



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

11th Meeting, 2020 (Session 5)

Tuesday 17 March 2020

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 8 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft] from—

Ash Denham, Minister for Community Safety, Hamish Goodall, Civil Law and Legal System Division, and Heather McClure, Scottish Government Legal Directorate, Scottish Government.

3. **Subordinate legislation:** Ash Denham (Minister for Community Safety) to move—

S5M-21029 That the Justice Committee recommends that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft] be approved.

4. **Subordinate legislation:** The Committee will consider the following negative instrument—

Police Pensions (Amendment) (Scotland) Regulations 2020 (SSI 2020/33)

5. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting held on 12 March 2020.

6. **Defamation and Malicious Publication (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Michael Papparakis, Policy Manager, Private Law Unit, Jill Clark, Head of Private Law Unit, and Jo-Anne Tinto, Solicitor, Scottish Government Legal Directorate, Scottish Government.

7. **Defamation and Malicious Publications (Scotland) Bill (in private):** The Committee will review the evidence heard earlier in the meeting.
8. **Elder abuse:** The Committee will consider feedback from the presentation given by Dr Hannah Bows on 12 March 2020.

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The papers for this meeting are as follows—

**Agenda items 2 and 3**

Paper by the Clerk

J/S5/20/11/1

**Agenda item 4**

Paper by the Clerk

J/S5/20/11/2

**Agenda item 5**

Paper by the Clerk

J/S5/20/11/3

**Agenda item 6**

Paper by the Clerk

J/S5/20/11/4

PRIVATE PAPER

J/S5/20/11/5 (P)

## Justice Committee

11<sup>th</sup> Meeting, 2019 (Session 5), Tuesday 17 March 2020

### Subordinate legislation

#### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

- [Civil Litigation \(Expenses and Group Proceedings\) \(Scotland\) Act 2018 \(Success Fee Agreements\) Regulations 2020 \[draft\]](#)

#### Introduction

2. The instrument is made under section 4(1), 4(2), 5(1), 5(2) and 7(3) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

3. The purpose of the instrument is to regulate success fee agreements in Scotland, cap success fees under those agreements and provide that some kinds of success fee agreements will not be available for family proceedings. Success fee agreements are “no win, no fee” agreements which enable potential litigants to raise a legal claim which they may not otherwise be able to pursue due to the potential cost, particularly if they are not eligible for legal aid.

4. Further details on the purpose of the instrument can be found in the policy note attached at **Annex A**.

#### DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 25 February 2020 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

#### JUSTICE COMMITTEE CONSIDERATION

6. Prior to formally considering the instruments, the Justice Committee sought written evidence from relevant organisations. Five responses were received from the-

- Law Society of Scotland,
- Thompsons Solicitors,
- Forum of Scottish Claims Managers,
- Forum of Insurance Lawyers, and
- Association of British Insurers.

These are attached at **Annex B** to this paper.

7. The Justice Committee is required to report to the Parliament on the instrument by 29 March 2020. The Minister for Community Safety has lodged motion S5M-21029

proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 17 March to answer any questions on the instrument and to move the motion for approval.

8. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 29 March. Thereafter, the Parliament will be invited to approve the instrument.

**9. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

**POLICY NOTE****THE CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS)  
(SCOTLAND) ACT 2018 (SUCCESS FEE AGREEMENTS) REGULATIONS 2020****SSI 2020/XXX**

The above instrument (the “Regulations”) is made in exercise of the powers conferred by section 4(1), 4(2), 5(1), 5(2) and 7(3) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (“the 2018 Act”).

**Purpose of the instrument**

The regulations will regulate success fee agreements in Scotland, cap success fees under those agreements and provide that some kinds of success fee agreements will not be available for family proceedings. Success fee agreements are “no win, no fee” agreements which enable potential litigants to raise a legal claim which they may not otherwise be able to pursue due to the potential cost, particularly if they are not eligible for legal aid.

**Background**

The 2018 Act received Royal Assent on 5 June 2018. It provides a framework for the implementation of the recommendations of the Review of the Expenses and Funding of Civil Litigation<sup>1</sup> carried out by Sheriff Principal James Taylor which require primary legislation.

The overarching aim of the 2018 Act is to increase access to justice by creating a more

accessible, affordable and equitable civil justice system for Scotland that:

- makes the costs of civil action more predictable;
- increases the funding options for pursuers of civil actions; and
- introduces a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

The Regulations implement Part 1 of the 2018 Act which concerns success fee agreements.

**Policy Objectives****Success fee agreements**

The Regulations provide for the regulation of success fee agreements in Scotland. The term “success fee agreements” covers both speculative fee agreements and damages based agreements. A speculative fee agreement is a type of 'no win no fee' funding arrangement in terms of which an enhanced fee will normally be charged in the event of success and is calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed

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<sup>1</sup> <https://www.gov.scot/Publications/2013/10/8023>

by the solicitor and client. This contrasts with damages based agreements whereby the success fee is calculated as a percentage of the client's damages or recovered funds. In both types of agreements there is to be paid, in the event of success, a 'success fee', but no fee (or a lower one) if the action is lost. In other words, both speculative fee agreements and damages based agreements are types of 'no win, no fee' agreements, entered into in connection with actual or contemplated civil proceedings. Success fee agreements concern "relevant services" which are defined to be one of either "legal services" or "claims management services".

The 2018 Act treats both speculative fee agreements and damages based agreements as "success fee agreements" and the success fee will be a percentage of the damages awarded or agreed. In Scotland success fee agreements offered by solicitors have until now been in the form of speculative fee agreements, but following implementation of Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, solicitors will also be able to offer damages based agreements. Claims management companies will also continue to offer damages based agreements. Except in the case of personal injury cases, success fee agreements may also be entered into on a 'no win, lower fee' basis.

Solicitors have indicated that potential litigants appear to like the simplicity and predictability of success fee agreements based on a set percentage of the damages achieved since they pay nothing up front (the provider of the relevant services will bear the costs of the outputs of raising the action and will seek to recover those costs from the other party). Litigants rarely, if ever, retain 100% of damages achieved since, even if they are in a position to finance the action themselves, they will have to pay the cost of their legal representation and set that off against the damages received. The recipient of relevant services under a success fee agreement is therefore, in the event of success, in the same position as a self-financing litigant. Without success fee agreements, if litigants are not in a financial position to raise proceedings by any other means (for example, if they are ineligible for legal aid), they would receive 100% of nothing, since they may be unable to litigate at all. Increasing the availability of success fee agreements will therefore increase access to justice.

#### *Success fee cap*

The objective of capping success fees is to increase options and provide a greater level of certainty for claimants entering into success fee agreements so that they are able to find the best value representation to meet their needs. It will, in particular, increase access to justice for those who are unable to fund an action themselves yet do not qualify for legal aid (the "excluded middle").

The 2018 Act defines "success fee" as the payment which is – in the event of success – to be made to the "provider" (the solicitor or claims management company) by the "recipient", namely the person who receives legal services or claims management services under the success fee agreement.

In considering whether there should be a cap on the success fee which can be charged by solicitors or claims management companies, Sheriff Principal Taylor believed that a "proper balance must be struck between sufficient remuneration for solicitors and justice for clients awarded damages".

A member of the advisory panel to Sheriff Principal Taylor's Review, which contained

representatives of both pursuer and defender/insurer interests, indicated that the success fee caps recommended “were the outcome of long and detailed debates leading to a fully considered compromise”.

Regulation 2 sets the following caps on success fees as recommended by Sheriff Principal Taylor.

Type of case	Cap (all caps include VAT)
<b>Personal injury cases</b>	Up to 20% of the first £100,000 of damages  Up to 10% for the next £400,000  Up to 2.5% of damages over £500,000
<b>Employment Tribunal cases</b>	Up to 35% of the monetary award recovered
<b>Commercial and all other actions</b>	Up to 50% of the monetary award recovered

Sheriff Principal Taylor stressed that these percentage caps should be maxima. There is clearly a danger that, in time, these caps may be viewed as the going rate, and not maxima. He argued, however, that from the evidence before him, that it was likely that with members of the public becoming increasingly aware of different funding mechanisms, that competition will determine the actual rates used.

It should be noted that since the cap is inclusive of VAT, no more than 20% is deducted from the client's first £100,000 of damages in a personal injury case, but the solicitor receives a success fee of considerably less. So, for example, if a client is awarded £100,000, the success fee is set at 20% and VAT remains at 20%, then the client receives £80,000 in damages, the solicitor receives £16,667 and VAT is paid at £3,333. Counsel's success fee (plus VAT) and any outlays not recovered from the other side in the judicial account of expenses must be met out of the £16,667 received by the solicitor.

Regulation 2(4) and (5) provide the success fee caps recommended by Sheriff Principal Taylor for, respectively, employment tribunals and other cases.

Regulation 2(6) makes it clear that only one success fee can be paid even if there is more than one provider of relevant services (for example, both a claims management company and a solicitor) and the success fee cap applies to the total amount payable by the recipient of those services, regardless of whether such services are provided under one or more success fee agreements.

*Family proceedings*

Sheriff Principal Taylor, when considering success fee agreements, concluded that damages based agreements in particular were not suited to all types of litigation. Sheriff Principal Taylor noted in his Review that damages based agreements were not available for family proceedings in England and Wales and recommended that they should also not be available for family actions in Scotland. He argued that it was much more difficult to define success in family proceedings since the court may require to make a range of different orders dealing with various aspects of, for example, matrimonial breakdown aside from purely financial matters and 'success' may therefore be divided. It does not therefore seem appropriate that damages based agreements, which are predicated on the provider of the relevant services taking a percentage of damages awarded or agreed, should be used in such cases.

The Faculty of Advocates submitted evidence to the Justice Committee during the Bill's Parliamentary stages that speculative fee agreements were sometimes used in family proceedings and argued that this funding option should not become unavailable to litigants.

The Scottish Government fully agreed with Sheriff Principal Taylor's recommendation that damages based agreements should not be used in family proceedings. The 2018 Act therefore gave Scottish Ministers' power to make regulations so as to specify what kinds of litigation should be capable of being dealt with by certain kinds of such agreements. This was intended to permit consultation on what should be included in regulations to ensure the correct result is reached for family proceedings. In the event, very few responses were received in relation to these questions and so the regulations simply exclude the use of damages based agreements from family proceedings. The power will allow for future proofing since the regulations can change as practice changes.

The policy objective is therefore to prohibit the use of damages based agreements in family proceedings and this is achieved by Regulation 3.

*Terms of a success fee agreement*

Regulation 4 seeks to ensure that success fee agreements are offered on a relatively standard basis and can readily be compared by potential recipients of relevant services. The aim to make the costs of litigation more transparent and predictable, thereby increasing the confidence of recipients of relevant services. To this end, Regulation 4 sets out a number of requirements to do with the content of success fee agreements. It remains open to the provider and recipient of relevant services to agree further terms.

The Scottish Government is mindful that a degree of regulation will be provided by the professional rules of the Law Society of Scotland (for solicitors) and of the Financial Conduct Authority (for claims management companies) and general consumer protection legislation will also apply, for example a "cooling off period" may apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

The proposed requirements in the draft regulations are therefore relatively light touch, but if it emerges over time that the initial affirmative regulations are not sufficiently robust, then it will open to Ministers to make more prescriptive affirmative regulations.

### **Commencement and application**

The Regulations come into force on 27 April 2020 and apply to success fee agreements entered into on or after that date.

### **Consultation**

The Scottish Government consulted on aspects of Part 1 of the 2018 Act, specifically on caps on success fees (section 4), possible exclusions from success fee agreements (section 5) and success fee agreements more generally (section 7) in 2018-19. The consultation can be viewed on the Scottish Government website at: <https://consult.gov.scot/justice/success-fee-agreements/>

The analysis of consultation responses can be viewed on the Scottish Government website at:

<https://www.gov.scot/publications/success-fee-agreements-scotland-consultation-part-1-civillitigation-expenses-group-proceedings-scotland-act-2018-analysis-consultationresponses/pages/2/>

The Government consulted on the legislative proposals in 2015. The consultation can be viewed on the Scottish Government website at:

<https://www.gov.scot/Publications/2013/10/8023/5>

The analysis of consultation responses can be viewed on the Scottish Government website at:

<https://www.gov.scot/Publications/2015/08/6159/3>

### **Impact assessments**

A Business and Regulatory Impact Assessment (BRIA) for the Bill was published on the

Scottish Government website at:

<https://www.gov.scot/Publications/2017/06/7388>

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <https://www.gov.scot/Publications/2017/06/9266/1> and the Bill was found to have no significant effects in relation to the protected characteristics.

No other impact assessments are required in respect of these Regulations.

### **Financial effects**

The financial effects of the 2108 Act were set out in the Financial Memorandum for the Bill:

[http://www.parliament.scot/Civil%20Litigation%20\(Expenses%20and%20Group%20Proceedings\)%20\(Scotland\)%20Bill/SPBill14FMS052017.pdf](http://www.parliament.scot/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14FMS052017.pdf)

**Scottish Government Justice Directorate  
Civil Law and Legal System Division  
February 2020**

**Written Submissions received on the Draft Instrument**

**THE LAW SOCIETY OF SCOTLAND**

The Law Society of Scotland set up a Working Party to look at Success Fee agreements overseen by the Civil Justice Committee. The Working Party were heavily involved in the regulations at the draft stages. The regulations produced are designed to provide clarity to the profession and protect the public interest.

## **THOMPSONS SOLICITORS**

### INTRODUCTION AND GENERAL COMMENTS

In general, Thompsons Solicitors fully support both the policy objectives and drafting of Regulations. We fully support the need to introduce Regulations under Part I of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

We nevertheless take the view that there is a need to amend the draft Regulations in 2 respects. We also believe that it is of equally vital importance that Rules are introduced under Part II of the 2018 Act; and that those Rules are introduced at the same time as the Regulations under Part I of the Act.

### SUCCESS FEE CAP

We agree with the policy behind the Success Fee Cap and in particular we agree with the level of success fee caps that are set out in Regulation 2(3) and 2(4). We would submit that they represent a fair and reasonable level of fees.

We recognise that the cap is different to the levels in England and Wales. That seems reasonable and appropriate given that the two jurisdictions are now far apart from each other in terms of civil litigation practice, policy and procedure.

We nevertheless recognise and agree with the submissions made by the Association of Personal Injury Lawyers to Scottish Governments Consultation on Success Fee Arrangements for Scotland, in respect that there appears to be an omission in the Regulations in respect of pursuing claims to the Criminal Injuries Compensation Authority. Unlike all other types of Personal Injury cases that are regulated by the 2018 Act, the solicitor pursuing the criminal injuries compensation authority case will not recover any fees other than those directly deducted from the client's damages under a success fee. In all other Personal Injury Cases regulated by the 2018 Act, the solicitor also recovers fees from the compensator, which is of course normally an insurance company.

Thus, the position with fee recovery in respect of criminal injury compensation authority cases is exactly the same as in relation to employment tribunal cases. It is therefore submitted that, like employment tribunal cases, the cap in respect of criminal injuries compensation authority cases should be up to 35% of the monetary of the amount recovered.

### QUALIFIED ONE-WAY COSTS SHIFTING

The 2018 Act is of course based upon the recommendations of Sheriff Principal Taylor after a comprehensive review process. The recommendations in relation to success fees were only part of an inter-linked package of reform aimed at increasing access to justice.

The other key recommendation was in relation to Qualified One-Way Costs Shifting. Sheriff Principal Taylor's vision of increasing access to justice cannot be achieved with only one of his recommendations being followed and introduced. It is submitted that it is essential that both changes are introduced with all due haste; and both come into effect on the same day.

## TERMS OF SUCCESS FEE AGREEMENTS – “GOLDEN HANDCUFF PROVISIONS”

As currently drafted, the Regulations will allow solicitors to impose success fee agreements that will make it too expensive for a client to raise the quality of service that they have received from their solicitor as a basis to terminate the agreement and to appoint a new firm to represent them.

Regulation 4(1)(j) and (k) allows solicitors to continue a very common practice within personal injury speculative fee agreements whereby the firm will act on a “no-win no-fee” basis but charge the client a high hourly rate for all work undertaken if the client terminates their agreement prior to the case concluding. Thompsons Solicitors have seen many other firms’ speculative fee agreements and it is not uncommon to see an hourly rate of £200 or more. Such a clause within a Success Fee Agreement will often make it impossible for a client to change solicitors in low value cases because it will simply be uneconomic to do so.

For example, under the Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016, the fee that will be recovered from the compensator in respect of a Personal Injury claim that settles (pre-litigation) for £2,500 is £1,250.50 (excluding VAT). If the client entered into a Success Fee capped at 20%, including VAT, they would require to pay £417 plus VAT to the solicitor out of their damages. Accordingly, the maximum legal fees that may be paid to a solicitor in a case that settles for £2,500 is £1,675.50 plus VAT.

Consider a situation where a client instructs Firm A to pursue a personal injury case on their behalf but becomes dissatisfied with the level of service. They decide to instruct Firm B. When the client transfers to Firm B, Firm A issue their fee note for the work undertaken up to that point. Firm A has undertaken 5 hours of work at £200 per hour. Their total fees are £1,000. It takes Firm B a further 10 hours to successfully conclude the case. Under the Act and Regulations the maximum fees in the case are £1,675.50 plus VAT. Because Firm A charged the client £1,000 plus VAT for 5 hours work, Firm B will earn only £675.50 plus VAT for 10 hours work.

That is simply unfair. Moreover, if a firm is approached by a potential client with a case to transfer from another solicitor, they will of course look at the economics and if the outcome is likely to be as described above, is highly likely they will simply be unable to act. Solicitors will decline instructions. The client will be locked in, via the golden handcuffs of the original “no-win no-fee” agreement, to a Firm in whom they have lost confidence and from whom the client believes that they have received a sub-standard service.

It is submitted that the Regulations must provide that where a client changes solicitors the fees that each firm receive (both from the compensator/insurer and under a speculative fee agreement) must be proportionate to the amount of work that each contributed to the overall work undertaken to bring the matter to a successful conclusion.

It is submitted that an additional subsection could be added to regulation 4(1) in the following (or similar) terms:

(l) notwithstanding paragraphs (1) (j) and (k) provide that where the recipient terminates the success fee agreement for the purpose of instructing a different

provider to continue the matter, the recipient shall only require to pay any fee when the matter is resolved and shall only be liable to pay a sum that is proportionate to the total fees payable relative to the contribution of the provider to the total work undertaken by all providers to secure the financial benefit.

## FORUM OF SCOTTISH CLAIMS MANAGERS

### ***Executive Summary***

- We support the introduction of caps for success fee agreements.
- We believe that the maximum cap will become the standard success fee level:
  - there is little competition between Pursuers Solicitors
  - a Pursuer is unlikely to shop around or have the knowledge to challenge the level of success fee.
- We remain strongly opposed to the application of success fees to a Pursuer's future loss claim.
- Whilst there may be an issue currently in ring-fencing future damages on cases that settle for a lump sum, that is not an insurmountable problem and could be changed going forward.

### ***Protection of Future Losses***

1. Future losses are a feature of claims involving the most serious injuries where a Pursuer will suffer ongoing or permanent impairment and this heading of claim is to enable the Pursuer to pay for the care they need for the rest of their life or compensate for their inability to return to work and earn in the future.
2. We are deeply concerned that future losses are not intended to be ring fenced from success fees and the impact will be felt by the Pursuer directly.

#### ***Future Earnings Example:***

***If a court has decided that a Pursuer, but for the accident, would have worked 10 years till retirement and earned £10,000 per year then that would total £100,000.***

***If we ignore other elements of claim and apply the suggested caps just to the future earnings claim, this would mean a Pursuer would only receive £80,000 of their award and lose 2 years of future earnings because £20,000<sup>2</sup> is payable to the solicitor as a success fee.***

#### ***Real life Example featuring Future Care:***

***One of our members recently settled a claim for a catastrophically injured Pursuer who required specialist care for the rest of their life and the future loss claim was settled for approximately £6.25m.***

***As part of the settlement, the Solicitor received £425,000 within the current rules.***

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1.1 <sup>2</sup> SUCCESS FEE CAP 2. (3) (A) - 20% OF FIRST £100,000

***The proposed success fees would mean that in this example, the Solicitor could receive an additional £203,750 that has been taken straight from the money that was allocated to pay for the Pursuers future care.***

3. Success fees taken from future losses will affect vulnerable people most by taking away a percentage of their full compensation and could have the unintended consequence of making them fall back on unsuitable care (to make up the shortfall) or falling back on the public care system with the cost being to the public purse.
4. The success fees are in addition to the judicial fees the Solicitors will recover from the at fault party plus any additional fee uplift applied by the courts to reflect the value, complexity or additional work done on the case.
5. As evidenced by the examples, success fees applying to future losses mean the injured Pursuer loses out.

### ***Ring fencing of Future Losses***

6. The Law Society of Scotland and Sheriff Principal Taylor previously argued that there would be difficulty in ring-fencing future damages, pointing to the fact that cases often settle for a lump sum rather than on a clear structured basis.
7. Not all cases settle on a lump sum basis, but where they do, this issue is not an insurmountable one. It would be possible on a case by case basis for there to be an agreement reached between the Pursuer and Defender representatives on a split of the total between past and future.
8. Since 2007, there has been a similar process where Pursuer and Defender representatives must reach a written agreement on the level of contributory negligence for the purpose of Compensation Recovery Unit NHS Charges.<sup>3</sup>
9. The evidence of the agreement must be put before the Compensation Recovery Unit before they will reduce the amount of NHS charges due to be paid.
10. A similar process could easily be introduced to ensure safe ring fencing of future losses, even in cases that settle by way of a lump sum.

### ***Qualified One-Way Costs Shifting***

11. It should also be borne in mind that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 has introduced Qualified One-Way Costs Shifting so the balance of access to justice is weighted favourably to the Claimants' Solicitor (who will have almost no cost risk, yet enjoys additional

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<sup>3</sup> <https://www.gov.uk/government/publications/recovery-of-benefits-and-or-lump-sum-payments-and-nhs-charges-technical-guidance/recovery-of-benefits-and-lump-sum-payments-and-nhs-charges-technical-guidance#the-law---nhs-charges> Sections 11.1 to 11.3 refer

streams of revenue in the form of all the different types of fee that are in addition to one another).

## **APPENDIX 1 - ABOUT THE FORUM OF SCOTTISH CLAIMS MANAGERS**

The Forum exists as a representative organisation on behalf of its members and works to communicate and promote their interests in the handling of insurance claims

1. The Forum aims to promote improvements to the law to enable easier and quicker access to justice for consumers.
2. The Forum's membership covers a number of major insurers, financial institutions together with claims handling companies and local authorities.
3. The individual members of the Forum are all senior professionals, being Claims Managers or equivalent within their respective organisations, and as such bring together a wealth of experience in insurance claims matters.
4. To provide some context of the size and scale of our membership:
  - Our members directly employ approximately 5,550 people in Scotland.
  - We generate over £1.9 billion annually in respect of insurance premiums collected in Scotland (Personal and Commercial business premiums.)
  - Solely on claims, we spend £1.257 billion annually in Scotland.
  - Our industry is a major economic contributor to Scotland, with Glasgow the largest insurance centre in the UK outside London and is regarded as a core pool of talented resources.
5. Insurance companies exist to provide financial protection for consumers and businesses in the event that the unforeseen happens.

## **FORUM OF INSURANCE LAWYERS**

### **Introduction**

We thank the Justice Committee of the Scottish Parliament for the opportunity to make this submission on the Regulations for consideration by the committee at a meeting on 17 March 2020.

### **Executive Summary**

1. There should be a duty of disclosure of any success fee agreement by the provider to the opposing party and, where the matter is litigated, to the court.
2. The rules on additional fees should be amended so that the extent by which the pursuer's agents are remunerated under a success fee is taken into account by the court and / or the auditor when making any decision on (a) whether an additional fee should be allowed and, if so, (b) the level of that.
3. Cases where a claimant / pursuer lacks capacity should be excluded from success fee agreements.
4. Cases where liability is admitted without any deduction for contributory negligence pre-litigation should be excluded from success fee agreements.
5. The provisions of Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 on periodical payments of damages should urgently be brought into force because of the way in which success fee agreements in personal injury claims involving future loss of >£1m are to interact with periodical payments of damages in terms of s.6 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.
6. Further consideration should be given to the introduction of fixed expenses in Scotland.

### **Explanations for the five points made in the Executive Summary**

#### 1. Duty of disclosure

1.1 There are at least three practical reasons why there should be a duty of disclosure of any success fee agreement by the provider to the opposing party and, where the matter is litigated, to the court:

- 1.1.1 At para 155 of the Justice Committee's 21/12/17 Stage 1 Report on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, at the foot of page 30 and the top of page 31, the Committee records that it "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". This references Sheriff Principal Taylor's oral evidence to the Justice Committee recorded at column 19, three paras from the foot, of the Official Report of the 31/10/17 Justice Committee meeting. The Sheriff Principal said "I also have a suggestion about when a judge is asked to make a decision about an

additional fee. A number of factors - about half a dozen - have to be taken into account, including the complexity of the case ... The provision should be extended to require the judge to consider the extent by which the pursuer's solicitor is being remunerated by way of a success fee". FOIL agrees. It will only be possible for a solicitor considering whether to oppose any motion for an additional fee with reference to the level of any success fee if that solicitor has sight of any success fee agreement. Likewise, it will only be possible for a court to take the level of any success fee into account if the court has prior sight of any success fee agreement.

1.1.2 Given the way in which success fee agreements in personal injury claims involving >£1m future loss are to interact with periodical payments of damages in terms of s.6 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, the opponent solicitor and, where relevant, the court will need to have prior sight of the success fee agreement in such claims because of the potential effect on the mode of any settlement / award.

1.1.3 The current draft Regulation (4)(3) requires success fee agreements in personal injuries claims to include a provision that the provider of legal services is liable to pay where the court makes an award of expenses in consequence of proceedings being conducted in the manner described in s.8(4)(a), (b) or (c) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 if the court indicates that the conduct concerned was that of the provider and not the recipient. In order to determine the need for any such indication, the opponent solicitor and, where relevant, the court will need to have prior sight of the success fee agreement in such claims.

1.2 Disclosure would also serve a useful purpose in providing a check that success fee agreements are drafted in compliance with the regulations.

## 2. Amendment of rules on additional fees

2.1 In that expenses are generally a matter for the court's discretion, there is an argument that even without amendment of the rules on additional fees a court / auditor could take the fact of any success fee remuneration into account when determining matters on additional fee.

2.2 It is preferable that the matter is put beyond doubt by amendment of the rules on additional fees so that a court / auditor is required to take the level of any success fee into account when determining matters on additional fee. Reference is made to the recommendations of the Justice Committee and Sheriff Principal Taylor as outlined at 1.1.1 above.

## 3. Exclusion where claimant / pursuer lacks capacity

3.1 Lack of legal capacity here refers to non-age (the pursuer being under 16) or where the pursuer is mentally incapax. It is the pursuer who is to be compensated. It would be inappropriate for someone other than the pursuer to agree to a deduction from damages on account of a success fee. There is no Court of Protection in Scotland. Failure to exclude these cases from the scope of success

fee agreements may give rise to satellite litigation of itself. On gaining legal capacity, for example in the case of a child reaching the age of 16, the child could sue those who agreed to a certain success fee deduction on that child's behalf. The best approach would be for claims involving pursuers without capacity to be excluded from the success fee agreement regime. It should be recalled that legal aid is still available in Scotland for such claims. The financial qualification would be met by these claimants so a means of funding is available to avoid any unmet legal need given the test of the applicant having a plausible case and the award of legal aid being reasonable.

#### 4. Where liability is admitted without any deduction for contributory negligence pre-litigation.

4.1 Where liability is not in dispute, the amount of work for the pursuer's agent to carry out is considerably less. Separately though crucially, where liability is not in dispute, the risk of the pursuer's claim not being successful and, consequently, the risk to the pursuer's agents of not recovering fees, are massively reduced. Therefore, a success fee agreement is not justified in these circumstances. To give effect to this, FOIL appreciates that success fee agreements would need to be drafted with a review mechanism at the point of litigation and a default provision where liability is admitted pre-litigation.

#### 5. Urgency for Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 to be brought into force

5.1 s.6 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 was included in the legislation because, contrary to the original unanimous recommendation of the Justice Committee that future loss in personal injury claims be excluded from the scope of success fee agreements, future loss in such claims has not been ring-fenced. As a result, where future loss in a personal injury claim is >£1m, s.6(6) provides that one of two conditions need be met before compensation for such loss may be paid as a lump sum rather than in periodical instalments (with the court or an independent actuary having to state / certify that it is in the recipient's best interests that compensation be paid as a lump sum rather than in periodical instalments). At this time, though, a court may not impose a periodical payment order so they are presently only available where both parties agree to one. This is because Part 2 of the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 on periodical payments of damages is not yet in force (with no indication of when it will be brought into force). s.6 of the 2018 Act is only properly workable when Part 2 of the 2019 Act is in force hence the urgency for Part 2 of the 2019 Act to be brought into force.

#### 6. Fixed expenses

6.1 It should not be forgotten that pursuers' agents recover and retain judicial expenses in cases where the pursuer is successful. Where the circumstances permit, pursuers' agents may also apply for an additional fee, a percentage uplift on the judicial expenses set with reference to the particular case with no maximum percentage. Where successful in such an application, the pursuer's agents retain the uplift too. Since 3 April 2017 pursuers' agents have also been able to secure a 50% uplift on a certain period of expenses if they lodge a Pursuers' Offer which is

subsequently vindicated. Now, in addition, pursuers' agents are to be allowed to take a share of the damages as fees.

6.2 The potential for a 50% Pursuer's Offer uplift was not available, nor even under consideration, when Sheriff Principal Taylor produced his Report in September 2013. Even in September 2013, the Sheriff Principal gave consideration to "Fixed expenses" (from page 73 to page 86 of his Report). Whilst Sheriff Principal Taylor did not recommend the wholesale introduction of fixed expenses in September 2013, he did recommend (on page 86) "that a model along the lines of the Patents County Court should be introduced for cases proceeding under Chapter 47 of the Rules of the Court of Session (commercial actions). If this proves successful, consideration should be given to extending the scheme to other courts." This model is for maximum amounts for each procedural step and is subject to maximum levels for overall costs.

6.3 Given Sheriff Principal Taylor's recommendation and particularly given the developments on expenses since that was made, with the introduction, for example, of Pursuer's Offers and now with success fee agreements being brought into force, it is time to give fresh consideration to fixed expenses.

## ASSOCIATION OF BRITISH INSURERS

1. The Association of British Insurers is the voice of the UK's world leading insurance and long-term savings industry. A productive, inclusive and thriving sector, we are an industry that provides peace of mind to households and businesses across the UK and powers the growth of local and regional economies by enabling trade, risk taking, investment and innovation. The UK insurance industry is the largest in Europe and the fourth largest in the world. It is an essential part of the UK's economic strength, managing investments of over £1.8 trillion and paying nearly £12bn in taxes to the Government. It employs around 300,000 individuals, of which around a third are employed directly by providers with the remainder in auxiliary services such as broking.

### **Executive summary**

- The ABI supports the introduction of caps for success fee agreements.
  - The ABI remains strongly opposed to the application of success fees to a pursuer's future losses in cases more than £500,000.
  - A claimant's future losses should be ring-fenced - compensation intended to support injured people for the rest of their lives should be protected and not at risk of reduction by a cut going to their solicitors.
  - As the Justice Committee previously concluded, the provisions relating to success fees should not be brought into force until the courts have the power to impose periodical payment orders.
2. The ABI supports the principle of improving access to justice by the introduction of success fees and predictability in fees, as set out in the ABI's submission<sup>4</sup> to the Justice Committee during its consideration of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill in 2017. The regulation of success fee agreements is welcome and long overdue as it provides pursuers with a level of protection that was previously missing.
  3. The ABI supports caps on success fees and in our 2017 submission called on the Scottish Government to collect and publish data on the share of damages currently taken from pursuers under speculative fee arrangements as this would assist the Justice Committee in its understanding of the current market in speculative fee agreements. Such data would allow a more comprehensive analysis of the current range of percentages being taken from damages. We are disappointed to note that this data has not been obtained/provided by the Scottish Government to date.
  4. Success fees are capped at 25% of damages in England and Wales and history shows that there is little competition between solicitors in terms of the success fees charged. A survey of personal injury clients was carried out by Yarrow and Abrams<sup>5</sup>, this showed that clients' understanding of Conditional Fee Agreements was limited, they rarely shopped around and were unaware that success fees could vary between firms. This lack of competition led to the Civil Justice Council in England and Wales having to mediate fixed success fees to

<sup>4</sup> [https://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/CL-ABI.pdf](https://www.parliament.scot/S5_JusticeCommittee/Inquiries/CL-ABI.pdf)

<sup>5</sup> Yarrow and Abrams "Nothing to Lose?", a report published in 2000 by the Nuffield Foundation and Westminster University

create a fair system. Experience indicates that the maximum cap for a success fee will become the standard price with little competition amongst pursuer solicitors below that level. We support the proposed success fee caps in 2.3.a and 2.3.b of the draft legislation.

5. The Committee will recognise that the application of success fee arrangements in civil litigation inevitably means that pursuers do not receive 100% of the sum agreed by parties or awarded to them by a court.
6. The level of a success fee should be ultimately based on an assessment of the risks in the individual case. The success fee must be proportionate to the true risk of the pursuer's solicitor undertaking the work.
7. We strongly oppose the proposal that success fee agreements be permitted to apply to future losses more than £500,000. 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. We shared the concerns expressed by the Justice Committee on including future losses in the calculation of success fees in its Stage One report on the Civil Litigation Bill, and we supported the Committee's call for Scottish Ministers to reconsider the ring-fencing of future losses from success fees.<sup>6</sup>
8. 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. The success fee should only apply to past losses and damages, which should be more than sufficient to cover the risks of a case faced by the pursuer's solicitor. It is important to remember that the success fee is an addition to the solicitor's regular fee, paid at the expense of an element of the pursuer's damages.
9. For example where a catastrophically injured pursuer requires a care regime for the remainder of their life, the cost of that care will be calculated with reference to the pursuer's life expectancy, anticipated cost of care (as evidenced by expert reports) and expected investment return. The resulting sum should be sufficient to provide the pursuer with the care they require for the rest of their life. If however their solicitor is to receive a portion of this figure by way of a success fee, the result would be likely to leave the claimant with a shortfall, putting eventual pressure on the public care system and public purse to provide the necessary care. The introduction of success fees applied to future losses leads to a real risk of damages inflation.
10. There is no justification for a pursuer solicitor taking a cut of the money awarded to their client which is intended to support them financially for the rest of their life. Pursuer solicitors already receive payment for judicial expenses incurred in a successful case. This covers the pursuer solicitor's time spent and fees charged on a case, expenses incurred including counsel and expert fees for reports, any court fees incurred, and VAT. The legal fees element of judicial expenses is based on the current judicial hourly rate of £156 and on the work

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<sup>6</sup> Justice Committee Stage One Report paragraph 3 <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2017/12/21/Stage-1-Report-on-the-Civil-Litigation--Expenses-and-Group-Proceedings---Scotland--Bill/JS052017R24.pdf>

carried out by the pursuer's solicitor. For example, a set fee is paid for every page of a witness statement taken by that solicitor. The longer and more complicated a case is, the greater the judicial expenses likely to be incurred.

11. In addition, a pursuer solicitor may make an application to the court for an "additional fee" which represents a percentage increase in the legal fees element of the judicial expenses. Additional fees tend to be sought and awarded in high value or complex cases. There is currently no restriction on the percentage increase and is regularly set in excess of 100% of the judicial expenses. We supported the Committee's recommendation in its Stage One report on the need to reform the existing rules on additional fees<sup>7</sup> and we are disappointed this has not been subsequently addressed by Scottish Ministers.
12. All this is paid by a defender over and above the compensation paid to a successful pursuer, and adds to the cost of litigation borne by the defender whether it is a public body such as the NHS in clinical negligence cases, a self-insured entity, or an insurance company.
13. The Law Society of Scotland and Sheriff Principal Taylor previously argued that there would be difficulty in ring-fencing future damages, pointing to the fact that cases often settle for a lump sum rather than on a clear structured basis. Not all cases settle on a lump sum basis, but where they do this issue is not an insurmountable one. It would be possible on a case by case basis to agree what portion of the claim relates to past and future losses – something that already happens in cases where losses have to be allocated to different heads of claim for Compensation Recovery Unit purposes.
14. It is therefore difficult to see any legitimate reason or merit in permitting pursuer solicitors to take a further 2.5% of any award over £500,000 from their clients. Pursuer solicitors are already well-remunerated as set out above and it is impossible to justify additional financial reward at the expense of the pursuer. As the Medical and Dental Defence Union of Scotland said in its evidence to the Justice Committee during Stage One of the Bill, "this potentially amounts to triple counting and cannot be said to be in the interests of justice."<sup>8</sup>
15. In respect of cases where the amount of the financial benefit is over £1,000,000 the alternative of a Payment Protection Order will ensure 100% compensation for a pursuer. The Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 gives the courts authority to impose PPOs in such cases where the court considers they are in the best interests of the pursuer. In its Stage One report on the Bill the Committee concluded that the provisions of the Bill relating to success fees should not be brought into force until such time as the court has the power to make a periodical payment order<sup>9</sup>. That power is not yet in place and we would encourage Scottish Ministers to bring forward the necessary regulations for the implementation of PPOs. The courts in England and Wales have the power to impose PPOs but the Scottish courts still do not, despite the enactment of the Damages Act.

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<sup>7</sup> Justice Committee Stage One report paragraph 155.

<sup>8</sup> Justice Committee Stage One report paragraph 151.

<sup>9</sup> Justice Committee Stage One report paragraph 144.



**Justice Committee**

**11<sup>th</sup> Meeting, 2019 (Session 5), Tuesday 17 March 2020**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instrument:
  - [The Police Pensions \(Amendment\) \(Scotland\) Regulations 2020](#) [see page 3];
2. If the Committee agrees to report to the Parliament on the instrument it is required to do so by 30 March 2020.

**Procedure for negative instruments**

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
4. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
5. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
6. Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *a/ways* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

### **Guidance on subordinate legislation**

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

### **Recommendation**

9. The Committee is invited to consider the instrument.

## POLICY NOTE

### THE POLICE PENSIONS (AMENDMENT) (SCOTLAND) REGULATIONS 2020

#### SSI 2020/33

The above instrument was made in exercise of the powers conferred by section 1(1) and (2)(g) of, and paragraph 7(b) of Schedule 2 to, the Public Service Pensions Act 2013 (“the 2013 Act”). The instrument is subject to negative procedure.

#### **Purpose of this instrument**

This instrument makes minor amendments to the suite of police pensions regulations and injury provisions to reflect a recent legal judgment affecting public service pension schemes. The instrument makes other changes in relation to the administration of the scheme.

#### **Policy Objective**

Changes to survivor benefits reflect the Supreme Court’s ruling on 12 July 2017 in the Walker v Innospec case ([2017] UKSC 47) that the company’s position had been incompatible with EU Directive 2000/78/EC on discrimination in the workplace. It was concluded that Mr Walker’s male spouse should be entitled to a pension calculated on the basis of all the years of his service with Innospec, provided that at the time of Mr Walker’s death they remained married. The amendments are fully retrospective and remove the current restriction on using only service from April 1988 for benefits paid to survivors of civil partnerships and same sex marriages.

Only the 1987 pension scheme regulations are being amended because this is the only pension scheme that limits the service to be taken into account when calculating the survivor benefit for same-sex civil partners or spouses. The 2007 Injury Benefits regulations are being amended for the same reason.

Changes to the Police Pensions (Additional Voluntary Contributions) Regulations 1991 are made to add a new approved provider. Following consultation with its members, Equitable Life transferred its business to Utmost Life and Pensions limited, with this change taking effect from 1 January 2020. Regulation 7 adds the new provider to the scheme effective from that date.

Regulations 3, 6, 9 and 10 allow for members of the 1987 and 2007 scheme to buy back pensionable service in relation to any period of unpaid maternity support leave during the period from 3 April 2011 to 1 September 2014.

Regulation 11 removes the time limit on member contribution rate to avoid the need to make regular changes to the scheme regulations to provide for the ongoing collection of member contributions. This is consistent with the provisions of the 1987 and 2006 police scheme regulations. Additionally, Regulation 11 clarifies the meaning of final pay in the 2015 scheme regulations in relation to part-time members, to ensure the level of enhancement for member retiring with an entitlement to enhanced upper tier ill health benefits is proportionate to that awarded to whole time members, consistent with the approach taken for the 2006 scheme.

## **Consultation**

To comply with the requirements of Section 21 of the 2013 Act, a draft statutory instrument was issued for consultation between 13 December 2019 to 27 January 2020. A copy of the consultation document is available on the Scottish Public Pension Agency's website <https://pensions.gov.scot/>

A summary of consultation responses will also be made available on the SPPA website.

## **Impact Assessments**

The Minister for Public Finance and Digital Economy confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

## **Financial Effects**

The changes provided by this instrument will not have a material impact on the costs of the scheme.

Scottish Public Pensions Agency  
An Agency of the Scottish Government  
February 2020

**Justice Sub-Committee on Policing**

**11<sup>th</sup> Meeting, 2020 (Session 5), Tuesday 17 March 2020**

**Note by the Clerk**

**Feedback paper**

**Introduction**

1. On 12 March 2020, the Justice Sub-Committee on Policing held an evidence session on policing the United Nations Framework Convention on Climate Change 26th Conference of Parties climate summit. Also known as COP26. COP26 will take place from 9 to 20 November 2020 at the Scottish Events Campus in Glasgow.
2. The Sub-Committee heard from Assistant Chief Constable (ACC) Bernie Higgins, Conference of the Parties 26, and James Gray, Chief Financial Officer, Police Scotland.
3. ACC Higgins provided an update on the preparations being made by Police Scotland. ACC Higgins told the Sub-Committee that COP26 will be a major conference, with 193 heads of states invited, and between 130 and 150 expected to attend. ACC Higgins is the Gold Commander and responsible for the police planning and delivery of the event.
4. There are a number of challenges for Police Scotland, including ensuring the safety and security of delegates at the event and at their accommodation, policing social events, and a major rally planned for the middle Saturday (14 November).
5. ACC Higgins confirmed that the conference location, at the Scottish Event Campus in the centre of Glasgow will have an impact on the public. ACC Higgins outlined in detail the planning and preparation that is on-going and gave a reassurance that he is confident that Police Scotland can deliver policing for the conference and that there would be no threat or compromise to the safety of the public.
6. The estimated costs of policing the conference are now £180m. These costs contain an element of contingency, and will be independently reviewed by the Metropolitan Police Service on an on-going basis.
7. James Gray confirmed that the UK Government is to provide marginal cost recovery. This includes mutual aid provided by other police forces, and accommodation costs for police officers. Peter Hill, the Chief Executive of COP26, has agreed the principle that there should be no financial detriment to Police Scotland. James Gray also confirmed that the Foreign and Commonwealth Office is to secure accommodation for officers, and absorb that cost.
8. The UN is to take control of the campus on Sunday morning before the event, and there will be a 'Blue Zone', which will be protected by UN staff. ACC Higgins confirmed that this area will not be international territory, and that it will be subject to Scots law.

9. ACC Higgins also confirmed that Police Scotland does not consider climate change protesters as a terrorist threat, and are classified as climate change protesters. Based on data on Extinction Rebellion protests in London last year, Police Scotland is planning on the basis of 300 arrests a day, and they are updating their custody arrangements to accommodate such numbers.

10. On the consideration that Police Scotland is giving to the impact of the Covid-19 pandemic virus, ACC Higgins confirmed that this forms part of their contingency planning. At present there is a desire and appetite for the conference to go ahead. ACC Higgins also confirmed that an Assistant Chief Constable has been appointed as gold commander for the response to the coronavirus. Preparations are under way and protective equipment is currently being distributed to officers.

11. An Assistant Chief Constable has been appointed as gold commander for 'business as usual' to ensure that Police Scotland policing functions across Scotland are delivered in an appropriate manner during the COP26 conference.

12. ACC Higgins told the Sub-Committee that officer welfare is being considered and that police unions and staff associations are involved in planning meetings for policing COP26. ACC Higgins also confirmed that he was engaging with the Crown Office and Procurator Fiscal Service and Glasgow City Council on policing plans.

13. The Sub-Committee also agreed its forward work programme and agreed to write to Police Scotland to seek further information on the plans to introduce body-worn videos cameras in Policing 2026.

14. The Sub-Committee's next meeting will be on Thursday 2 April.

**Justice Sub-Committee clerks**  
**12 March 2020**

**Justice Committee****11th Meeting, 2020 (Session 5), Tuesday, 17 March 2020****Defamation and Malicious Publications (Scotland) Bill****Paper from the Clerk****Introduction**

1. The Defamation and Malicious Publications (Scotland) Bill (“the Bill”) was introduced by the Cabinet Secretary for Justice on 2 December 2019. The Bill and accompanying documents can be accessed [here](#).

2. The purpose of the Bill is to clarify and strengthen the statutory underpinning of defamation in Scots law. The Bill seeks to do this by placing certain key elements of Scots common law on defamation on a statutory basis. The Bill will also replace and restate, in one place, elements of the existing statutory provisions in Scots law.

3. According to the policy memorandum which accompanies the Bill, the overarching policy objective of the Bill is “to modernise and simplify the law of defamation (and the related action of malicious publication) in Scotland in order to-

- strike a more appropriate balance between freedom of expression and the protection of individual reputation; and
- clarify the law and improve its accessibility.

4. The Committee agreed its initial approach to Stage 1 scrutiny of the Bill at its meeting on 14 January 2020. The current Stage 1 deadline for the Bill is 22 May.

5. The Committee is scheduled to begin taking oral evidence by hearing from the Scottish Government Bill Team at this meeting. The Committee will begin taking evidence from stakeholder witnesses on Tuesday 24 March.

**Approach to Stage 1 consideration**

6. The Committee has yet to consider its approach to its scrutiny of the Bill at Stage 1. In order to inform its consideration, the Committee will take oral evidence from the officials of the Scottish Government Bill Team at its meeting on Tuesday 17 March 2020. They are—

- Michael Papparakis, Policy Manager, Private Law Unit,
- Jill Clark, Head of Private Law Unit, and
- Jo-Anne Tinto, Solicitor, Scottish Government Legal Directorate, Scottish Government.

7. Following this evidence session, the Committee will consider the evidence received as part of the Stage 1 scrutiny of the Bill.

**Justice Clerks  
12 March 2020**