

## **Justice Committee**

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

#### **Written submission from STUC**

1. The STUC is Scotland's trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.
2. The STUC represents over 560,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers.
3. The STUC have actively engaged with civil litigation reform over many years. We know the importance that access to justice serves not only in relation to individuals securing fair and just redress but also in relation to maintaining and improving standards of health and safety.
4. We therefore fully engaged with the Sheriff Principal Taylor Review and fully support the vast majority of his recommendations. In particular, we fully support Sheriff Principal Taylor's recommendations to introduce Qualified One Way Costs Shifting (QOCS) and his recommendations in relation to the rare and extreme cases where the benefits of QOCS should be removed from an individual pursuing a personal injury case. That is only where the claim is fraudulent (recommendation 51), there is an abuse of process (recommendation 52) and where the pursuer's behaviour is "Wednesbury unreasonable" (recommendation 54).
5. We work closely with the TUC. We are aware from the TUC and our affiliates who represent members across the UK that the introduction of QOCS in England and Wales has improved access to justice.
6. We therefore strongly support the introduction of QOCS in Scotland if the system fully implements Sheriff Principal Taylor's recommendations. That will improve access to justice. It will create a more accessible, affordable and equitable civil justice system.
7. We therefore welcome the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. We welcome the Scottish Government's policy to fully implement Sheriff Principal Taylor's recommendations in relation to QOCS. We are aware of a range of vested commercial interests that would seek to limit access to justice and the Scottish Government's aim to counter this is entirely laudable.
8. We believe the Bill's authors genuinely desire to fully implement Sheriff Principal Taylor's recommendations. However we believe that full implementation of Sheriff

Principal Taylor's recommendations in relation to QOCS requires amendments in relation to QOCS Sections 8(4) (a), (b) and 10.

9. With the necessary amendments we would fully support the entire Bill and in particular also support the provisions within Parts 3 and 4 of the Bill relating to Auditors of the Court and Group Proceedings respectively.
10. Additionally, we appreciate that Sheriff Principal Taylor did not consider or make any recommendations in relation to court fees but the STUC have long opposed the current "pay as you go" model for paying court fees. We will respond to the Scottish Government consultation on fees which we believe is pending but would also submit that the Bill is an appropriate vehicle to change the current approach to court fees.

### **Qualified One Way Costs Shifting (QOCS)**

11. In our submission there were 3 key components to Sheriff Principal Taylor's recommendations in relation to QOCS:

- There must be certainty
- The bar for removing QOCS should be set high
- The benefit of QOCS should only be removed in extreme cases.

12. Accordingly, Sheriff Principal Taylor recommended that a pursuer merely acting unreasonably was not enough for QOCS to be removed. Only "Wednesbury" unreasonableness should result in QOCS being removed. Similarly, in relation to other circumstances where QOCS may be removed, Sheriff Principal Taylor recommended that this would only be in circumstances where there was fraud or an abuse of process.

13. We do not think those overarching principles are reflected sufficiently in the current drafting of the Bill.

14. Section 8(4)(a) provides that the benefit of QOCS will be removed where a claimant "makes a fraudulent representation in connection with the proceedings". In our view, QOCS should only be removed where the bringing of the case itself or a material part of it is fraudulent. To the contrary, the current wording of the Bill could result in the benefit of QOCS being removed because of a single representation in relation to an issue quite peripheral to the main subject matter of the litigation. Such an outcome would not reflect Sheriff Principal Taylor's recommendations.

15. Section 8(4)(b) provides that the benefit of QOCS will be removed where a pursuer "behaves in any manner which the court considers falls below the standards reasonably expected of a party in civil proceedings". We would submit that the level of unreasonableness described in this subsection is less than the Wednesbury unreasonable test recommended by Sheriff Principal Taylor.

16. Section 10 of the Bill relates to third party funding and sets out circumstances where the court may make an award of expenses against the funder. This section

of the Bill is intended to implement the recommendations contained in Chapter 11 of Sheriff Principal Taylor's report. That section of Sheriff Principal Taylor's report related to "commercial investors [who] provide financial support to litigants usually for an agreed share of any sums recovered." Clearly, this does not include Trades Unions who provide financial support to their members to pursue personal injury claims.

17. 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.

### **Court Fees**

18. The STUC believe that court fees can represent a significant barrier to access to justice. Accordingly, given that the intention of the Bill is to improve access to justice we believe that the Bill should also address the issue of court fees. The court fees paid in an average personal injury case is in the range of £3,000 – £5,000. That is a significant sum and is more often than not disproportionate to the level of damages. In financial terms, it is a particular problem for Trades Unions who support (and fund the court fees) for hundreds of members' cases at any one time.
19. Accordingly, in our submission, court fees should only be required to be paid at the end of the case by the unsuccessful party. Such an approach will strike a fair balance. It will allow the Scottish Courts Service to continue to receive an income from court fees but in a way that will not cause significant disadvantage to Trades Unions.

STUC  
18 August 2017