ANNEX B INFORMATION GATHERING EXERCISE QUESTIONNAIRE

1. **Are the stated aims and purposes of the current voluntary pre-action protocols adequate to comply with the recommendations of the Scottish Civil Courts Review if made compulsory?** ***(Please tick as appropriate)***

☐ Yes ☒ No ☐ No Preference

As a multi-jurisdictional firm within the UK and Ireland, acting as panel solicitors for most of the major insurers in those jurisdictions, we have experience in the different approaches north and south of the border. In our view, the best option would be to have a consistent approach in the handling of pre-litigation cases throughout the UK.

We see cases litigate for reasons that are largely irrelevant to the facts of the case such as solicitors writing to incorrect or out of date addresses for an insurer and then litigating over the lack of response. Litigation papers can go to the incorrect address and only then is the problem investigated and realised.

We often face situations where it is unclear if correspondence and medical reports have been sent by claimants. In some cases, letters sent a week later by Recorded Delivery arrive at the same time as the first letter sent in Ordinary post. Where the first letter demands a response within 7 days there can be litigation just through the failings of the postal system.

Many cases are litigated where there is very little difference between the pre-litigation offers (only one offer is allowed in terms of the current system) and the sums tendered after the action is litigated. In those cases, the injured person obtains a few hundred pounds more (several months later) whereas the pursuer`s solicitors will recover litigated expenses (often significantly greater than the VPAP level and particularly so in the lower value cases).

Clearly, this cannot be in the interests of the injured party.

A more co-operative approach to settlement is required than the current "best offer or litigate" system in place.

Litigations are frequently seen where additional heads of claim (such as services and miscellaneous costs) are introduced without any notification of such claims during the pre-litigation discussions.

There are currently no sanctions for this. In fact, the present protocol does not impose any penalties on the claimant in respect of a breach of the VPAP by the pursuer or his agents. The current VPAP lacks teeth.

Essentially, the overriding objective for parties must be that a Compulsory Pre-Action Protocol (CPAP) facilitates a genuine attempt by parties to resolve the matter without resorting to litigation.

A key outcome for mandatory protocols should be a transparent process, which encourages both sides to have an early exchange of information and evidence, to facilitate dialogue and agreement and create a compulsory legacy that can be used if the case litigates without parties starting the process afresh.

A mandatory protocol needs teeth by way of clear binding rules obliging courts to reprimand either party for their failure to adhere to the protocol or the spirit of the protocol.

We are of the view that we have an opportunity to improve access to justice and speed of compensation for the injured innocent victim. This opportunity is not one to be missed.

2. If not, what changes, if any, should be made to the voluntary pre-action protocols to make them more effective in achieving their stated aims and purposes?

Plan A

An electronic based procedure (similar to what is currently used in England and Wales by the Ministry of Justice Reforms) would create efficiency savings for both Pursuers Solicitors and Defender Insurers alike. We would refer to the FSCM's response.

If this is considered too much of a change at this stage we would submit that this ought to be a medium term goal.

Plan B

In the meantime, we would recommend that a CPAP claim must begin with the letter of claim that is sent recorded delivery or by e-mail.

Insurers should post a list agreeing a central single address (postal and e-mail) for each organisation to which the letter of claim must be sent. This should be posted on the Law Society of Scotland's website.

The letter of claim should include:

(a) The name, date of birth, occupation and NI number of the pursuer
(b) The date and location of the accident.
(c) Any registration numbers in RTA cases or, ideally, the policy details or insurer references.
(d) Full accident circumstances.
(e) Witness details (with contact details) – clearly this is restricted to witnesses and details known to the pursuer or his agents.

(f) A brief account of the nature of the injury involved and the heads of claims sought.
(g) A request for any information held by the insurer or insured that may assist the pursuer in their investigations of liability or quantum (eg – accident reports or wage records).

This (particularly the disclosure of witnesses) will assist with early investigations on both sides.

A statement of valuation of claim with all medical reports and vouching should be disclosed upon admission of liability (including admissions subject to contributory negligence).

It must be a reasonable valuation. A significantly over-stated valuation ought to be penalised with sanctions should the claim subsequently be litigated.

All heads of claim should be detailed and valued within the statement of valuation of claim.

There should be no new heads of claim introduced after the statement of valuation of claim is lodged, unless special cause is shown. An example of such special cause may be where a pursuer`s injury has, unexpectedly, become worse resulting in the pursuer having to give up his work and creating a new head of claim of wage loss.

The sheriff ought to be empowered to strike out any additional heads claim in subsequent litigation.

There should be cost consequences against a party that fails to disclose evidence to support all heads of claim.

Offers should be sent recorded delivery or via email with a delivery and read receipt.

The period of settlement should be extended. Presently the protocol allows for one offer and then the claimant can litigate. This practice does not encourage active negotiations that are more likely to achieve settlement. The extension should require parties to make offers and counter proposals to elicit early settlement.

We recommend that all pre-litigation offers should be treated as 'pre-litigation tenders' and should have financial consequences.

Fixed costs should be introduced to ensure that any costs paid to pursuer firms and pursuer`s experts are proportionate. We consider that the VPAP fees are excessive in claims under £25,000. This is all the more apparent when compared to the level of fees in the rest of the UK. The levels of costs proposed in the response by FOIL Scotland are considered reasonable.

For any Compulsory Pre-Action Protocol to work, there should be sanctions on a party which fails to comply with the Protocol. This would prevent cases litigating without reason and would act as an incentive to proper negotiations being carried out.

We would suggest the following sanctions:

1. Breach by Defender entitles the Pursuer to litigate without penalty

2. If the Pursuer litigates in breach of the Compulsory Pre-Action Protocol, their expenses should be modified to 'nil' (unless there are limitation issues)

3. If the Pursuer fails to subsequently beat a Defenders Pre-litigation offer, their expenses should be modified to 'nil'

4. If a Pursuer beats a Defenders Pre-litigation offer, the Pursuers damages should be uplifted by 10%

5. In the case of unreasonable conduct by the pursuer and/or their agents, the defender will be entitled to recover the expenses of the litigation

6. Pre-litigation admissions of liability should be binding as long as the claim remains worth under £25,000 and there are no issues of fraud (including exaggerated claims).

In relation to claims with a value greater than £25,000 we are of the view that Pre-litigation admissions of liability should not to be binding upon the defender.

The timescales as proposed in the FOIL Scotland response are considered reasonable by us.

3. Are changes required to ensure that pre-action protocols better reflect the needs of party litigants?

☒ Yes ☐ No ☐ No Preference

Our understanding from our clients is they follow the ABI voluntary code of conduct for Insurers when dealing with unrepresented claimants:

https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/Migrated/Motor/ABI%20code%20of%20practice%20-%20third%20party%20assistance.ashx

Such unrepresented claimants are free to seek legal advice or representation at any time.

We understand they are of the view that it would be entirely possible to re-work the Voluntary code of conduct into a branch of the Pre-Action Protocol suitable for party litigants.

We consider that the fees payable under the CPAP should only be paid to Scottish Law Firms and an individual ought not to be in a position to recover those expenses.

4. Should a compulsory pre-action protocol apply to higher value cases involving fatal or catastrophic injury?

☐ Yes.

☒ No. If not, what should the "cut off" threshold be?

☐ No Preference

We consider that claims above £25,000 are less likely to be easily dealt with in terms of the stricter time constraints of the CPAP proposed above.

This, however, does not mean that we advocate that there is no structure to pre-litigation negotiations in these sorts of cases.

The practice of disclosure of full accident circumstances, witness details (with contact details), medical evidence and vouching being disclosed is capable of being applied to fatal or catastrophic injury claims.

The current VPAP could be adapted to cover these higher value cases.

It would need to be a voluntary procedure but must become binding upon agreement. There would need to be sanctions in respect of breaches.

We also consider that the practice of pre-litigation offers to be treated as 'pre-litigation tenders' (suggested above) should be equally applied to these higher value claims.

Admissions of liability ought not to be binding in these higher value claims.

The suggested framework proposed in the FOIL Scotland response under this question is considered reasonable.

5. Is it necessary to consider any additional protocols, or maintain exceptions, for specific types of injury or disease claim, for example, mesothelioma?

☒ Yes ☐ No ☒ No Preference

We would, for the sake of brevity, adopt the submissions of the FOIL Scotland response under this heading.

6. **How successful has the use of separate pre-action protocols for professional negligence and industrial disease claims been?**

We would, for the sake of brevity, adopt the submissions of the FOIL Scotland response under this heading.

7. **Should a pre-action protocol for medical negligence claims be developed?**

X Yes. No No Preference

We would, for the sake of brevity, adopt the submissions of the FOIL Scotland response under this heading.

8. **If you answered yes to Question 7, what should the key features be?**

We would, for the sake of brevity, adopt the submissions of the FOIL Scotland response under this heading.

9. **Are there are any issues relating to the operation of the Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales that should be taken into account?**

X Yes No No Preference

We would, for the sake of brevity, adopt the submissions of the FOIL Scotland response under this heading.

10. **Should a new pre-action protocol regime be introduced in advance of the creation of the specialist Personal Injury Court? Please give reasons for your answer.**

☒ Yes ☐ No ☐ No Preference

There should be no delay in introducing the CPAP.

It should be introduced either in advance of, or at the same time as, the establishment of the specialist Personal Injury Court.

There is no reason why the rules of the new Personal Injury Court could not be adapted to include the sanctions proposed above.

The Scottish pre-litigation model in place is very much in need of change and the time is ripe to have a pre and post-litigation model that fits the needs of consumers in the 21st century.

The respective recommendations contained in the Gill and Taylor reports will be run together, and any pre-action protocol should be seen as an integral part of this reform. It is important to recognise how a Compulsory Pre-Action Protocol would work as a component part of the current Court Reform Bill and any legislation designed to enact Sheriff Principal Taylor's recommendations.

A tightly controlled CPAP will, in our view, reduce the amount of low value claims reaching the courts. It will reduce the time taken for claimants to receive their awards and will reduce the costs of claims for all parties.

We have stated our preference for the CPAP to be in near identical terms with the current English system (with minor amendments to reflect the different court procedures). We consider that this is a realistic and achievable goal.

11. Are you or your organisation aware of variations in awards of expenses where the pre-action protocol has not been adhered to?

☒ Yes ☐ No ☐ No Preference

We have argued matters of expenses before almost all of the Sheriff Courts and in the Court of Session.

The courts have returned wide-ranging decisions, as might be expected when the matter is entirely at the discretion of the court.

The more favorable decisions, from a defenders` perspective, have been orally given.

There have been many cases where the pursuer`s expenses have been modified to nil. Just as many have had no modification at all. The rest have had some sort of modification to a fixed sum (£150) or by a percentage reduction (as much as 60%).

The wide range of awards and the level of discretion granted to the courts cause plentiful hearings on expenses. This is of little benefit to the pursuer, who is likely to already have his claim paid in full, and will not have any interest in the outcome of the expenses argument.

A CPAP, combined with new rules in the personal injury courts, can be a seamless progression between the pre and post-litigation claims. Where there are strict conditions and rules relating to expenses there will be less discretion and more certainty.

Greater certainty is required and a Compulsory Pre-Action Protocol with clear sanctions for non-compliance would give that greater certainty resulting in less court time being wasted hearing lengthy expenses submissions.