

Justice Committee

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

Written submission from DWF LLP

1. DWF LLP is a leading business law firm, with over 2,000 people working across 16 offices in a wide range of sectors. We carry out substantial litigation and advocacy services in all types of proceedings. We have one of the largest Insurance teams in the UK with nearly 900 people, including 94 partners and over 600 legal advisers.
2. The comments in this submission are restricted to the subject of personal injury claims, but (except where otherwise stated) should not be read as applying to clinical negligence claims where we accept different considerations might apply.

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

3. DWF recognises the need to provide access to justice for all parties under Scots law. While we support the main aims of the Bill we have concerns that the Bill as it stands could have unintended consequences that could be seriously detrimental to these aims.
4. When Sheriff Taylor prepared his report he noted that between 2008 and 2011 claims registered by the DWP in Scotland rose by 7% compared to 23% in England and Wales. Those statistics are now out of date. Recent statistics from DWP show a dramatically different picture. Claims in Scotland from 2008/9 to 2015/16 have increased by 43% and over the same period there has been a 25% increase in the number of personal injury actions raised in Scotland.¹ This does not indicate Scotland has a problem with access to justice; rather there is evidence from the data that the compensation culture which has been present for some time in England and Wales has now reached Scotland.
5. We are concerned that the Bill excludes the regulation of Claims Management Companies (CMCs) in Scotland as they are already regulated in England and Wales. We see this Bill as an ideal opportunity to regulate this industry in Scotland and by doing so provide safeguards against their operations and more suspect activities including nuisance calls encouraging people to make disingenuous claims. There is little sense in the Bill introducing a cap on success fees without some means to regulate the cap. We know that a number of other bodies share these concerns.
6. We support the principle of improving access to justice by introducing success fees and predictability in fees, but the proposed but unwarranted introduction of Qualified One-way Costs Shifting (QOCS) as provided for so far in the Bill we believe will replace a perceived inequality with a genuine inequality. We believe significant amendments need to be made to the Bill to ensure its provisions do not encourage and assist fraudulent claimants and unscrupulous claims

¹ Source: FOI response from DWP dated 12 April 2016

management companies who see Scotland as an area where rewards are greater and they can operate free from any regulation.

7. It should be appreciated that in England and Wales QOCS was introduced at the recommendation of Lord Justice Jackson as part of a move away from a litigation process which he saw as giving rise to substantial unnecessary cost and which required reform. Specifically, the aim was to remove from defenders what was perceived as the unfair burden of paying success fees and after the event insurance policy premiums, but at the same time ensuring that pursuers were protected from adverse costs orders, and as part of a balanced and linked package, QOCS was introduced to provide protection to claimants from those costs orders.
8. The same need for QOCS does not arise in Scotland: there is no comparison between the unfairness which was being addressed by Jackson in England and Wales, and the position in Scotland. No case has been made out that there exists any issue in Scotland to which QOCS is the solution. In fact, the introduction of QOCS in Scotland is likely to encourage the pursuit of weak claims by pursuers who will have protection from adverse costs orders and is likely thereby to fuel the Scottish compensation culture further.
9. We would also highlight a specific additional unfairness which will arise in the case of certain individuals facing claims made against them. QOCS will not create an "equitable justice system" where a defender is uninsured (for example a householder defending a public liability claim). It is manifestly unfair and inequitable for QOCS to apply in a case where the defender is not a public body and is not insured

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;**
10. The level of the success fee must be based on an assessment of the risks inherent in the case.
 11. To safeguard pursuers we strongly support an overall cap on the success fee. The Scottish Government will require to collect and publish data on the share of damages currently taken from pursuers under speculative fee agreements in order to determine the appropriate level for the cap. That will be an ongoing task to ensure the level of the cap remains appropriate. The cap will also have to be policed with sanctions for its breach. Any contract which includes a deduction in excess of the cap should be void.
- (ii) allow solicitors to enforce damage based agreements (a form of "no win, no fee" agreement, where the fee is calculated as a percentage of the damages recovered)**
12. DWF believe there is a need for a cap on the fee allowed by damage based agreements.

13. Future losses must be ring-fenced from the DBA calculation due to the risks this causes in terms of the pursuer running out of damages prior to the end of their life and the pressure this would put on the public purse and the public care system. These awards should stay with the injured person and not be transferred to lawyers.

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

14. If QOCS is introduced in the way set out in the Bill with no provisions to prohibit referral fees, regulate claims management companies or reduce recoverable legal costs we consider there will be a further substantial increase in claims, increased risk of fraud, substantial costs to the taxpayer and a corresponding increase in insurance premiums. The absence of tighter controls will create financial and risk based incentives which will only increase the likelihood of unmeritorious claims.

15. The introduction of QOCS in Scotland will lead to the compensation culture becoming entrenched in Scotland at the same time as further measures are being taken in England and Wales to reduce its impact. The introduction of the current proposals without amendment will see the activities of CMCs and claimant operations being transferred to Scotland in greater number still as they seek the line of least resistance.

16. We would suggest that those other measures which should be introduced are: reduction of pursuer's judicial expenses for low value claims; a ban on referral fees; and regulation of claims management companies. All of these steps were taken in England and Wales and had an effect in mitigating the same issues which have now migrated to Scotland. None of these would impact on a pursuer's ability to conduct litigation without fear of an adverse costs order, and none of them would impact on access to justice.

17. If contrary to our submission QOCS is brought in to the Scottish jurisdiction it should only apply where a defender is insured or is a public body. To apply QOCS to personal injury claims where the defender is an uninsured private individual, no matter how rare such claims may be, is even more clearly unfair and inequitable.

18. If the purpose of QOCS is to deal with a David v Goliath situation, it should not apply where a pursuer is funded by a DBA.

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

19. DWF supports this proposal.

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

20. DWF supports the general principle behind this provision. As we understand it the majority of pursuer firms and/or claims management companies will meet awards of expenses made against the pursuer and will also fund the pursuer's outlays up front. Those entities are therefore providing financial assistance to the pursuer and, under a DBA, will have a direct financial interest in the outcome of the case. The pursuer is not at risk of paying the defender's expenses. In those circumstances there is no difference between a venture capitalist funding a commercial action and a law firm, trade union or claims management company funding a personal injury action.

21. Further clarity is needed however to avoid unnecessary litigation. It should be made clear that any third party which enters into a success fee agreement or a DBA 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.

22. Where a pursuer is backed by a third party in this way, and a defender is backed by an insurance company, it is neither equitable nor proportionate for one party to enjoy the benefit of QOCS while the other does not. There is already an obvious inequality where a defender is uninsured but a pursuer enjoys financial assistance and support. For those reasons we consider that the rule set out at section 10 should be an exception to QOCS and should be moved to section 8.

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

23. DWF supports 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**

24. DWF supports this proposal.

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

25. DWF supports this proposal.

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

26. There are a number of additional measures which we believe are required both to achieve a balanced package of reform and to bear now on Scotland's compensation culture evidence by the substantially increased number of claims:

Claims Management Company regulation and referral fee ban

27. The lack of CMC regulation in Scotland is an area for growing concern. Some solicitor firms in Scotland have established their own CMCs to avoid the prohibition on contingency fees. There needs to be further regulation of this industry as whole and certainly statutory controls should apply to anyone offering a Damages Based Agreement. There will be a considerable gap (most likely several years) before any legislation following the conclusion of the Independent Review of the Regulation of Legal Services comes into force. Sheriff Principal Taylor recommended that claims management companies should be regulated in Scotland. In our submission it is extremely risky to proceed with his recommendations on QOCS and DBAs in isolation without having a system of regulation in place for claims management companies, in order to protect the public and police any caps on success fees. This is especially the case if referral fees are not prohibited.
28. Sheriff Taylor recommended that only regulated bodies should be allowed to charge a referral fee and that for any other person to do so should be a criminal offence. In our view where referral fees are banned in England and Wales, so they should be in Scotland or else CMCs will increasingly move their activities away from England and Wales and into Scotland.

Reduction of pursuer's judicial expenses for low value claims

29. There is a significantly higher level of costs recovery in Scotland compared to England and Wales, in pre-action settlements. This is especially true in lower value claims. This is the "reward" side of the risk/reward matrix. As QOCS reduces the risk then, unless reward is also reduced, there are significant incentives for a substantial increase in claims which will only incentivise claims farmers and the less scrupulous claims management companies.

Legal aid

30. DWF believes legal aid should not be available for personal injury claims unless the applicant can demonstrate that they have attempted to obtain representation from a firm offering success fees or DBAs and has been refused. It is not in the public interest for legal aid to be expended supporting a claim which could be funded by alternative means. In this way the legal aid budget can be allocated to other deserving cases such as those relating to family law and housing where the types of funding arrangements used in personal injury cases would not be suitable.

Analysis of the cost to the public purse

31. We wonder why the cost to the public purse has not yet been assessed. We anticipate the number of claims under the new provisions will increase significantly. A substantial number of those claims will be made against public bodies. Some analysis of the cost to the public purse, and the additional burden on the Scottish Court Service, is required.

DWF LLP
16 August 2017