ASLEF Response to the 'Making Justice Work" Consultation Reform (Scotland) Bill

The Associated Society of Locomotive Engineers and Firemen (ASLEF) is the UK's largest train driver's union representing approximately 18,000 members in train operating companies and freight companies as well as London Underground and light rail systems. ASLEF has almost 1,700 members in Scotland.

Legal services are one of the most important benefits of trade union membership. Employment law and personal injury legal services are not "stand alone" benefits. They form a key and integral part of our overall industrial strategy. The employment law service ensures justice for individual members and is an essential check on employers with a poor attitude towards industrial relations. Our personal injury service ensures that individual members receive the redress they deserve and is also key to promoting, maintaining and advancing health and safety within workplaces.

Statistics show that less than 0.5% of workplace accidents result in investigation and prosecution by the Health and Safety Executive (HSE). Trade unions therefore view personal injury claims as the main, and only effective, means of "policing" breaches and promoting health and safety. Unions encourages members to pursue claims on that basis and have a proud history of taking test cases to extend the boundaries of civil liability which, in turn, have made workplaces safer.

Membership recruitment and retention are extremely important to all trade unions at this time. Membership has declined over the years. A key challenge to the trade union movement is to remain relevant to our members to ensure membership retention and increased membership through recruitment. Recent research shows that trade union legal services play a very important role in relation to both retaining existing members and recruiting new members.

It will therefore be seen how important our legal services are to our members and the union. Our funds are, however, finite. Unlike the insurance companies who defend personal injury cases against our members, we do not have an endless supply of money to throw at legal services.

It is necessary for us to very strictly control our spend on legal services. We have to tightly manage how the services are provided. For example, this includes why we have always instructed a small panel of solicitors and have instructed that as many cases as possible are litigated in one central forum (until now, that has been the Court of Session) to provide economies of scale. We also require some services to

cross fund others. There is no cost recovery in employment law and we therefore require to fund those cases. The costs associated with such matters are high. We, accordingly, require the personal injury work to fund itself based upon cost recovery. Unlike other organisations, we insist that our members retain all of their damages which mean that margins are very tight.

The way our solicitors conduct personal injury cases therefore depend entirely upon the costs they are able to recover under the Rules of Court. We will not, for example, allow Counsel to be employed if their cost is not recoverable. Similarly, we will not permit our solicitors to obtain multiple expert reports where only one will be recoverable. This is in stark contrast to the approach of the insurance industry. In the past, they have employed solicitors (and, often, Counsel) to defend them in small claims cases and they continue to employ Counsel in actions where that cost will not be recoverable. There can be no doubt that the insurance industry will employ Counsel to defend them in all cases in the proposed specialist personal injury court, irrespective of the value of the case.

Our considerable experience in assisting our members who have been injured at work, together with our knowledge of the reality of industrial relations, provides us with two clear lessons.

Firstly, there is a direct link between members' ability to pursue personal injury cases successfully and the attitude of employers to health and safety within a workplace. Secondly, if there is an imbalance in terms of representation in pursuing personal injury cases, this will have a significant impact upon the outcome which, in turn, will impact upon workplace safety.

Our considerable experience shows that access to justice has nothing to do with being able to raise a court action. When it comes to personal injury matters, access to justice demands access to appropriate advice and representation. Taking into account the approach that insurers will follow, this means that access to justice demands the right to representation by Counsel in the vast majority of, if not all, personal injury cases.

Any reform which reduces the right of victims of personal injury to legal representation would be a significant restriction in access to justice and would be unacceptable. The proposals as currently framed do restrict access and are unacceptable. We do not propose to answer every question in the consultation paper. We shall instead only answer the questions relevant to trade union legal services. It will be clear from our answers to those sections, and this introduction, that we have two key points:

- Personal injury cases with a value of less than £5000 should not go before a Summary Sheriff (where there will be no real legal cost recovery) but should instead go before the proposed specialist personal injury court; and
- Injured parties with a personal injury case with a value of more than £5000 should be entitled to be represented by Counsel.

Chapter 1 – Moving business from the Court of Session to the Sheriff Court

Question 1 – Do you agree that the provisions in the Bill raising the exclusive competence and promoting the powers of remit will help to achieve the aim of ensuring that cases are heard at the appropriate level?

As the proposals are currently drafted, no.
The Court of Session currently provides the "appropriate level" of justice for personal injury cases. ASLEF are not arguing that the work remain in the Court of Session. Instead, it is our position that with the exclusive financial competence being raised, the Sheriff Court will only be the "appropriate level" if victims of personal injury continue to enjoy all of the following key components of the justice system:

- Specialist Rules
- Specialist Judges
- Civil jury trials
- Costs recovery
- One court with jurisdiction for all of Scotland
- The right (sanction) to use Counsel.

Some of these components are proposed in the Bill but one crucial aspect has been overlooked and one is not entirely clear.

The Bill does not provide for automatic sanction for Counsel. It is not entirely clear what the position is with personal injury cases with a value of less than £5000.

Access to justice demands access to advice and representation. It also demands that there is an equality in the level of representation between parties. Insurers will continue to use Counsel in cases in the proposed specialist personal injury Sheriff Court, irrespective of the value of the case. We understand that there is a drive to control the cost of litigation and there is a perception that the cost of Counsel is one of the main contributors to litigation costs. A balance, however, can be struck. There are two ways in which this can be done:

- A matrix whereby the level of sanction will be restricted depending upon the value of the case. Thus, there can be no sanction for cases with a value of less than £5,000; only sanction for Junior Counsel with a value between £5,000-£50,000; and sanction for Senior and Junior Counsel in cases with a value of over £50,000.
- A table of fees restricting how much Counsel can charge per day for appearing in court.

As will be set out in Chapter 2, personal injury cases have been excluded from the small claims court for over five years. They should continue to be excluded from the lowest tier of the judicial system and should not be heard before Summary Sheriffs.

Certain classes of personal injury cases should continue to go before the Court of Session, irrespective of their value. Cases involving asbestos related conditions should always go before the Court of Session. Cases involving fatal injuries should also always go before our highest civil court, the Court of Session.

Question 2 – Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?

No comment.

Question 3 – Do you think that the Court of Session should retain concurrent jurisdiction in any areas?

Yes. The Court of Session should continue to have jurisdiction in relation to all asbestos related cases and all fatal cases.

Question 4 – What impact do you think these proposals will have on you and your organisation?

As explained within the introduction, although legal services are a key benefit to our members, the personal injury service we provide requires to the tightly controlled financially and to be self-funding, which is to say that, our solicitors' fees are restricted to what is recovered from the other side. It is accordingly essential that we continue to be able to litigate all of our personal injury cases in one central forum to take advantage of the economies of scale that such a model allows. If personal injury cases with a value of less than £5,000 were required to proceed before Summary Sheriffs, with no or very limited costs recovery, we would not be able to support our members' cases in that forum and members with cases with a value of less than that sum would not have access to justice. We would not employ Counsel to represent our members unless sanction for Counsel was permitted and unless there was a system for automatic sanction for Counsel, our members would often be at a significant disadvantage in personal injury cases because insurers will always employ Counsel irrespective of the value of the case and the rules of recovery for Counsel's fees.

Chapter 2 – Creating a new judicial tier within the Sheriff Court

ASLEF has only one comment to make in relation to this chapter.

When the court limits were last altered in 2007, the Cabinet Secretary for Justice, Kenny MacAskill, excluded personal injury cases from the small claims court on the basis that victims of personal injury needed legal representation, medical and other expert evidence. He accordingly said that it was inappropriate for personal injury cases to be litigated in the Small Claims Court were there was not costs recovery and where victims could not therefore obtain legal representation or the evidence they required to prove their cases.

Those arguments apply as much to day as they did in 2007. Personal injury cases should therefore be excluded from the new judicial tier within the Sheriff Court. We assume from the consultation paper, and from the previous comments from the Cabinet Secretary for Justice, that it is the intention of the Scottish Government to exclude personal injury cases from the new tier within the Sheriff Court.

If that is not the case, any attempt to require personal injury victims to raise their cases within the new judicial tier within the Sheriff Court would represent a significant reduction in rights in terms of access to justice and an inexplicable u-turn on the part of the Scottish Government. It would also entirely defeat the logic behind the creation of the specialist personal injury court. If a specialist personal injury court is to be created within the Sheriff Court, it stands to reason that the court should deal

with all personal injury cases within the exclusive financial limit of the Sheriff Court. Anything else would create a two tier system of justice for which there can be no justification.

Chapter 3 – Creating a new Sheriff appeal court

ASLEF has only one point to make in relation to Chapter 3.

The specialist personal injury court has been created specifically to ensure that personal injury cases are determined by specialist personal injury Sheriffs. It would be illogical for appeals from specialist Sheriffs to go more "generalist" Sheriffs within a Sheriff appeal court.

Logically, appeals from the specialist personal injury court should go to the appellate jurisdiction of the Court of Session, the Inner House.

Chapter 4 – Creating a specialist personal injury court

Question 16 – Do you agree with the establishment of a specialist personal injury court?

Subject to there being automatic sanction for Counsel and all personal injury cases within the exclusive financial limit of the Sheriff Court being capable of being raised with the court (including those with a value of less than £5,000), we agree with the establishment of a specialist personal injury court.

Question 17 – Do you agree that civil jury trials should be available in the specialist personal injury court?

Yes. Solicitors in Scotland have no experience of conducting civil jury trials. There must be automatic sanction for Counsel in jury trials.

Question 18 – What impact do you think these proposals will have on your organisation?

As long as there is automatic sanction and personal injury cases are excluded from Summary Sheriffs then the impact on the trade union and our members will be manageable. If there is no automatic sanction or if personal injury cases with a value of less than £5,000 required to be heard in the new Summary Sheriff tier, the impact on the union and our members would be profound. The union could not support members' cases with a value of less than £5,000. Insurers would continue to instruct Counsel and our members would be at a significant disadvantage.

Chapters 5 and 6

ASLEF has no specific comments on these chapters.

Chapter 7 – Alternative Dispute Resolution

Question 36 – Do you think ADR should be promoted by means of court rule?

ADR has no place within personal injury actions. There are already plenty of stages during a personal injury matter for both sides to exchange information and sensibly discuss matters. There is the Pre Action Protocol which requires the exchange of certain information. There is the exchange of statement of values of claim within the Court Rules and there are Pre-Trial Meetings. An additional tier of forced ADR would be unnecessary, cumbersome and forcing a party to use ADR must be questionable in terms of the European Convention on Human Rights.