

## **Justice Committee**

### **Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill**

#### **Written submission from DAC Beachcroft Scotland LLP**

#### **Introduction: About DAC Beachcroft Scotland LLP**

1. DAC Beachcroft LLP and DAC Beachcroft Scotland LLP provide general insurance claims litigation and claims handling services to insurers throughout the UK, Ireland and wider global markets. We have more than 500 insurance professionals and act for nine of the top ten UK general insurers with expertise and experience across the entire sector. Our long history of commitment to, and investment in, the insurance sector, as well as being one of the largest defender litigation firms in Scotland, means that we have an unrivalled depth of experience and breadth of insight.
2. Our personal injury team has specialist expertise across the full range of personal injury work in Scotland. Our strategic litigation unit offers a unique service for insurers dealing with emerging and important market issues.
3. As a key stakeholder in the defender personal injury claims market, DAC Beachcroft Scotland LLP is delighted to have the opportunity to give its views on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill and the arrangements it includes to address the Scottish Government's stated policy objective of enhanced access to justice for all.

#### **Our response to the Bill**

4. We set out in the following paragraphs our response to the Call for Evidence, following the questions raised.

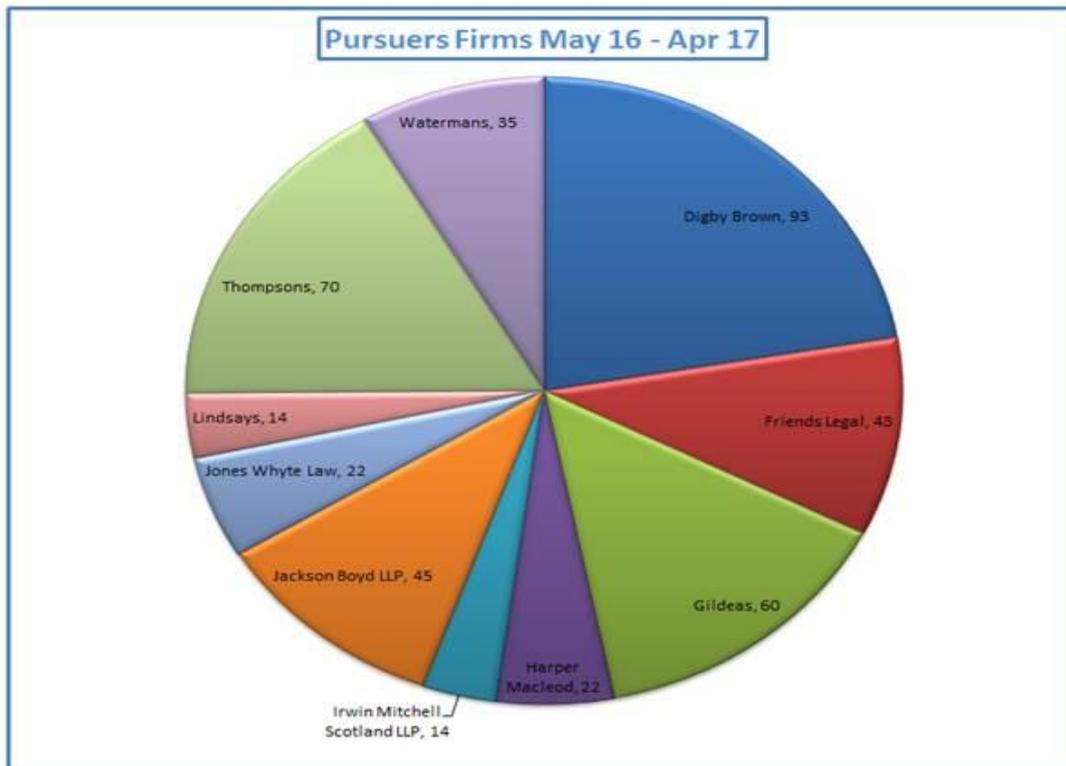
#### **Whether the Bill will achieve the policy aim of improving access to justice by creating a more accessible, affordable and equitable civil justice system**

5. The present Bill was introduced to implement the recommendations of the Report of the Taylor Review of Expenses and Funding of Litigation in Scotland which was published in October 2013.
6. It seeks to address these goals through the introduction of success fees, abolishing the liability of a losing pursuer to pay the defenders' costs and the introduction of group litigation procedure.
7. We did not believe the Scottish litigation expenses and funding system required such a radical review or revision as was seen to be necessary in England and Wales. Scotland had not experienced the problems which have arisen from referral fees, success fees, After the Event insurance and satellite costs litigation. Therefore, there were in our view dangers in seeking to address such issues as may validly arise from the litigation funding system in Scotland by applying solutions arrived at in England and Wales to quite different problems. We have approached this response however by recognising the wish of the Scottish

Government to implement the recommendations of Sheriff Principal Taylor and offering what we trust are constructive comments on the proposals.

8. In our view any system which allows the recovery of a litigant's costs and which accordingly exposes the opponent to a risk of an award of costs should in our view do so in a way that:
  - Is proportionate to the level of the litigation,
  - Is predictable, certain and transparent
  - Facilitates access to justice, not acting as a barrier or impediment.
9. We believe that in many respects the existing Scottish system for recovering expenses based as it is on the use of tables of fees prescribed by the courts works well. It offers certainty and predictability and also the requisite degree and transparency. Such criticisms as there may be as to proportionality and access to justice are in our view linked to the process of civil courts reform and the financial thresholds of the courts and codes of procedure therein which were addressed by the Courts Reform (Scotland) Act 2014 following Lord Gill's recommendations.
10. We do not consider, as a matter of general principle, that a litigant should in some way be wholly indemnified or have a right to make 100% recovery of his legal expenses from his opponent. In Scotland there is a long tradition of acting on a 'no win, no fee' basis in personal injury claims with judicial expenses accepted in lieu of a fee to the client. We believe however that this does not imply that a client need be fully indemnified in respect of legal expenses nor is it a departure from any presumption in favour of full compensation. In any event, a client who expends some of his compensation on irrecoverable legal costs still receives at the point of award full compensation for his injury and losses. We believe that a litigant ought to have a proportionate financial stake in his litigation and share the risks. Many of the problems which have arisen in England and Wales are precisely due to the disconnection from the risks and expenses of the process. These included the actions of certain claims management companies (CMCs) which led to widespread instances of fraud such as staged accidents. England and Wales introduced the regulation of CMCs coupled with the abolition of success fees and recoverable after the event insurance premiums for which qualified one way cost shifting and a 10% uplift in the level of general damages was the quid pro quo. Scotland had none of those issues and is a danger that without similar provision for Scotland there is a risk of CMCs transferring their attention to the Scottish legal market.
11. On April 25 the Scottish Government announced an independent Review of the Regulation of Legal Services in Scotland. We understand this review will consider the regulation of CMCs, however it is not due to report with its recommendations until summer 2018 and subsequent legislation is unlikely to be laid before the Scottish Parliament until 2019. CMCs are already regulated in England and Wales by the Ministry of Justice and this responsibility will be transferred to the Financial Conduct Authority under the Financial Guidance and Claims Bill currently before the UK Parliament.

12. This means the existing regulatory loophole for CMCs in Scotland is likely to be extended until 2020. There is therefore an opportunity for CMCs to move their operations to Scotland to exploit this absence of regulation. CMCs are a major factor in the increase of personal injury (PI) claims and we anticipate this Bill as drafted will lead to a substantial rise in CMC activity in Scotland, more nuisance calls, and an increase in the number of PI claims raised and initiated in the Scottish courts.
13. We are aware of the so-called David and Goliath arguments in respect of the apparent inequality of arms between those representing pursuers and those representing defenders who are in the main instructed by insurers or self-insuring public bodies or major corporate entities. It also includes moreover, many Government funded bodies, not least the Scottish NHS.
14. In our experience the overwhelming majority of personal injury cases are brought by firms who are known to have their own, or access to, funding products. Lest we be seen to encourage a system where legal services to pursuers are concentrated on a small number of firms, which we accept may not operate in the public interest, some of these firms act as agents for others or have established networks whereby other firms retain the link with the client but gain access to funding and specialist expertise.
15. Moreover many of the other pursuer firms with whom we regularly deal would appear to have access to funding including the indemnification of their clients in the event of an award of judicial expenses.
16. From an examination of our own internal data we can offer the following illustration based on the numbers of cases from each of a number of firms over the period shown.



17. We do not see that there is a lack of access to justice given the volume of cases raised by each of these firms all of whom act for pursuers and all of whom with one possible exception, would appear to have access to funding or after the event legal expenses insurance. Save for one of the firms above, our clients have been able to obtain payment of awards of expenses without the necessity of recourse against the pursuer as an individual.

**The specific provisions in the Bill which:**

- (i) regulate success fee agreements (sometimes called ‘no win, no fee’ agreements) in personal injury and other civil actions, including by allowing for a cap on any fee payable under such agreements**
- (ii) allow solicitors to enforce damages based agreements (a form of ‘no win, no fee’ agreement, where the fee is calculated as a percentage of the damages recovered)**

18. We propose to address these two questions together.

19. At the moment solicitors are barred from entering into damages based arrangements based on a percentage of the sum recovered in damages. CMCs are not and there is, as Sheriff Principal Taylor identified, a degree of artificiality in the prohibition in so far as solicitors are themselves free to set up a CMC and essentially “ride both horses” as some have done.

20. We have however a number of concerns in relation to the proposed provisions.

21. The provisions of the Bill appear to conflate success fees and damages based agreements. Success fees charged by a solicitor have been permissible in Scotland since 1992 provided that they are based on a percentage uplift of a solicitor's usual charges either on an agreed hourly rate or the judicial expenses recovered from the opponent. Damages based or American style contingency fees based on a percentage of the damages recovered have, as Clause 2 of the Bill identifies, always been unenforceable by a solicitor against his client, yet are commonly charged by unregulated CMCs. Indeed at the moment there is nothing to stop the double charging of a client, once by a CMC, on a damages based agreement basis and again by a solicitor to whom that client is referred on either a conventional fee basis or success fee basis.
22. Success fees, based on an uplift of usual fees or recovered judicial expenses are capped at the moment by regulations. The uplift cannot exceed 100% and the total success fee cannot exceed 25% of the damages recovered. We do not see that this protection is part of the proposed new success fee arrangements. Conditional fees hitherto imposed by the small number of CMCs operating in Scotland, are not capped other than by market forces. It is essential therefore that the capping provisions envisaged by Clause 4 are not left to further regulation but are enshrined from the outset in the provisions themselves with perhaps power given to alter the statutory cap by regulation in light of subsequent experience.
23. It should be noted that success fees, inclusive of VAT are also capped at 25% of damages in England and Wales.
24. In personal injury cases, we can see no good reason why the solicitor for a successful pursuer who recovers expenses should not require to apply these in reduction of the client's liability to pay a success fee. Why should a solicitor who may charge say 25% or 30% of the recovered damages not be required, in the interests of the client, to apply these against the success fee, as at the moment a solicitor charging a client privately would do? Furthermore in appropriate cases, a successful pursuer's agents may successfully seek an additional fee that is, a percentage uplift of the fees component of the judicial expenses. In some cases the additional fee can be in excess of 100% which would in our view represent a windfall which it would be unfair not to apply against the client's liability to pay a success fee. A successful pursuer's solicitors in a complex damages case, recovering judicial expenses and an additional fee can often obtain a total fee approaching £50,000. From our own data we can quote three recent examples:
- Case A: Damages of £600,000. Judicial account settled at £96,755 inclusive of additional fee. The solicitor's fee element would be about £47,000 excluding VAT.
  - Case B: Damages of £1m. Judicial account settled at £105,500 inclusive of additional fee. The solicitor's fee element would be about £50,000 excluding VAT.

- Case C: Damages of £730,000. Judicial account settled at £98,500 inclusive of additional fee. The solicitor's fee element would be about £47,000 excluding VAT.
  - Case D: Damages of £600,000. Judicial account settled at £58,000. No additional fee. The solicitor's fee element would have been about £16,500 excluding VAT.
25. If that solicitor were retaining 25% of the damages in addition, the Committee can see that the fees payable to a pursuer's solicitor would be even higher.
  26. For the same reason we do not agree that a solicitor should not be able to recover from his client outlays incurred. If nothing else this would add to the disconnection that exists between a litigant and the outcome of the proceedings.
  27. These provisions at the moment favour lawyers rather than put the pursuer, the consumer, at the centre of the proposed reform.
  28. Our view is that further reform of the law and practice of personal injury law is necessary to put the pursuer at the centre of proceedings. These would include further procedural reforms to promote early discussion of cases through better and earlier disclosure. These proposals unwittingly provide an incentive for less altruistic pursuer's lawyers to disclose or settle at a time when the litigation is more advanced and levels of costs are greater.
  29. We do not consider that future losses should be included in the success fee arrangements whether or not capped at £1m. Many personal injury actions, even those not in the catastrophic category (this is the term commonly used to describe head or spinal injury or severe life changing injuries involving amputations), involve future losses in the hundreds of thousands of pounds on account of either involving significant wage loss or younger pursuers or both. Once catastrophic injuries are taken into account then sums in the millions may be involved. Often the biggest component of these awards is the cost of future care or of necessary equipment or accommodation. It seems to us grossly unfair and not in the public interest that a solicitor's success fee should be inflated by what may be an arithmetical coincidence unrelated to the solicitor's actual skill or expertise and deducted from sums required to meet a severely injured persons needs
  30. We have to observe that the current personal injuries system, based as it is on an adversarial process, is the only way in which persons with life changing injuries receive levels of compensation to pay for standards of care which are beyond the means of the state and which quite properly from a public policy point of view should be paid by compensators. The injured person should be at the centre of the reform process, not his lawyers.
  31. Many cases resulting in awards over £1m are themselves not necessarily of a kind that might result in consideration of a periodical payment agreement. Furthermore at the moment the court has no powers to order an award of damages made up wholly or partly by a periodical payment order.

32. We would suggest that the provisions entitling a solicitor to include future losses be excluded. Future losses were not permitted to be included in the analogous legislation in England and Wales. If we are unable to persuade the Committee of this, at the very least these provisions should be deferred until the outcome of the forthcoming consultation on periodical payment provisions in Scotland announced by the Scottish Government.

**(iii) introduce 'qualified one way costs shifting' (QOCS), which means that a pursuer who acts appropriately in bringing a personal injury action or appeal will not have to pay the defender's legal expenses even if the action is unsuccessful**

33. We have a number of concerns about this proposal.

34. We are not convinced that in the context of the smaller Scottish legal services market that the current entitlement of a successful defender to recover judicial expenses represents a barrier against access to justice. We are not aware of data which informs the view that the existence of recoverable judicial expenses constrains the pursuit of meritorious claims. To the contrary, we have been made aware through our involvement with the Forum of Insurance Lawyers and the Association of British Insurers that in fact available data shows an increase in the levels of personal injury litigation in Scotland between 2008/9 and 2015/16.

35. Similar provisions in England and Wales, by virtue of the Legal Aid, Sentencing, and Punishment of Offenders Act 2012 (LASPO) were part of a package of measures aimed at curtailing certain practices which had been shown to be the unintended consequence of the recovery of success fees and after the event legal insurance premiums. Thus the introduction of QOCS, a ban on referral fees and regulation of accident management companies were part and parcel of a series of reforms aimed at tackling perceived abuses which had occurred in England and Wales.

36. As mentioned in our introductory remarks the larger firms acting on behalf of pursuers in Scotland are believed to be able to offer funding products incorporating an indemnity against any liability for a successful defenders' judicial expenses. The operation of agency or network relationships by certain of the larger pursuer firms affords other firms access to funding and specialist expertise.

37. If there is to be a restriction on a successful defender's right to recover judicial expenses, then it should be a condition of the restriction that the defender is insured thus protecting public bodies such as the NHS and local authorities many of whom carry large excesses or deductibles so that they are self-insuring often to as much as the first £500,000 of annual claims.

38. We believe that where a pursuer has given notice of funding as envisaged by Clause 10 of the Bill, the restrictions envisaged by Clause 8 should not apply. 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 CMC, including those operated by or on behalf of firms of solicitors, should not be liable for a successful

defenders' expenses. A potential liability for expenses serves as a useful control mechanism preventing unmeritorious cases and encouraging cautionary restraint on a pursuer's legal advisors.

39. The restriction should not apply to any case where a pursuer has failed to beat a Tender lodged by the defender. As presently drafted Clause 8 removes the sole protection that a defender has against a claim. It is not in our view in the interests of justice that a pursuer and his advisors can effectively disregard a well-pitched tender with impunity. In our view the circumstances in which a person "*conducts civil proceedings in an inappropriate manner*" in Clause 8(4) pitch the bar too high. We would not be of the view that a pursuer who proceeds or is advised to proceed against a Tender necessarily may be said in all cases to fall below the standards reasonably expected of a litigant or to have conducted the proceedings in a manner amounting to an abuse of process. Yet in our view such a pursuer ought to bear the defenders' expenses especially where he is funded.
40. Lastly we are unconvinced that the definition of proceedings conducted in an inappropriate manner in clause 8(4) goes far enough. It seems to us that there is merit in adopting the fundamental dishonesty test used in England and Wales where, it has to be observed it was necessary to introduce such a rule on account of the unintended consequences of the introduction of conditional fee arrangements and other measures aimed at "improving" access to justice.

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

41. We agree with this proposal. Given a successful pursuer is entitled to recover his judicial expenses, we have little difficulty in seeing why a donation to charity should be not be made in that situation.

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

42. We agree with this proposal subject to the recommendation that cases funded in this way not be exempt from the restriction on the pursuer's liability for expenses which we have discussed above.

**(vi) make legal representatives personally liable for any costs caused by a serious breach of their duty to the court**

43. We agree with this proposal.

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

44. We agree entirely with the proposals here and have nothing further to add save that we would welcome the further reform of the taxation of expenses system so that the disincentives which operate against the interests of defenders in taking

accounts to taxation including the inability to protect against the costs of taxation by making suitable costs protective offers, are removed.

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

45. Scotland lacks rules of court to facilitate group litigation. Analogous provisions have worked satisfactorily in England and Wales for some time.

46. Despite the lack of statutory provisions, the Court of Session has to an extent by virtue of its inherent powers to regulate its own procedure, introduced a series of case management measures which have facilitated a large volume of litigation arising from the same subject matter (for example in volume pharmaceutical litigation such as the Vioxx litigation and in the current “mesh” urinary incontinence cases). These steps although commendable lack the ability to facilitate true representative litigation and powers to compel or regulate the conduct of membership or participation in a group. Thus we are in favour of the necessary primary litigation to facilitate this.

47. We believe however that the detail is best left to the Scottish Civil Justice Council and that the Bill should be limited to a general statement of principle or empowerment as is found in Clauses 17(1) and the powers of the court to make provision by Act of Sederunt as conferred by Clause 18.

48. We would not be in favour of allowing a representative party who does not have a cause of action of his own, to bring group proceedings and in our view the grounds of membership of a group and the conditions on which that party acted as a representative should be left to rules of court.

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

49. We are of the view that the financial implications of the Bill have not been fully considered. We have concerns that these provisions may lead to a rise in speculative, unmerited litigation driven by CMCs. With the restriction on the right of defenders to recover their expenses, we would foresee a rise in insurance costs for the consumer as insurance companies pass on the rising costs of litigation both to individual consumers and to business and commerce. Furthermore there will be an impact on self-insured or partially self-insured bodies such as local authorities and the NHS.

50. Many of the objectives desired by the Bill, above all controlling the rising cost of litigation in personal injury litigation for everyone, could be achieved by a further series of reform of the rules of court aimed at reducing the adversarial nature of the procedure such as by promoting earlier disclosure and earlier discussion. At the moment, as we have indicated, the pursuer is largely a spectator to the proceedings. Our concern is that these proposals far from empowering consumers and hence aiding access to justice, provide an incentive for lawyers to choose the most appropriate time to settle, a time that may not necessarily be in the pursuer’s interests.

DAC Beachcroft Scotland LLP  
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