Committee, Sheriff Principal Taylor suggested that the recent rise in the number of personal injury claims in Scotland (as discussed earlier), could be attributable to the popularity of damages-based agreements offered by claims management companies. [147] The Committee also heard evidence that, in the last 18 months, 16 new claims management companies in Scotland had registered with Companies House. [141]

290. Nonetheless, currently claims management companies are not regulated in Scotland. This contrasts with the position in England and Wales, where claims management companies have been regulated by the Ministry of Justice (via the Claims Management Regulator) since 2007.

291. In his Report, Sheriff Principal Taylor recommended that there should be a regulator for claims management companies in Scotland (recommendation 85). However, this is not provided for in the Bill. In the Policy Memorandum (at paragraph 11), the Scottish Government stated that the regulation of claims management companies would be considered as part of an ongoing review of the regulation of legal services. This review, which is being chaired by Esther Roberton, is due to report in summer 2018.

Developments during the course of the Committee's scrutiny of the Bill

292. From the outset of the Committee's scrutiny of the Bill at Stage 1, it was clear that there was significant concern about the continuing lack of regulation of claims management companies in Scotland. In particular, evidence from defender and insurer representatives argued that there would be considerable risks in proceeding with the Bill in the absence of such regulation. They considered that the Bill, particularly the introduction of QOCS, would make Scotland a more attractive market for claims management companies. For example, the Association of British Insurers commented that, without regulation, one likely outcome of the Bill would be that claims management companies would increase their activities in Scotland, including nuisance calls. [148]

293. This evidence also emphasised that any delay in regulating claims management companies, for example while awaiting the outcome of Esther Roberton's review and any subsequent legislation, would disadvantage Scottish consumers. [149] Others, such as Brodies LLP, [150] explicitly argued that the provisions in the Bill

should not be brought into force until such time as claims management companies were regulated.

294. On the other hand, while supportive of the regulation of claims management companies, representatives from the Law Society, [120] Thompsons Solicitors and the Association of Personal Injury Lawyers [151] thought that the implementation of the Bill should not be delayed until regulation was in place.

295. It was also suggested to the Committee that the provisions in the Bill, which would allow solicitors to enforce damages-based agreements, would mean that claims management companies would "wither on the vine". [152] Indeed, Sheriff Principal Taylor told the Committee:

> I actually think that most claims management companies in Scotland will disappear, because the vast majority are simply fictions – they are firms of solicitors who have set up their own tame claims management company.
>
> Source: Justice Committee, Official Report 31 October 2017, col. 14.

296. This was disputed by other evidence, including by Andrew Lothian from the Forum of Insurance Lawyers who said that:

> Until such companies are regulated, the opposite will be the case … The Bill will put solicitors on a level playing field with claims management companies only after such companies are regulated. Until that time, there is no level playing field and therefore no reason why such companies should wither on the vine.
>
> Source: Justice Committee, Official Report 26 September 2017, col. 43.

Financial Guidance and Claims Bill

297. At the same time as the Committee was undertaking its scrutiny of the Bill, the Financial Guidance and Claims Bill was being considered by the UK Parliament. This Bill would strengthen the regulatory regime for claims management companies in England and Wales, by transferring responsibility for regulation to the Financial Conduct Authority.

298. The Committee heard that the strengthening of claims management company regulation in England and Wales made the concerns about the absence of regulation in Scotland even more pertinent. [148]

299. At the Committee's meeting on 26 September 2017, Andrew Lothian of the Forum of Insurance Lawyers suggested that, to address these concerns, claims management companies in Scotland could be regulated through an appropriate amendment to the Financial Guidance and Claims Bill. [153]

300. The Committee therefore wrote to the Minister to ask whether the Scottish Government would consider such an amendment.

301. On 16 October 2017, the Minister replied stating that the Scottish Government now believed that it should pursue the possibility that regulation might be achieved, "at least on an interim basis", through an appropriate amendment to the Financial Guidance and Claims Bill.

302. On 20 November 2017, the Minister informed the Committee that amendments to the Financial Guidance and Claims Bill, as agreed with the Scottish Government, were laid on 14 November 2017 which would extend regulation of claims management companies by the Financial Conduct Authority to Scotland. These amendments were agreed to in the House of Lords on 21 November 2017. At the time of publication of this report, the Financial Guidance and Claims Bill has completed its passage through the House of Lords, and had its First Reading in the House of Commons on 22 November 2017.

303. The Committee subsequently heard strong support for these developments. For example, Thomas Docherty, representing Which? told the Committee that ensuring that the same rules operate in Scotland as in England and Wales "would go a huge way towards solving the problem" posed by the operation of claims management companies. [154] Professor Alan Paterson also suggested that the "argument for UK-wide regulation sounds quite strong". [155]

304. The written submission from Which? emphasised:

> It is important that changes to adequately protect Scottish consumers are introduced on a permanent rather than interim basis, and the regulatory framework is mirrored across the UK in the long term.
>
> Source: Which?, written submission, page 5.

305. Both George Clark, of Quantum Claims, and Martin Haggarty, of Accident Claims Scotland Ltd, also told the Committee that they supported regulation of claims management companies in Scotland. [156]

The timing of regulation

306. Assuming that both the Civil Litigation Bill and the UK Financial Guidance and Claims Bill are passed by the respective Scottish and UK Parliaments, there is the possibility that the Civil Litigation Bill's provisions will be implemented before any regulation of claims management companies in Scotland is in place.

307. Thus there remains the potential for a regulatory gap. This was acknowledged by the Minister when giving closing evidence to the Committee, as the timing of secondary legislation required under the Financial Guidance and Claims Bill to effect the regulation of claims management companies in Scotland would be a matter for the UK Government. [157] She went on to say:

> I expect that, if there is a gap, it will not be unduly long. However, it is important to note that when it becomes clear that regulation is imminent, that will have a significant impact on the pretensions of claims management companies.
>
> Source: Justice Committee, Official Report 21 November 2017, col. 46.

308. In his report, Sheriff Principal Taylor recommended that only solicitors, members of the Faculty of Advocates and claims management companies which are regulated should be entitled to enter into damages-based agreements (recommendation 68). In oral evidence, Sheriff Principal Taylor told the Committee that the Bill should contain provision that only a regulated body could enter into a damages-based

agreement. This would mean that claims management companies would not be allowed to enter into damages-based agreements until such time as they became regulated. [158]

309. The Scottish Government had suggested that the definition of providers of "relevant legal services" in section 1 of the Bill was wide enough to capture claims management companies.[xxxvii] This would mean that the requirements in Part 1 of the Bill applying to success fee agreements (for example, they must be in writing and would be subject to success fee caps) would also apply to claims management companies.

310. However, other evidence to the Committee questioned whether claims management companies would be caught by the definition in section 1. Both Kim Leslie of the Law Society and Simon di Rollo QC of the Faculty of Advocates emphasised that claims management companies could be structured in different ways and therefore might not necessarily be caught by section 1. [159] Martin Haggarty, representing claims management company Accident Claims Scotland Ltd, also expressed doubts as to whether the definition would cover claims management companies. [160]

311. Further, it was argued that, even if the definition did cover claims management companies, without a regulator the requirements of the Bill could not be enforced.

312. As Andrew Lothian representing the Forum of Insurance Lawyers told the Committee:

> It was envisaged that section 1 would apply to claims management companies as well as solicitors, but the difficulty with that is that solicitors are regulated and claims management companies are not. If there were a cap on DBAs [damages-based agreements] and it was breached, the solicitor would, quite properly, be subject to professional discipline, whereas there would be nothing to catch the rival claims management company.
>
> Source: Justice Committee, Official Report 26 September 2017, cols. 42-43.

Referral fees and cold calling

313. Solicitors may be referred cases by a variety of bodies including employer and trade organisations, trade unions, Citizens Advice Bureaux, and claims management companies. The arrangement will sometimes involve the payment of a fee by the solicitor, known as a referral fee.

314. In his Report, Sheriff Principal Taylor recognised that there were problems with the ways in which claims were sourced and referred. He recommended that claims management companies should not be able to cold call prospective clients (recommendation 74) and that only regulated bodies should be entitled to charge a referral fee (recommendation 71). He also recommended that solicitors who obtain clients from a claims management company should be obliged to satisfy themselves that the claims management company did not obtain clients by cold calling (recommendation 75).

---

xxxvii Correspondence from Scottish Government officials for the SPICe briefing on the Bill.

315. In its written submission to the Committee, Which? pointed to its research, published in 2016, which found that Scottish cities suffer the highest number of nuisance calls in the UK. More recent research for Scotland, published in September 2017, showed that 81% of those with a landline, and 70% of those with a mobile, said that they had received an unsolicited marketing or sales call in the last month. The most common types of nuisance calls were accident claims, PPI and silent calls. [161]

316. Sheriff Principal Taylor told the Committee that "cold calling is the biggest mischief of claims management companies". He emphasised that the recommendations in his Report would help to address this issue. [162]

317. The Bill does not make any provision in respect of referral fees. The Policy Memorandum stated that referral fees would be considered as part of Esther Roberton's review. [4]

318. Nonetheless, the Committee heard some evidence that the Bill should regulate or ban referral fees. The Forum of Insurance Lawyers (FOIL), for example, noted that referral fees are banned in England and Wales and should therefore also be banned in Scotland to "ensure a level playing field, and that the Scottish consumer is not penalised compared to the consumer in England and Wales". [163]

319. As was discussed earlier in the report, defender and insurer representatives also saw a ban on referral fees as an important safeguard against the risk of fraudulent claims following the introduction of qualified one way costs shifting (QOCS). In a supplementary written submission, FOIL noted that the ban on referral fees in England and Wales did not affect claimants, who still had QOCS protection, but "disrupted the business model of the less reputable claims management companies". [164]

320. The Association of British Travel Agents also argued in favour of banning referral fees, suggesting this would enhance transparency in the relationship between claims management companies and legal firms. [165]

321. The Bill also does not contain any provision in respect of cold calling. However, as the Minister explained to the Committee, legislative action on cold calling remains reserved to the UK Parliament. [166] The Minister noted other action the Scottish Government had taken to tackle cold calling, including establishing the Nuisance Calls Commission and funding call-blocking units for vulnerable groups. [167]

322. Sheriff Principal Taylor's recommendation that solicitors should be required to satisfy themselves that a claim has not been obtained by cold calling would require the Law Society to change its Professional Practice Rules and Guidance. The Law Society was asked by the Committee whether it intended to do so. [168]

323. In a supplementary written submission, the Law Society stated that while it was "very concerned about cold calling", this was a matter outwith its control and instead steps should be taken by the Scottish Government to introduce a complete ban on cold calling. It added that cold calling was:

> not really an issue which should be laid at the door of solicitors given that they have not created the problem and have very limited scope for sorting it. While it would be possible to introduce a system requiring solicitors to make enquiries about the source of a claim and get verification about cold calling not having been involved, that would not be a full-proof system and simply adds to the administrative burden placed on solicitors.
>
> Source: Law Society of Scotland, supplementary written submission, paragraph 4.

324. Sheriff Principal Taylor also referred to steps that were being taken through the Financial Guidance and Claims Bill to address the issue of cold calling. [162] Amendments were agreed to in the House of Lords which would place the new single financial guidance body under a duty to have regard to the effect of cold-calling on consumer protection. This body would be required to advise the Secretary of State to institute bans on cold-calling for products or services where considered necessary, and the Secretary of State may subsequently lay regulations to introduce such a ban. These provisions apply to Scotland as well as England and Wales.

Conclusions on the regulation of claims management companies

325. The Committee welcomes the amendments that have been laid, at the request of Scottish Ministers, to the Financial Guidance and Claims Bill currently being considered by the UK Parliament. These will extend regulation of claims management companies to Scotland. The Committee asks the Scottish Government to clarify whether it intends this regulation to be on an interim or longer term basis.

326. Should the Scottish Parliament ultimately pass the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, there remains a risk that its provisions will be implemented before any regulation of claims management companies in Scotland is in place. The Committee considers that the Bill's provisions should not be brought into force until such regulation is in place.

327. The Committee also asks the Scottish Government to amend the Bill to provide that only regulated bodies can offer success fee agreements. This would implement Sheriff Principal Taylor's recommendation and provide greater protection to pursuers, particularly if there is any delay in regulating claims management companies.

328. The evidence the Committee has heard on banning referral fees and cold calling should be considered as part of the ongoing independent review of the regulation of legal services, being chaired by Esther Roberton.

329. The Committee recognises that cold calling is a reserved area. However, it urges the Scottish Government to continue to take steps to tackle cold calling and where appropriate work with the UK Government to protect Scottish consumers.

It also calls on the Law Society of Scotland to put in place proper checks to ensure that any clients referred to solicitors by claims management companies were not obtained by cold calling, as recommended by Sheriff Principal Taylor.

Auditors of court

330. Part 3 of the Bill makes provision in respect of auditors of court. Auditors of court are responsible for independently reviewing the fees charged by a solicitor for legal work. This process is known as taxation.

331. Taxation is commonly used to settle the amount to be paid by the losing party to cover the winning party's legal expenses. This is referred to judicial taxation.

332. Parties who use an auditor must pay a fee for their work. This is based on the value of the account they are taxing. Auditors can listen to the arguments presented by either side at a hearing if requested to do so.

Scottish Civil Courts Review

333. Lord Gill looked at the role of auditors of court as part of his Review. He found that the current arrangements for taxing accounts of expenses were complex, lacking in transparency and consistency. He therefore recommended that auditors of court should be salaried posts recruited through a public appointments process, and should be required to have relevant skills and experience. He also recommended that the Auditor of the Court of Session should have a role as "head of the profession". This should involve issuing guidance to other auditors to ensure a consistency in the approach taken to the taxation of accounts.[xxxviii]

Proposals in the Bill for auditors of court

334. Section 13 of the Bill provides for auditors of court (including the Auditor of the Court of Session) to become salaried public positions with the Scottish Courts and Tribunals Service (SCTS). The SCTS will be responsible for appointing auditors on terms and conditions as it sees fit.

335. Under section 15, the Auditor of the Court of Session is required to issue guidance to other auditors of court about the exercise of their functions, including the types and levels of expenses that may be allowed in an account of expenses. Auditors of court must have regard to the guidance when exercising their functions.

336. Section 16 places a duty on the SCTS to publish an annual report setting out details of the number of taxations carried out by auditors and the fees received for that work.

337. The Policy Memorandum states that the policy objective of Part 3 of the Bill "is to increase transparency and consistency in the taxation of accounts in civil proceedings, whilst preserving the fair and adversarial character and integrity of the auditing process". [169] It goes on to say that bringing auditors of court within the SCTS will enable a consistent approach to be taken and provide the opportunity to

---

xxxviii See recommendations 191-199, and discussion at paragraphs 82-87 in Chapter 14.

"develop and share knowledge, experiences and skills within a team of professionals, led by a head of profession". [170]

338. The Policy Memorandum also notes that the Scottish Government considers that, since other officers of court (including some sheriff court auditors) are SCTS employees, the "natural employer" for auditors of court is the SCTS and not the Scottish Government or some other body. [171]

Evidence on auditors of court

339. Most evidence to the Committee did not comment in detail on the proposals contained in Part 3 of the Bill, unless to express support.

340. However, the written submission from the Judges of the Court of Session argued that the Auditor of the Court of Session should not be a salaried employee of the SCTS, as provided for in the Bill. They suggested that the Auditor would be vulnerable to criticism if he or she was required to deal with taxations involving the SCTS or the Scottish Government. Instead, the Judges suggested that the present system of tenure of office should be retained but payment of salary should be in the same manner as judges. [172]

341. Similar comments were made in the written submission from the Scottish Courts and Tribunals Service (SCTS). It noted that the proposals in the Bill had moved away from Lord Gill's recommendation that auditors of court should be subject to a public appointments process. [173] The SCTS also argued that an employed auditor may not be considered to be independent in taxations involving the SCTS or Scottish Ministers. It suggested that the Auditor of the Court of Session should be given similar protections from removal from office as a judge. This would allow independence to be protected. Any sheriff court taxations where there was a conflict of interest could then be referred to the Auditor of the Court of Session. [174]

342. The Sheriffs' Association also expressed concerns that the Bill would not ensure the independence of the auditor, and noted that the Bill contains "no explicit recognition of the need for independence". It suggested that it would be more appropriate for an independent body, such as the Judicial Appointments Board, to appoint the Auditor of Court of Session. [175]

343. A detailed response from Andrew Smith QC, an advocate at the Scottish Bar, as well as a practising barrister in England and Wales, set out a number of problems with the current approach to taxation, including a lack of predictability as to what an auditor might allow by way of fees and expenses. [176] While welcoming the "thrust" of the Bill, he argued that further improvements could be made. For example, he suggested that auditors should be required to provide written reasons for their decisions. He also argued that the Auditor of the Court of Session should become a member of the SCTS on the coming into force of the Bill, to ensure the Auditor was subject to Freedom of Information requirements. [177]

344. The Society of Sheriff Court Auditors emphasised that most sheriff court auditors are currently self-employed, contrary to what is suggested in the Policy

Memorandum (paragraph 61 states that "the majority" of sheriff court auditors are employed by the SCTS). [178]

345. The Society of Sheriff Court Auditors also noted that the Policy Memorandum, at paragraph 70, states "it is intended that there be transitional arrangements in regulations under the Bill to allow the present incumbents to continue to be self-employed until their retirement".

346. However, paragraph 72 of the Policy Memorandum, goes on to state that "it is not proposed that the new employment arrangements will be applied to the current Auditor of the Court of Session who was appointed on a self-employed basis and has security of tenure until he reaches his 65th birthday". It makes no reference to the new employment arrangements not applying to other self-employed auditors.

347. The Society of Sheriff Court Auditors therefore asked for further clarity on the proposed transitional arrangements. The Society submitted that the retirement age arrangement in place for the Auditor of the Court of Session should also apply to the existing sheriff court auditors. [179]

348. In closing evidence, the Minister told the Committee:

> The Auditor of the Court of Session will remain in tenure until he reaches 65 … The position is not the same for the sheriff court auditors, but they would be perfectly able to apply to be a salaried auditor in the Scottish courts and tribunals system.
>
> Source: Justice Committee, Official Report 21 November 2017, col. 48.

349. The Committee heard evidence that auditors of court, or at least the Auditor of the Court of Session, should be public appointments. It also heard that further provision is required in the Bill to guarantee the independence of auditors. The Committee asks the Scottish Government to respond to this evidence, with a view to addressing the concerns raised about the independence of auditors of court.

350. The Committee also notes that there appears to be an inconsistency in what is stated in paragraph 70 of the Policy Memorandum – that present auditors would continue in self-employment until their retirement – and what the Minister told the Committee in closing evidence – that this would only apply to the Auditor of the Court of Session. The Committee asks the Scottish Government to provide further details on the transitional arrangements it intends to put in place for auditors of court.

Group proceedings

351. Part 4 of the Bill makes provision for a new procedure – known as "group procedure" – to be introduced in the Court of Session. Proceedings subject to that procedure will be known as "group proceedings" .

What are group proceedings?

352. Group proceedings, sometimes known as multi-party actions, are claims where a number of persons have the same or similar rights. In its report on multi-party actions in 1996, the Scottish Law Commission identified two essential components of multi-party actions:

> A number of possible claimants or pursuers; and a single issue or a number of issues which are common to all the possible claims. It is said that the existence of this core of common issues makes it possible for all the claims to be dealt with in a single litigation and that the advantages of the single litigation outweigh the disadvantages.
>
> Source: Scottish Law Commission, Multi-Party Actions (Report No 154), Part 2 paragraph 1.1.

353. There are three broad categories of group proceedings:

- Class actions – these are brought by a named pursuer as a representative of a class of people with the same legal issue. The representative seeks redress for themselves and for other members of the group.
- Organisation actions – these are brought by organisations, such as consumer groups or environmental groups, on behalf of their members or the general public. Here the organisation acts on behalf of those affected.
- Public interest actions – these are brought by public officials on behalf of the general public or a particular group of the public.[xxxix]

354. Group proceedings can take the form of either an opt-in or opt-out system.

355. In opt-in systems, pursuers must expressly consent to be part of the action. Those affected who do not join the group proceedings are free to bring their own legal claims.

356. In opt-out systems, the court agrees a definition of those affected by the proceedings. Anyone covered by the definition is deemed to consent to court action on their behalf unless they expressly opt out. Only those who have opted out retain the right to bring their own legal claim.

357. In opt-out systems, estimates are made of the number of people covered by a claim and the extent of their loss. Any monetary award will be calculated on this basis and divided between the members of the group in an appropriate manner.

---

xxxix See Policy Memorandum at paragraph 79 and Scottish Law Commission Report at Part 2 paragraph 2.2.

358. In opt-out systems there may be money left over from any financial award because not all those affected have been identified. Different legal systems have different solutions to this problem. The residual award may be donated to charity, to the court system, or to some fund that supports group litigation.

Background to the Bill's provisions on group proceedings

359. In its report on multi-party actions in 1996, the Scottish Law Commission recommended that a new procedure for multi-party actions should be introduced for the Court of Session (recommendations 1 and 2). It recommended that this should be on an opt-in basis (recommendation 13).

360. Lord Gill also considered the issue of multi-party actions in his Report on the Scottish Civil Courts Review (see Chapter 13). Lord Gill endorsed the Scottish Law Commission's recommendation that there should be a special multi-party procedure (recommendation 157). He also agreed that the new procedure should initially be introduced only in the Court of Session (recommendation 166). However, Lord Gill recommended that it would be for the court to decide whether in the particular circumstances of a case an opt-in or an opt-out model would be appropriate (recommendation 163).

361. Lord Gill also recommended that there should be a special funding regime for multi-party actions. On balance, he considered that this regime should be administered by the Scottish Legal Aid Board (recommendation 175)

362. Sheriff Principal Taylor considered issues of expenses and funding in relation to multi-party actions. He recognised that damages-based agreements would present a potential means of funding multi-party actions (see Chapter 12 paragraph 7). However, he noted:

> Questions of expenses and funding cannot be separated from questions of procedure. The new procedures necessary to permit multi-party actions in Scotland will have to be created before final decisions can be made about how such actions should be funded.
>
> Source: Taylor Review, Chapter 12 paragraph 9.

The Bill's provisions on group proceedings

363. Section 17 provides for a new court procedure known as "group procedure" to be available in the Court of Session. Under this procedure, a "representative party" may bring group proceedings on behalf of two or more persons (a "group") with similar claims.

364. The procedure will operate on a opt-in basis, so that participants must expressly agree to be part of the group.

365. Representative parties will be able to bring proceedings on behalf of the group, even where that representative party is not directly affected by the issues being litigated. This would enable, for example, charities and campaigning groups to raise court action on behalf of those affected by an issue.

366. The consent of the court would be required before group proceedings could be taken forward. This would give the court the opportunity to consider whether the individual claims were sufficiently related to justify proceeding as a group.

367. The Bill does not go into further details about how group proceedings should operate. Instead, section 18 gives the Court of Session wide powers to make provision for group proceedings via act of sederunt (a form of secondary legislation which creates court rules). Section 18(2) gives non-exhaustive examples of what these rules may cover. Section 18(3) ensures that any rules must not contradict the requirements set out in section 17.

Scottish Government's policy justification for the approach taken

368. The Policy Memorandum notes that there is currently no group procedure in Scotland. While a pragmatic approach has previously been taken by the courts in relation to mass litigation, it suggests that some recent mass litigation has "shown the limitations of the current system". [180]

369. The Scottish Government consulted on proposals to introduce a group procedure in its 2015 consultation. The approach taken in the Bill has been significantly developed since that consultation. The Policy Memorandum states:

> In subsequent meetings with stakeholders since the beginning of the year, there has been virtually universal support for opt-in rather than opt-out. The Bill will provide for an 'opt-in' regime. This is relatively straightforward whereas the challenges 'opt out' would present are considered too complex to resolve at this stage in the development of a group procedure. The benefit of this approach is that it presents an opportunity for the courts to gain experience from dealing with more straightforward group procedure cases. Incorporating an 'opt-out' option could be a consideration for the future, subject to the successful implementation of the 'opt-in' procedure.
>
> Source: Policy Memorandum, paragraph 91.

370. The Scottish Government suggests that the introduction of a group procedure will:

> help to broaden access to justice by allowing multi-litigants the opportunity to bring an action at a lower cost than individual cases. In turn, taking forward a number of related claims as a group procedure can help deliver a more streamlined and cost-effective outcome and reduce court time. An additional and important societal benefit to facilitating collective redress is the potential to deter harmful behaviour on the part of businesses and encourage corporate social responsibility.
>
> Source: Policy Memorandum, paragraph 93.

371. It is the Scottish Government's intention that the Scottish Civil Justice Council (whose remit includes preparing draft rules of procedure, which may then be

formally made by the Court of Session) will develop detailed proposals through consultation with stakeholders. The Policy Memorandum states that this will allow the Council "to consult a wide range of interests and keep rules under review without the need for primary legislation". [181]

372. The Delegated Powers Memorandum suggests that it is appropriate for rules of procedure to be dealt with by secondary legislation as "they may require regular amendment to deal with how the new group proceedings procedure develops, new eventualities or to adapt to changing circumstances. … This is of course the position for the other rules of courts and tribunals". [182]

Evidence on group proceedings

Views on the overall approach taken in the Bill

373. The Committee heard broad support for the introduction of a group procedure in Scotland. For example, Paul Brown, of the Legal Services Agency, told the Committee that he "vigorously" supported the introduction of group proceedings and had "no doubt" that this would increase access to justice. He said that in his experience, such proceedings were hugely less stressful and more straightforward for the pursuers involved". [183] Simon di Rollo QC, representing the Faculty of Advocates, stated that the provision was "long overdue". [129]

374. The Equality and Human Rights Commission specifically welcomed the fact that third party bodies without a direct legal interest would be able to bring group proceedings . [184] Scottish Environment LINK similarly welcomed this approach. [185]

375. Some evidence suggested that the detail was best left to rules of court. For example, DAC Beachcroft Scotland LLP thought that the Bill should be limited to a general statement of principle (as is found in section 17(1)) and the power of the Court of Session to make provision by act of sederunt (as conferred by section 18). It also said that it did not support allowing a party without a direct legal interest in the proceedings to bring proceedings on behalf of a group. [186]

376. Paul Brown of the Legal Services Agency suggested that, if the detail was being left to court rules, there needed to be "as open consultation as possible". [86] Thomas Docherty, representing Which?, expressed concern that the Scottish Government had not been able to guarantee that consumers would be involved in the consultation. [187]

377. The Judges of the Court of Session thought that there were some areas of potential conflict which would not be suitable for regulation via court rules. These included liability for the other side's expenses where the case is lost and how to distribute any award of compensation covering the whole group. [188]

378. The Forum of Insurance Lawyers suggested that group procedure should also be available in the sheriff court. [189] Paul Brown of the Legal Services Agency also suggested that restricting group proceedings to Court of Session could act as an

impediment to bringing those proceedings. He noted that "the need to have Edinburgh agents and counsel or a solicitor advocate will mean that the costs will be a lot higher". [190]

379. The Law Society queried why juries would be excluded from group procedure, noting that no explanation had been provided by the Scottish Government for this approach. [191]

Views on opt-in versus opt-out proceedings

380. Evidence to the Committee from Which? argued strongly that the Bill should provide for an opt-out mechanism for group proceedings. In its written submission, Which? stated:

> In our experience, an opt-in mechanism will not be sufficient in many cases in the consumer context because large groups of consumers can suffer the same kind of harm without having access to effective redress. This is because individual consumers may have claims that are not of a sufficient financial value to warrant the time and expenses of pursuing them separately, or following the necessary administrative step of opting into an unfamiliar process.
>
> Source: Which?, written submission, paragraph 4.

381. Which? went on to note:

> Breaches of consumer protection laws can have a relatively small impact on a large number of consumers. This means that cumulative consumer detriment is high, but the incentive for any one person to participate in a court action is low.
>
> Source: Which?, written submission, paragraph 6.

382. Which? argued that an opt-out system would boost the overall level of compensation achieved and strengthen the deterrent effect of private enforcement:

> Even where individual consumers lose out by only a few pounds, businesses know they will still have an effective mechanism by which to seek redress.
>
> Source: Which?, written submission, paragraph 10.

383. Which? also noted that a regime for opt-out collective actions already existed in the UK under the Consumer Rights Act 2015. Under these procedures, anyone can apply to the Competition Appeal Tribunal for permission to bring claims for damages acting as a representative of a class of persons who are alleged to have suffered losses as the result of a competition law infringement. [192] In oral evidence, Thomas Docherty representing Which? told the Committee that Which? was therefore "puzzled" by the Scottish Government's argument that it is too difficult to come up with an opt-out system. [193]

384. Thomas Docherty added an opt-in system was "better than nothing", but that it would do nothing to help consumers with low value claims. [187]

385. Professor Alan Paterson also told the Committee that, while an opt-in system would be "helpful", an opt-out system would have a "much bigger impact for consumers". [187]

386. However, Paul Brown of the Legal Services Agency , emphasised the need to introduce some form of group procedure without delay:

> It has taken an inordinate amount of time to get to where we are, and it is a significant step that we are discussing group proceedings. It would be a pity if one went for the most ambitious arrangement and that resulted in further delay. Therefore, although I am entirely in favour of an opt-out system, I am principally in favour of there being some form of group proceedings, which I am sure will help some people. … I would be in favour of going for the most ambitious arrangement but not if it took five years for the rules to be produced.
>
> Source: Justice Committee, Official Report 14 November 2017, cols. 31-32.

387. Kim Leslie told the Committee that while the Law Society had previously been "more ambitious", it had "agreed that because group proceedings are novel—we have not had them before—the simplest route is perhaps not the wrong choice". [194]

388. In closing evidence, the Minister emphasised that the Scottish Government was "keen to make progress, and it was considered that it would be more straightforward to start with an opt-in system". This would be the "prudent and more pragmatic course of action". She went on to say that the Government "will keep the opt-out approach under review, but it is important to start somewhere and to make progress on that basis". [195]

389. The Minister was also asked whether, because the Scottish Government does not have direct control over the development of court rules by the Scottish Civil Justice Council, there was a risk that the initiative would be "kicked into the long grass". She responded that she did not think that would be the case, but that she would reflect on "whether there might need to be some other language to that effect in the Bill to give a clearer steer". [196]

Funding of group proceedings

390. Both Paul Brown of the Legal Services Agency and Professor Alan Paterson argued strongly that the issue of how to fund group proceedings needed to be resolved in order for them to work. [197] In particular, they noted that while legal aid should be one option, it was currently set up to fund individuals. The legal aid regulations would therefore need to be changed to allow groups to be assessed. [198]

391. The Minister told the Committee that the funding arrangements for group proceedings would be legal aid or success fee agreements. She added "there would be a requirement to amend the current legal aid rules, and the on-going legal aid review might have certain views on that". [199]

Conclusions on group proceedings

392. The Committee welcomes the provisions in the Bill which will allow for a group procedure to be introduced in Scotland for the first time. It is clear from the evidence that the Committee heard that this provision is widely welcomed.

393. The Committee welcomes the introduction of an opt-in procedure. It notes that the Scottish Government has chosen to start with this approach for pragmatic reasons, and recognises that there is a need to proceed with the introduction of group procedure without delay.

394. However, the Committee would welcome further clarity from the Scottish Government as to why the option of an opt-out procedure has been ruled out at this stage. In particular, the Committee notes the evidence it heard from Which? on the benefits of an opt-out approach for low value claims for consumer problems. The Committee considers that there could be advantages in allowing the court to decide in any particular case whether proceedings would be on an opt-in or opt-out basis. This would be in line with Lord Gill's recommendations in his Report of the Scottish Civil Courts Review. The Committee also requests more detail as to how the Scottish Government will keep the possibility of an opt-out procedure under review.

395. The Committee urges the Scottish Government to take appropriate steps to ensure that the relevant rules and procedures to facilitate group proceedings are developed through wide consultation, and are implemented without delay.

396. The Committee welcomes the Scottish Government's commitment to amend the legal aid rules to enable legal aid to be available for group proceedings. The Committee requests to be kept updated with the progress of this work.

Financial Memorandum

397. The Financial Memorandum accompanying the Bill is required to set out the "best estimates" of the costs associated with the measures introduced by the Bill.[xl]

398. Paragraph 15 of the Financial Memorandum states that "there is difficulty in providing figures for most of the areas provided for in the Bill". It gives a number of reasons for this:

- As the Bill is permissive, it is not known what the take up will be for the new options available in civil litigation. Much will depend on market practice.
- Those professionals mainly affected by the proposals are civil court practitioners and there are no relevant official or comprehensive statistics or financial details regarding these activities for the private sector.
- Statistics are often not available from law firms as the information is regarded as commercially sensitive.

399. Nonetheless, the Financial Memorandum recognises that the Bill may lead to a rise in the number of claims and that there are therefore potential financial implications for local authorities, the NHS and other public bodies, individuals, and businesses. It does not, however, quantify what these costs might be.[xli]

Evidence on the Financial Memorandum

400. The potential for the Bill to lead to a rise in the number of claims, including unmeritorious or fraudulent claims, has been discussed earlier in the report. Indeed, as noted above, the Financial Memorandum itself anticipates that the Bill will lead to a rise in a number of claims.

401. Both the Association of British Insurers (ABI) and the Forum of Insurance Lawyers (FOIL) expressed concern that the Financial Memorandum did not properly assess the financial implications of the Bill, including the potential for an increase in insurance premiums for consumers.

402. The ABI, for example, stated it was

> concerned that the Financial Memorandum to the Bill acknowledges that there is significant financial liability to public bodies and local authorities as a result of the Bill, however the memorandum is unable to quantify the likely cost. It is not clear why no actuarial projections or other research has been commissioned to consider the impact of this Bill.
>
> Source: Association of British Insurers, written submission, paragraph 39.

403. FOIL also commented that it was "surprising that the cost to the public purse has not been calculated in the Financial Memorandum" [200] . It set out its own

---

xl Standing Orders of the Scottish Parliament, rule 9.3.2.
xli See the Financial Memorandum at e.g. paragraph 13.

projections of the financial impact that an increase in a number of claims could have on the public sector. [201]

404. Similar points were made in the written submissions from DAC Beachcroft Scotland LLP (at paragraph 49) and DWF LLP (at paragraph 31).

405. The Finance and Constitution Committee issued a call for evidence on the Financial Memorandum. Seven responses were received (3 from NHS Boards and 4 from local authorities).

406. In summary, these responses highlighted that the Bill's provisions could lead to a rise in the number of claims which would have associated costs for NHS Boards and local authorities. Some responses (for example, North Ayrshire Council) accepted that it was not possible to quantify the potential increase in claims or award levels at this time. Others (for example, Aberdeen Council) suggested that little attempt had been made to quantify the impact of the Bill. This evidence also emphasised that additional funding may be required from the Scottish Government to meet any cost increases for health boards and local authorities (see, for example, South Lanarkshire Council and NHS Borders).

Scottish Government response

407. In light of the evidence above, the Committee wrote to the Minister on 7 September 2017 to ask whether any modelling had been done to estimate the impact of the Bill on the number of claims. The Committee also asked whether the Scottish Government could share any further information to allow it to assess the potential costs of the Bill.

408. In her response of 24 September 2017, the Minister reiterated the difficulties in estimating the impact of the Bill as set out in the Financial Memorandum. She added that views had also been sought on the likely impact of the Bill's provisions when preparing the Business and Regulatory Impact Assessment. She suggested that "the lack of definitive responses is an indication of the difficulty of estimating the number of extra cases which may be brought forward".

409. The Minister's response also pointed to data from the Scottish Civil Justice Statistics as showing a 41% decrease in all civil court cases since 2008-9. She went on to say that the Government did not believe "the possibility of more cases being brought against insurers and public bodies is a justifiable argument against private citizens being more able to exercise their rights against such bodies, particularly as the number of civil cases has fallen so much in recent years".

410. The Committee heard concerns that the Financial Memorandum accompanying the Bill fails to properly assess the potential costs of the Bill to the public purse. While the Committee acknowledges the difficulties involved in estimating any increase in the number of claims brought as a result of the Bill, it considers that the Scottish Government should undertake more detailed modelling on the likely impact of the Bill.

General principles of the Bill

411. The Committee recommends to the Parliament that the general principles of the Bill be approved.

Annex A - Extracts from the minutes

Extracts from the minutes of the Justice Committee and associated written and supplementary evidence

22nd Meeting, 2017 (Session 5) Tuesday 13 June 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) to issue a call for written evidence on the Bill; and (b) initial witnesses on the Bill.

25th Meeting, 2017 (Session 5) Tuesday 5 September 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Hamish Goodall, Civil Law and Legal System Division, and Greig Walker, Solicitor, Directorate for Legal Services, Scottish Government.

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (in private): The Committee considered the written evidence received and potential witnesses for the scrutiny of the Bill at Stage 1. The Committee agreed a number of witnesses, and agreed to further consider potential witnesses in private at future meetings.

27th Meeting, 2017 (Session 5) Tuesday 19 September 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Ronnie Conway, Co-ordinator, Association of Personal Injury Lawyers;

Brian Castle, Regional Co-ordinator Scotland, Motor Accident Solicitors Society;

Patrick McGuire, Partner, Thompsons Solicitors.

Written evidence

Association of Personal Injury Lawyers

Association of Personal Injury Lawyers supplementary submission

Motor Accident Solicitors Society

Thompsons Solicitors Scotland

28th Meeting, 2017 (Session 5) Tuesday 26 September 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: The Committee will took evidence on the Bill at Stage 1 from—

Simon di Rollo QC, Faculty of Advocates;

Andrew Stevenson, Vice President, Glasgow Bar Association;

Kim Leslie, Convener, Civil Justice Committee, Law Society of Scotland;

Calum McPhail, Association of British Insurers;

Luke Petherbridge, Senior Public Affairs Manager, Association of British Travel Agents;

Andrew Lothian, Vice-Chairman, Forum of Insurance Lawyers in Scotland;

David Holmes, Head of Legal: Scotland and Corporate, Medical and Dental Defence Union of Scotland.

Liam Kerr declared interests as a director and sole shareholder of Trinity Kerr Ltd, a provider of legal services, and as a member of the Law Society of Scotland. Ben Macpherson declared interests as being no longer a non-practising member of the Law Society of Scotland, but still on the roll of Scottish solicitors.

Written evidence

Faculty of Advocates

Glasgow Bar Association

Law Society of Scotland

Law Society of Scotland supplementary submission

Association of British Insurers

Association of British Insurers supplementary submission

Association of British Travel Agents

Association of British Travel Agents supplementary submission

Forum of Insurance Lawyers

Forum of Insurance Lawyers supplementary submission

Medical and Dental Defence Union Scotland

29th Meeting, 2017 (Session 5) Tuesday 3 October 2017

Work programme (in private): The Committee considered its work programme and agreed (a) further witnesses for the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill at Stage 1; [. . .]

31st Meeting, 2017 (Session 5) Tuesday 31 October 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Sheriff Principal James Taylor;

Elaine Samuel, Honorary Fellow, University of Edinburgh.

Liam Kerr declared interests as a practising solicitor and as a member of the Law Society of Scotland and of the Law Society in England and Wales.

33rd Meeting, 2017 (Session 5) Tuesday 14 November 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

Martin Haggarty, Managing Director, Accident Claims Scotland Ltd;

Paul Brown, Chief Executive/Principal Solicitor, Legal Services Agency;

George Clark, Managing Director, Quantum Claims;

Professor Alan Paterson, School of Law, University of Strathclyde;

Thomas Docherty, Parliamentary Affairs Manager, Which?.

Liam Kerr declared interests as a solicitor with current practising certificates from the Law Society of Scotland and, in England and Wales, the Law Society. Ben Macpherson declared an interest as being registered on the Scottish roll of solicitors.

Written evidence

Which?

34th Meeting, 2017 (Session 5) Tuesday 21 November 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill The Committee took evidence on the Bill at Stage 1 from—

Annabelle Ewing, Minister for Community Safety and Legal Affairs, Scottish Government.

Annabelle Ewing, Minister for Community Safety and Legal Affairs, declared an interest as a member of the Law Society of Scotland and holder of a current practising certificate.

Liam Kerr declared interests as a solicitor with current practising certificates from the Law Society of Scotland and, in England and Wales, the Law Society. Ben Macpherson declared an interest as being registered on the Scottish roll of solicitors.

35th Meeting, 2017 (Session 5) Tuesday 5 December 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue consideration at its next meeting.

36th Meeting, 2017 (Session 5) Tuesday 12 December 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (in private): The Committee continued consideration of a draft Stage 1 report. Various changes were agree to and the Committee agreed to continue consideration at its next meeting.

37th Meeting, 2017 (Session 5) Tuesday 19 December 2017

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill (in private): The Committee continued consideration of a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.

Annex B - Written evidence

List of other written evidence

Associated Society of Locomotive Engineers and Firemen

Aviva

Bakers Food and Allied Workers Union

BLM Scotland

Brodies LLP

Clyde & Co (Scotland) LLP

DAC Beachcroft Scotland LLP

DWF LLP

Equality and Human Rights Commission

Family Law Association

Fire Brigades' Union

Forum of Scottish Claims Managers

GMB Scotland

Judges of the Court of Session

Maclay Murray & Spens LLP

Membury, Rona

Pinsent Masons LLP

Public and Commercial Services Union

Scottish Courts and Tribunals Service

Scottish Environment LINK

Scottish Trades Union Congress

Sheriffs' Association

Smith, Andrew QC

Society of Sheriff Court Auditors

UnionLine Scotland

UNISON Scotland

Unite Scotland

Usdaw

Watermans Accident Claims and Care

Zurich Insurance plc

[1] Policy Memorandum, paragraph 7. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[2] Report of the Scottish Civil Courts Review, recommendation 189. (2009, September). Retrieved from https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4

[3] Policy Memorandum, paragraph 20. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[4] Policy Memorandum, paragraph 11. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[5] Association of Personal Injury Lawyers. (2017, August). Written submission, paragraph 5. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-APIL.pdf

[6] UNISON Scotland. (2017, August). Written submission, paragraph 6. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Unison.pdf

[7] Taylor Review, Foreword page iii. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[8] Forum of Insurance Lawyers. (2017, August). Written submission, paragraphs 15-17. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[9] Association of British Insurers. (2017, August). Written submission, paragraph 7. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[10] DWF LLP. (2017, August). Written submission, paragraph 4. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-DWF.pdf

[11] Justice Committee. (2017, September 19). Official Report 19 September 2017, col.11. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[12] Justice Committee. (2017, September 19). Official Report 19 September 2017, col.17. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[13] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 4. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[14] Justice Committee. (2017, October 31). Official Report 31 October 2017, col.18. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[15] Justice Committee. (2017, November 21). Official Report 21 November 2017, cols. 38-39. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[16] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 24. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[17] Policy Memorandum, paragraph 4. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[18] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 35. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[19] Law Society of Scotland. (2017, August). Written submission, paragraph 4. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[20] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 5. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[21] Scottish Environment LINK. (2017, August). Written submission, paragraph 3. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SELink.pdf

[22] Thompsons Solicitors. (2017, August). Written submission, paragraph 31. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Thompsons.pdf

[23] STUC. (2017, August). Written submission, paragraph 19. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-STUC.pdf

[24] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 39. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[25] Policy Memorandum, paragraph 35. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[26] Justice Committee. (2017, September 19). Official Report 19 September 2017, cols.1-3. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[27] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 2. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[28] Law Society of Scotland. (2017, August). Written submission, paragraph 8. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[29] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 8. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[30] Justice Committee. (2017, September 26). Official report 26 September 2017, col.30. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[31] Association of British Insurers. (2017, August). Written submission, paragraph 12. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[32] Justice Committee. (2017, September 26). Official Report 26 September 2017, col.30. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[33] Policy Memorandum, paragraph 28. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[34] Sheriffs' Association. (2017, September). Written submission, paragraphs 2-3. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SheriffsAssociation.pdf

[35] Taylor Review, Chapter 9 paragraph 70, and recommendation 41. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[36] Taylor Review, recommendation 69. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[37] Justice Committee. (2017, November 14). Official report 14 November 2017, cols. 13, 16. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[38] Taylor Review, recommendations 42 and 57. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[39] Taylor Review, recommendations 43, 44, 58 and 59. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[40] Policy Memorandum, paragraph 34. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[41] Which?. (2017, November). Written submission, paragraph 34. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Which.pdf

[42] Law Society of Scotland. (2017, August). Written submission, paragraph 17. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[43] Policy Memorandum, paragraph 21. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[44] Justice Committee. (2017, September 5). Official Report, 5 September 2017, col. 12. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11057&mode=pdf

[45] Justice Committee. (2017, November 21). Official Report, 21 November 2017, cols. 35, 37. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[46] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 7. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[47] Association of British Insurers. (2017, August). Written submission, paragraph 19. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[48] DAC Beachcroft Scotland LLP. (2017, August). Written submission, paragraph 21. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-DACBeachcroft.pdf

[49] Andrew Smith QC. (2017, September). Written submission, paragraph 51. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SmithAndrew.pdf

[50] Justice Committee. (2017, September 19). Official Report 19 September 2017, cols. 4, 6. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[51] Business and Regulatory Impact Assessment for the Bill, page 9. (2017, June). Retrieved from http://www.gov.scot/Resource/0052/00520596.pdf

[52] Taylor Review, recommendations 62 - 66. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[53] Taylor Review, Chapter 9 paragraph 110. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[54] Policy Memorandum, paragraphs 31, 33. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[55] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 22. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[56] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 21. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[57] Justice Committee. (2017, September 26). Official Report 26 September 2017, cols. 32, 34. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[58] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 34. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[59] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 7. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[60] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 8. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[61] Justice Committe. (2017, September 19). Official Report 19 September 2017, col. 10. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[62] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 13. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[63] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 8. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[64] Justice Committee. (2017, September 5). Official Report 5 September 2017, col. 14. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11057&mode=pdf

[65] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 41. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[66] Taylor Review, Chapter 9 paragraph 109. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[67] Law Society of Scotland. (2017, August). Written submission, paragraph 21. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[68] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 16. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[69] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 44. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[70] Justice Committee. (2017, September 26). Official Report 26 September 2017, cols. 10-11. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[71] Faculty of Advocates. (2017, August). Written submission, paragraph 10. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FacultyofAdvocates.pdf

[72] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 10. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[73] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 18. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[74] Justice Committee. (2017, October 31). Official Report 31 October 2017, cols. 7-9. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[75] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 28. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[76] Equality and Human Rights Commission. (2017, August). Written submission, paragraph 5. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-EHRC.pdf

[77] Medical and Dental Defence Union of Scotland. (2017, August). Written submission, paragraph 9. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-MDDUS.pdf

[78] Taylor Review, Chapter 9 paragraphs 72-80. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[79] Taylor Review, paragraphs 71, 78, 88.. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[80] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 19. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[81] Faculty of Advocates. (2017, August). Written submission, paragraphs 7-8. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FacultyofAdvocates.pdf

[82] Law Society of Scotland. (2017, August). Written submission, paragraph 19. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[83] Taylor Review, recommendation 70 and Chapter 9 paragraph 65. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[84] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 51. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[85] Equality and Human Rights Commission. (2017, August). Written submission, paragraphs 11, 13. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-EHRC.pdf

[86] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 32. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[87] Sheriffs' Association. (2017, September). Written submission, paragraph 13. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SheriffsAssociation.pdf

[88] Scottish Courts and Tribunals Service. (2017, August). Written submission, paragraph 7. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SCTS.pdf

[89] Scottish Courts and Tribunals Service. (2017, August). Written submission, paragraphs 7-8. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SCTS.pdf

[90] Law Society of Scotland. (2017, August). Written submission, paragraph 34. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[91] Taylor Review, Foreword iii-iv. (2013, September). Retrieved from http://www.gov.scot/Resource/0043/00438205.pdf

[92] Policy Memorandum, paragraph 38. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[93] Policy Memorandum, paragraphs 43-44. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[94] Association of Personal Injury Lawyers. (2017, October). Supplementary written submission, paragraph 22. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-AssociationofPersonalInjuryLawyerssupp.pdf

[95] Motor Accident Solicitors Society. (2017, August). Written submission, paragraph 15. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-MASS.pdf

[96] UNISON Scotland. (2017, August). Written submission, paragraph 5. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Unison.pdf

[97] Association of British Insurers. (2017, August). Written submission, paragraphs 28-30. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[98] Medical and Dental Defence Union of Scotland. (2017, August). Written submission, paragraph 16. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-MDDUS.pdf

[99] Association of Personal Injury Lawyers. (2017, October). Supplementary written submission, paragraph 17. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-AssociationofPersonalInjuryLawyerssupp.pdf

[100] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 24. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[101] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 21. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[102] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 18. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[103] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 19. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[104] Justice Committee. (2017, October 31). Official Report 31 October 2017, cols. 11-12. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[105] Faculty of Advocates. (2017, August). Written submission, paragraph 14. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FacultyofAdvocates.pdf

[106] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 40. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[107] Glasgow Bar Association. (2017, August). Written submission, paragraph 19. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-GBA.pdf

[108] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 18. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[109] Association of British Travel Agents. (2017, November). Supplementary written submission, paragraph 5. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABTAsupp.pdf

[110] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 20. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[111] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 17. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[112] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 17. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[113] Justice Committee. (2017, September 26). Official Report 26 September 2017, cols. 22-23. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[114] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 10. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[115] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 42. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[116] Association of Personal Injury Lawyers. (2017, August). Written submission, paragraph 8. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-APIL.pdf

[117] Law Society of Scotland. (2017, August). Written submission, paragraph 28. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[118] Fire Brigades' Union. (2017, August). Written submission, paragraph 11. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FBU.pdf

[119] Faculty of Advocates. (2017, August). Written submission, paragraph 13. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FacultyofAdvocates.pdf

[120] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 24. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[121] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 42. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[122] Association of British Insurers. (2017, October). Supplementary written submission, paragraph 10. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-AssociationofBritishInsurerssupp.pdf

[123] Justice Committee. (2017, October 31). Official Report 31 October 2017, cols. 10-11. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[124] Faculty of Advocates. (2017, August). Written submission, paragraph 12. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FacultyofAdvocates.pdf

[125] Association of British Insurers. (2017, August). Written submission, paragraph 26. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[126] Association of British Insurers. (2017, August). Written submission, paragraph 31. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[127] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 43. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[128] Justice Committee. (2017, September 5). Official Report 5 September 2017, col. 16. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11057&mode=pdf

[129] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 20. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[130] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 12. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[131] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 43. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[132] Policy Memorandum, paragraph 51.. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[133] Association of Personal Injury Lawyers. (2017, August). Written submission, paragraph 19. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-APIL.pdf

[134] Association of Personal Injury Lawyers. (2017, August). Written submission, paragraph 24. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-APIL.pdf

[135] Motor Accident Solicitors Society. (2017, August). Written submission, paragraph 19. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-MASS.pdf

[136] Law Society of Scotland. (2017, August). Written submission, paragraphs 29-30, 32. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[137] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 27. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[138] Law Society of Scotland. (2017, August). Written submission, paragraph 33. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[139] Family Law Association. (2017, August). Written submission, paragraph 7. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FLA.pdf

[140] Family Law Association. (2017, August). Written submission, paragraph 6. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FLA.pdf

[141] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 46. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[142] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 46. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[143] Justice Committee. (2017, October 31). Official Report 31 October 2017, cols. 15, 17. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[144] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 16. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[145] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 47. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[146] Policy Memorandum, paragraph 16. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[147] Justice Committee. (2017, October 31). Justice Committee, Official Report 31 October 2017, cols. 2-4. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[148] Association of British Insurers. (2017, August). Written submission, paragraph 10. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABI.pdf

[149] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 43. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[150] Brodies LLP. (2017, August). Written submission, paragraph 35. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Brodies.pdf

[151] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 28. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[152] Justice Committee. (2017, September 19). Official Report 19 September 2017, col. 6. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11092&mode=pdf

[153] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 45. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[154] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 25. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[155] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 27. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[156] Justice Committee. (2017, November 14). Official Report 14 November 2017, cols. 14, 16. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[157] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 45. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[158] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 13. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[159] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 25. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[160] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 29. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[161] Which?. (2017, November). Written submission, paragraphs 38-39. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Which.pdf

[162] Justice Committee. (2017, October 31). Official Report 31 October 2017, col. 15. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165&mode=pdf

[163] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 37. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[164] Forum of Insurance Lawyers. (2017, October). Supplementary written submission, paragraph 4. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOILsupplementary.pdf

[165] Association of British Travel Agents. (2017, November). Supplementary written submission, paragraph 10. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-ABTAsupp.pdf

[166] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 34. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[167] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 46. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[168] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 26. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[169] Policy Memorandum, paragraph 58. (2017, July). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[170] Policy Memorandum, paragraph 75. (2017, July). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[171] Policy Memorandum, paragraph 71. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[172] Judges of the Court of Session. (2017, August). Written submission, paragraphs 3-4. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-CourtofSession.pdf

[173] Scottish Courts and Tribunals Service. (2017, August). Written submission, paragraph 9. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SCTS.pdf

[174] Scottish Courts and Tribunals Service. (2017, August). Written submission, paragraphs 10-11, 13. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SCTS.pdf

[175] Sheriffs' Association. (2017, September). Written submission, paragraphs 15-16. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SheriffsAssociation.pdf

[176] Andrew Smith QC. (2017, September). Written submission, paragraph 21. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SmithAndrew.pdf

[177] Andrew Smith QC. (2017, September). Written submission, paragraphs 28, 80-81. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SmithAndrew.pdf

[178] Society of Sheriff Court Auditors. (2017, August). Written submission, paragraph 3. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SoSCA.pdf

[179] Society of Sheriff Court Auditors. (2017, August). Written submission, paragraphs 6, 8. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SoSCA.pdf

[180] Policy Memorandum, paragraph 83. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[181] Policy Memorandum, paragraph 94. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14PMS052017.pdf

[182] Delegated Powers Memorandum, paragraph 40. (2017, June). Retrieved from http://www.scottish.parliament.uk/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14_DPM_S052017.pdf

[183] Justice Committee. (2017, November 14). Official Report 14 November 2017, cols. 9-10. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[184] Equality and Human Rights Commission. (2017, August). Written submission, paragraphs 17-18. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-EHRC.pdf

[185] Scottish Environment LINK. (2017, August). Written submission, paragraph 38. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-SELink.pdf

[186] DAC Beachcroft Scotland LLP. (2017, August). Written submission, paragraph 48. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-DACBeachcroft.pdf

[187] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 33. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[188] Judges of the Court of Session. (2017, August). Written submission, paragraphs 7-12. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-CourtofSession.pdf

[189] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 49. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[190] Justice Committee. (2017, November 14). Official Report 14 November 2017. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[191] Law Society of Scotland. (2017, August). Written submission, paragraph 37. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[192] Which?. (2017, November). Written submission, paragraphs 21-22. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-Which.pdf

[193] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 31. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[194] Justice Committee. (2017, September 26). Official Report 26 September 2017, col. 28. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11113&mode=pdf

[195] Justice Committee. (2017, November 21). Official Report 21 November 2017, col. 49. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[196] Justice Committee. (2017, November 21). Official Report 21 November 2017, cols. 50-51. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[197] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 10. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[198] Justice Committee. (2017, November 14). Official Report 14 November 2017, col. 34. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11199&mode=pdf

[199] Justice Committee. (2017, November 21). Official Report 2017, col. 50. Retrieved from http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11218&mode=pdf

[200] Forum of Insurance Lawyers. (2017, August). Written submission, paragraph 50. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf

[201] Forum of Insurance Lawyers. (2017, August). Written submission, appendix 1. Retrieved from http://www.scottish.parliament.uk/S5_JusticeCommittee/Inquiries/CL-FOIL.pdf