Justice Committee

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

Written submission from Which?

About Which?

1. Which? is the largest consumer organisation in the UK with around 140,000 members and supporters in Scotland. We operate as an independent, a-political, social enterprise working for all consumers and funded solely by our commercial ventures. We receive no government money, public donations, or other fundraising income. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives, by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

2. Which is pleased to have the opportunity to respond the Committee's request to provide the consumer's perspective on civil litigation in Scotland in two distinct areas: the proposals contained within the Civil Litigation Bill on how group proceedings should be taken and the regulation of claims management companies operating from Scotland.

Opt-in v opt-out for group proceedings

Summary

3. Which? strongly supports the implementation of an opt-out mechanism for group proceedings where this is appropriate in the circumstances of the case.

4. 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 expense of pursuing them separately, or following the necessary administrative step of opting into an unfamiliar process.

General comments

<u>Opt-in</u>

5. In opt-in collective actions, only those people who have signed up to the action are represented and bound by the outcome.

6. 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. At the outset of a collective action, consumers do not know (i) whether they will get any money at all if they sign up (i.e. whether the claim will be won) and (ii) if the action is successful, how much compensation they will get. This makes it difficult

for them to assess whether the administrative burden of signing up will be worthwhile.

7. Law-breaking businesses therefore benefit from taking a little bit of money from a lot of people, rather than a lot of money from one person.

Opt-out

8. In an opt-out collective action, a representative brings a claim on behalf of all affected consumers. After the claim has been won, and the defender has been ordered to pay compensation, affected consumers can come forward and claim the proportion of the compensation that is rightfully theirs.

9. An opt-out mechanism removes the administrative burden of gathering together affected consumers before proceedings are commenced, when the incentive is low for consumers to get involved because the outcome of the action is uncertain.

10. An opt-out mechanism boosts the overall level of compensation achieved, and strengthens 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.

11. We agree with the desire not to create an overly litigious culture and believe that class actions should be subject to a straightforward, streamlined certification procedure before they can proceed. A certification process can act as a legitimate safeguard against unmeritorious claims, ensuring that opt-out actions are available only in appropriate cases.

Specific comments

What about consumers who do not want to be part of the group proceeding and want to pursue their own legal action?

12. Consumers who do not want to be bound by the outcome of the collective action can opt out of the proceedings by giving notice to the class representative.

13. Providing a real opportunity to opt out will mean that represented individuals are given the opportunity to opt out throughout the course of the action (prior to judgment) as well as after any collective settlement is reached; and rules can be introduced to set minimum standards for the advertising of multi-party actions both at the commencement of the claim and once the claim has been won. Therefore, those who wish to pursue action individually will not have their rights curtailed.

What will happen to the residual damages if the total is not claimed?

14. We agree that it is necessary for the court to have the power to make orders as to the disposal of any residual damages. In our view, any unclaimed funds should be distributed in a manner that could be expected to indirectly benefit the victims

of the infringement of consumer law so that the intention of the action is fulfilled to the greatest extent possible.

15. Unclaimed sums should be held by an organisation that is well placed to ensure they are distributed in a way that can deliver a benefit to victims of the infringement who have not been adequately compensated. There are various models that could be used to achieve this objective. Our preferred model is the establishment of a charitable trust, constituted and bound by legislation, that has a duty to award funds to charities or projects which will (as near as possible) benefit the victims of the infringement and similar consumers.

16. Residual funds should not, in any case, revert to the defender. This "reversion" model gives the defender an incentive to minimise the number of victims that receive compensation, whether by limiting the scope of advertising around the case or turning away victims who do come forward due to (for example) an overly strict application of the relevant evidence requirements.

How have opt-in group proceedings operated previously?

Opt-in

17. Prior to the implementation of the Consumer Rights Act 2015, the UK redress regime for competition law infringements only allowed group proceedings on an opt-in basis.

Football shirts

18. In 2007 Which? brought a collective action on an opt-in basis against JJB Sports, following an enforcement decision that JJB had fixed the price of certain football shirts in contravention of competition laws. Which? settled the case and was able to provide compensation for some consumers who had been victims of the infringement. However, the opt-in nature of the action meant low levels of consumer take-up. In that case, around 1,000 out of the potential millions who suffered loss benefitted from the settlement, which meant, in effect, the company was allowed to keep its unlawful gains.

Dairy

19. In 2011 a cartel in dairy products was investigated by the Office of Fair Trading; major supermarket chains (Tesco, Sainsbury's, Asda and others) were found to have fixed the price of milk and cheese above the market price.

20. While individual consumers may have paid just a few pounds more for milk and cheese over two years, the cumulative detriment was huge. Informal reports from lawyers and economists suggest the cumulative loss to consumers was around £270m. Only a tiny fraction of that amount would have been recouped via an opt-in action and the loss was so widely spread across the community that there would be little incentive for any particular individual to come forward at the outset of a case. Consequently, no claim was ever brought on behalf of consumers. The

supermarkets kept their £270m and had little incentive to refrain from similar behaviour in the future.

How have opt-out mechanisms worked in the UK?

21. A regime for opt-out collective actions in the competition law sphere was introduced by 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 the representative of a class of persons who are alleged to have suffered losses as the result of a competition law infringement.

22. The Tribunal's jurisdiction covers the whole of the United Kingdom.

23. Two group proceedings have been pursued under the new regime.

Mobility Scooters

24. The first case followed an infringement decision of the Office of Fair Trading ("the OFT") in May 2014. The OFT found that Pride and eight of its retailer customers had agreed the retailers would not advertise below-RRP prices on the internet for particular models of scooter. No penalty was imposed on Pride, and Pride did not seek to appeal the OFT's decision.

25. The claimant, Ms Gibson was the General Secretary of the National Pensioners Convention and she was found to be an appropriate class representative.

26. However, the Tribunal found that Ms Gibson had approached the estimation of loss on the wrong basis. In March 2017 her application was adjourned to enable her to reformulate the claim, address quantification and causation, and submit an amended application.

27. The claim was subsequently discontinued by consent with an agreement to pay the defendant's costs.

Mastercard

28. The second case (which is not yet concluded) relates to an allegation that in the region of 46.2 million consumers were overcharged by up to £14bn between 1992 and 2008 as a result of the finding by the European Commission and European Court of Justice that anti-competitive interchange fees had been charged by MasterCard for use of its payment cards. It is argued that this cost was passed on to consumers by retailers in the form of higher prices for goods and services.

29. The proposed class representative is Walter Merricks, an ex-lawyer who previously led the UK Financial Ombudsman Service. The Tribunal found that he was an appropriate class representative.

30. However, the Tribunal declined to certify Mr Merrick's claims on the basis that they did not possess sufficient commonality, given the differing ways and

amounts in which the interchange fees would have been passed on (if at all) by retailers to the individual consumer, depending on the type of goods or services sold and the kind of retail outlet. Similarly, the claims were held unsuitable to be brought in collective proceedings as, given the lack of clarity about the levels of individual losses sustained, they were inappropriate for an aggregate award of damages.

31. On 28 September 2017, the Competition Appeal Tribunal refused permission for Mr Merricks to appeal. On 27 October 2017 Mr Merricks made an application for Judicial Review in the High Court and applied to the Court of Appeal for permission to appeal.

32. These cases demonstrate that an "opt-out" regime need not lead to an explosion in "class action" litigation.

Claims management companies

Summary

- Which? is concerned about the practices of claims management companies (CMCs) including disproportionately high fees and charges as well as cold calling.
- The Scottish Government must act urgently to address the 'regulation gap' between England, Wales and Scotland.
- It is disappointing that the Civil Litigation Bill does not include measures to introduce regulation of claims management companies in Scotland.
- However, it is encouraging that the Scottish Government is exploring the opportunity to amend the Financial Guidance and Claims Bill currently passing through Westminster, in order to ensure CMCs are regulated in Scotland.
- 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.

The regulation of claims management companies

33. The Bill seeks to improve access to justice by creating a more accessible, affordable and equitable civil justice system, and Which? is therefore disappointed that the measures in the Bill do not extend to the regulation of the claims management industry.

34. The current situation, where consumers pay high charges to CMCs for what might be a small amount of work to progress a claim, is deeply unsatisfactory. Which? would like to see fewer consumers using CMCs to the extent they do today and is extremely supportive of measures, such as a cap on charges, to reduce the costs to consumers of using CMCs. There should be an end to consumers paying to make straightforward claims in situations where it is not really necessary to use a CMC.

35. Consumers should be empowered to claim redress for themselves and be entitled to keep the full amount of compensation owed to them, without paying high fees for CMC services. If consumers were empowered to go straight to firms when making simple claims, they would be able to collect all compensation owed to them without paying high CMC fees. While we welcome the work currently underway as part of Esther Robertson's Review of the Regulation of Legal Services[1], the Scottish Government must act with more urgency to address this issue and limit the consumer detriment caused by the claims management industry.

Scale of consumer detriment

36. The high fees being charged by CMCs are a clear and significant case of consumer detriment. Figures from the Ministry of Justice[2] (MoJ) show that CMCs charge, on average, 25%-30% commission, while figures from the National Audit Office[3] (NAO) estimate that CMCs made between £3.8 – £5 billion between April 2011 and November 2015 alone, just in commission from Payment Protection Insurance (PPI) claims. This is a significant sum that could have gone directly to consumers, but instead was paid to CMCs, for what was often relatively little work.

37. The scale of nuisance calls by CMCs and level of associated consumer detriment has also been well documented. In 2013, Which? launched a nuisance calls reporting tool[4], enabling people to complain about and report nuisance calls and texts. Since then, our tool has captured over 63,000 nuisance calls reports. Of these, calls relating to accident claims and PPI claims are among the most common types. Between August 2016 and August 2017, our tool reported 1,200 nuisance calls in Scotland, with over 200 calls related to PPI and accident claims. This corresponds with data from the Information Commissioner's Office, which shows that calls relating to accident claims and PPI make up approximately one third of all live unsolicited calls reported to them.

38. Research published by Which? in 2016[5] found that Scottish cities suffer the highest number of nuisance calls in the UK. The analysis of 9 million calls between 2013 and 2016 found that nuisance calls to residents in Glasgow account for 51.5% of all calls to landlines in the city, while Edinburgh was a close second with 47.8%.

[1] http://www.gov.scot/About/Review/Regulation-Legal-Services

[2] https://consult.justice.gov.uk/digital-communications/cutting-costs-for-consumers-finanical-claims/supporting_documents/Consultation%20%20CMR%20%20Cutting%20the%20costs%20for%20consumers%20%20Financial%20Claims%20%2015%20Feb%202016.pdf

[3] https://www.nao.org.uk/press-release/financial-services-mis-selling-regulation-and-redress/; Note that these figures refer to CMCs based in England and Wales only

[4] https://www.which.co.uk/consumer-rights/advice/how-to-stop-nuisance-phone-calls#report-a-company-using-our-tool

[5] https://campaigns.which.co.uk/nuisance-calls-scotland/#_scottish-cities-top-table-nuisance-calls

39. In September 2017 we published new research for Scotland that showed that:

Landline

- 81% of those with a landline say that they have received an unsolicited marketing or sales call in the last month. This compares to 90 per cent who told us they had received an unsolicited call to their landline in the past month in 2015.
- The average amount of cold calls received last month by those with a landline was 14 (compared to 18 in 2015), with the most common types being silent calls (48%), accident claims (44%) and PPI insurance (42%).

Mobile

- 70% of those with a mobile say they received an unsolicited marketing or sales call on it in the last month (in comparison to 69 per cent in who told us they had received an unsolicited call to their mobile in 2015). The average amount of nuisance calls people received on their mobiles in the last month was 11, with the most common types being accident claims (39%), PPI insurance (34%) and silent calls (29%).

Attitudes towards nuisance calls

- 86% people agreed that cold calls are an annoying interruption to their daily life and 41% said that they have felt intimated by them. Furthermore, 71% said that receiving cold calls has discouraged them from picking up their landline phone when it rings.

Stronger regulation

40. Only through a tougher regulatory regime will consumers be adequately protected from poor practices carried out by CMCs. However, unlike in England and Wales, CMCs in Scotland are not currently regulated at all.

41. Sherriff Principal Taylor's Review of the Expenses and Funding of Civil Litigation (2013)[6], explicitly called for the regulation of CMCs in Scotland, citing concerns about the significant harm CMC activity caused consumers. The review also sought to create a "level playing field with solicitors", who are currently regulated by the Law Society of Scotland and are often in direct competition with CMCs. It is particularly disappointing and surprising, therefore, that the measures included in the Civil Litigation Bill do not introduce regulation for CMCs operating in Scotland.

42. The discrepancy in regulation between Scotland and England and Wales risks Scotland becoming increasingly attractive to CMCs and leaves Scottish consumers open to the harmful practices of rogue firms. While Esther Robertson's review of legal services is welcome, Which? is concerned that the timing of the review means that any recommendations for regulating CMCs in Scotland may not be enacted for several years.

[6] http://www.gov.scot/Publications/2013/10/8023/32

43. Which? recognises the importance of consistent rules for CMC activity between countries within the UK. This will limit confusion for consumers and limit opportunities for CMCs to profit from discrepancies in regulation. It is, therefore, encouraging that the Scottish Government is exploring the opportunity to amend the Financial Guidance and Claims Bill currently passing through Westminster, potentially via a Legislative Consent Motion that would extend the FCA's regulation of CMCs to Scotland.

44. The Bill will introduce a tougher regulatory regime for CMCs in England and Wales, transferring regulatory oversight from the MoJ to the Financial Conduct Authority. Which? would be very supportive of any action taken to extend this new regime to Scotland. However, it is important to ensure 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.

45. Given that the Bill is expected to receive Royal Assent in Spring 2018, and the transition from the MoJ to the FCA will follow swiftly after, the Scottish Government needs to act urgently to address the 'regulation gap' between England and Wales and Scotland.

46. The Taylor Review recommended the creation of a regulatory body for CMCs in Scotland. The Civil Litigation Bill presents an opportunity for the Scottish Government to establish this new regulatory body and introduce a new regulatory regime for CMCs. If amending the Financial Guidance and Claims Bill is only viewed as an interim solution to regulating CMCs in Scotland, then any new Scottish regulatory body's regime should mirror the tough rules that CMCs are subject to in England and Wales, to ensure that Scottish consumers will not be disproportionately at risk of harmful CMC practices.

<u>Capping CMC charges</u>

47. Consumers should be empowered to claim redress for themselves, without having to pay high fees and charges for the services of CMCs. Tougher rules on CMCs would limit the number of consumers using CMC services for straightforward claims, but Which? is also calling for firms, rather than consumers, to be required to pay CMC charges, when they are at fault.

48. This would result in more consumers receiving all of the compensation they are owed, rather than CMCs making excessive profits from processing claims that consumers could have made themselves. Crucially however, making firms pay CMCs' fees would also incentivise businesses to set up simpler and easier redress processes.

49. While Which? would like to see a situation where consumers did not use CMCs to the extent they do today, we are concerned that too often CMC activity is seen as the cause of the problem, rather than recognised as a symptom of wider failings in the delivery of compensation. Our response to the FCA consultation on

the rules and guidance on payment protection insurance (PPI) complaints[7] highlighted how banks failed consumers in the PPI claims process. It has been far too difficult for consumers to make a claim, and there are many reasons why consumers may decide not to make one, including that they are unaware that they may have cause for complaint.

50. Therefore, measures should be introduced that incentivise firms to take a proactive approach to financial redress. Which? is calling on the FCA to require financial firms to pay the costs of CMCs where the firm is at fault and the consumer is owed compensation. It is likely that a cap would need to be placed on the fees a CMC could charge, and it may be necessary to limit the circumstances in which the obligation on a firm to pay CMC costs arises, in order to avoid creating undesirable incentives, and the FCA should fully explore all of the different options.

51. These proposed measures should similarly be consulted on by the appropriate body in Scotland, if the Scottish Government goes down that route, to guarantee sufficient protection for consumers.

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Which?
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[7] http://www.which.co.uk/documents/pdf/ppi-consultation-which-response-439839.pdf