Written evidence submitted by DWF LLP (FGCB24)

We are grateful for the opportunity to give evidence to the Public Bill Committee in respect of its consideration of the Financial Guidance and Claims Bill. We represent insurers handling personal injury claims, both in England and Wales and in Scotland and it is in that respect that we focus our comments on the Bill.

About DWF

DWF is a leading legal business, with over 2,700 people in the DWF Group working in 25 offices globally. Our clients range from FTSE 100 multinational household names to private individuals, from both the public and private sector, and we go to market through the sectors they operate in. These include:

- Energy & Industrials
- Financial Services
- Insurance
- Public Sector
- Real Estate
- Retail, Food & Hospitality
- Technology
- Transport

Dedicated insurance practice

DWF has one of the largest dedicated insurance practices in the UK with over 1000 members of staff, providing us with a market leading capacity to help insurers, loss adjusters, corporate clients, local authorities and police forces. All benefit from our depth and breadth of experience and access to our full range of services.

This response is provided by DWF partner and Head of Motor, Nigel Teasdale, who is Immediate Past President of FOIL, a Director of Medco and who recently gave evidence before the Justice Select Committee on their inquiry into the proposed increase of the Small Claims Track financial limit; and by DWF partner, Andrew Lothian, Head of General Insurance, Scotland who gave evidence before members of the Justice Committee of the Scottish Parliament last year.

Incoming reforms of personal injury claims in England and Wales and in Scotland

1. We believe that it is important to view Part 2 of the Bill not only against the backdrop of the way in which the personal injury market currently operates, but also against its likely future arising out of the government's proposed reform of whiplash claims which it has announced will be brought forward in the Civil Liability Bill alongside the increase in the Small Claims Track limit to £5,000 for road traffic accident claims and to £2,000 in respect of employer's liability and public liability claims, which is likely to take place at the same time.

2. As we state below, we believe that it is also important to consider the Bill and its introduction of regulation of CMCs in Scotland against the backdrop of the introduction by the Scottish Government of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

Transfer of regulation of CMCs to the FCA

3. The transfer of regulation of CMCs away from the MoJ was one of a number of recommendations made by Carol Brady in her report entitled "Independent Review of Claims Management Regulation" in 2016, following her comprehensive review of CMC regulation. Part 2 of the Bill and clause 24 in particular gives effect to the transfer of regulation of CMCs from the MoJ to the FCA.

4. When the Claims Management Regulator was created, it was always considered that the MoJ would be the temporary home of the Regulator. Transferring regulation of CMCs to the FCA makes sense. The FCA is better equipped with the necessary powers to deal with CMC regulation

and has existing experience of acting as a regulator of other businesses operating in the financial and insurance sectors, which are both sectors in which CMCs operate.

5. We understand that the FCA will be ready to take over responsibility for regulation of CMCs by April 2019 and that there will then follow a reauthorisation process for CMCs who wish to remain regulated, followed by the implementation of a Senior Managers' Regime for those individuals directing CMCs (another Brady recommendation), which will mean that it will be possible to hold individual directors personally to account, where there is evidence of malpractice at the CMCs they operate.

A ban on cold calling

6. As the Bill proceeded through the House of Lords, it was amended so as to introduce a ban on cold calling and clause 4 of the Bill gives effect to a ban in Part 1, under the "Financial Guidance" part of the Bill. Against the backdrop of the ban on cold calling appearing in that context, when the Bill received its Second Reading in the Commons on 22 January 2018, the government's position that the ban on cold calling would be extended to all CMCs lacked clarity (in response to points raised by MPs Chris Philp and Andy Slaughter).

7. During the Third Reading of the Bill in the Lords, Baroness Buscombe, in response to a point being made by Baroness Altmann, gave the impression that the introduction of a wider ban was what the government intended, when she said "I reassure her that we have already committed to introducing legislation to ban cold calling in the other place".

8. In addition to banning cold calling taking place in claims sectors dealt with within the Financial Guidance part of the Bill, we believe that a ban should also cover CMCs operating in the personal injury sector and indeed that proposed wider ban was debated in that context when the Bill made its way through the Lords.

9. As Lord Sharkey said when he spoke in the House of Lords on the 1st day of the Bill's Report Stage:

> "*I believe that there is a widespread conviction in Parliament and in the country that cold calling in general is an unacceptable and omnipresent social menace. There is a widespread and entirely justified belief that cold calling can and does have dangerous and damaging consequences, especially for the vulnerable. I believe that there is general agreement that, when it comes to whiplash and holiday sickness, cold calling draws otherwise law-abiding people into committing fraud. It is time to be able to call a halt to all this, which is what Amendments 1 and 2 would do.*"

10. Lord Sharkey's comments resonate, particularly about fraud and echo our experience of defending fraudulent whiplash claims on behalf of insurers. During the course of contempt proceedings brought by Covea Insurance against Shirley Paxton in 2015 and in which DWF acted for the insurer, Paxton stated in her mitigation that she was inundated with cold calls from a claims management company and "cajoled" into making a claim for personal injury, even though she was not in the car at the time of the genuine collision. She made a fraudulent claim, even though she was a foster carer and a seemingly law abiding member of society. She was sentenced to four months in prison, suspended for 12 months. The Committee can read more about this case in our update

11. Ahead of implementation of the whiplash reforms, without a ban we anticipate an increase in cold calling activities from CMCs operating in the personal injury sector, as they attempt to capture as many claims as possible before the reforms are implemented, at a time when they would expect those claims to be still attractive to solicitors. Post reform, without a ban we anticipate that cold calling will continue and indeed potentially increase as CMCs both look to encourage claims now subject to the reforms in which they may be able to represent claimants themselves, but also encourage those claims with characteristics which suggest that they may still be attractive to solicitors.

12. This, in our view, makes the argument that there should a cold calling ban stronger than ever before and we would see the ban as necessary to support the government's other reforms in the personal injury market, and complementary of them. The fact that other reforms are expected to proceed does not negate the need for the ban, as there is ample reason to believe that CMC cold calling activity will continue after the reform unless a ban is introduced.

Fee cap

13. As the Bill currently stands, there will be a fee cap in place for those CMCs operating in the financial claims sector, handling PPI complaints and set at 20% plus VAT. The introduction of this cap arises again out of a government amendment to the Bill at its Third Reading in the Lords and was felt necessary to protect consumers ahead of the cut off point for claiming PPI and the introduction of a cap forms part of a range of measures. As Baroness Buscombe said at the Bill's Third Reading:

> "*This cap will complement the range of measures in relation to PPI and other financial claims that the claims management regulation unit has announced. These include banning upfront fees and banning charges, where it is identified that the consumer does not have a relationship or relevant policy with the lender, as well as ensuring that all cancellation charges are reasonable and that consumers are provided with an itemised bill setting out details of what they relate to. This package of measures will support the Government's aim to ensure that the claims management sector works in the interests of consumers by protecting them from excessive fees."*

14. The Bill also gives powers to the FCA to introduce fee caps in other sectors, but where there is already an expectation that CMCs will have a more prevalent role in the personal injury market post reform of whiplash claims, we believe that it is now essential for a fee cap to be introduced into the personal injury sector at the current stage, before that reform is introduced.

15. Back in 2016, the MoJ consulted on a proposal to cap fees in the financial sector and invited comment on whether there should be a fee cap in other sectors. When we responded to that consultation, we suggested that there should be a fee cap for those operating in the personal injury sector, particularly in light of the planned whiplash reforms, which had been announced by the then Chancellor, George Osborne as part of his 2015 Autumn Statement.

16. Along with the transfer of regulation to the FCA and the introduction of a Senior Managers' Regime, we would see the introduction of a fee cap as being part of a wider package of reforms, both in respect of the way in which CMCs operate and also as part of the whole package of reforms in the personal injury claims sector generally, in much the same way as the government see the capping of fees in the PPI claims segment as being part of wider reforms of those CMCs operating in the financial claims sector.

17. Given that the FCA will not be in a position to oversee CMCs until April next year and that re-authorisation will take place after that (as presumably will the introduction of the Senior Managers' Regime), having regard to the fact that the whiplash reforms and the raise in the financial limit of the Small Claims Track could be effective by April of next year, we suggest that Part 2 of the Bill be widened now so as to introduce a fee cap in addition on those CMCs operating in the personal injury sector.

18. We note that this was a concern raised by Chair of the Justice Select Committee, Bob Neill MP when he too spoke at the Second Reading of the Bill in the House of Commons. When he gave evidence before the Justice Select Committee on 16 January, Nigel Teasdale called for the fee cap on CMCs dealing with PPI to be extended to cover those CMCs acting in the personal injury sector.

Extending CMC regulation into Scotland

19. DWF has long campaigned for the regulation of CMCs in Scotland. We identified early last year that the transfer of the regulation of CMCs in England and Wales to the Financial Conduct Authority presented an opportunity to achieve regulation in Scotland. Despite the Scottish

Government's previous assertion that "there was little evidence of malpractice in Scotland" the reality is, as those of us dealing with personal injury claims in Scotland are only too aware, that there is a problem of a growing number of unregulated CMCs, many of which are engaged in unscrupulous activities, including cold calling and aggressively persuading people to bring unmeritorious claims.

20. The absence of fixed costs and availability of referral fees in Scotland, combined with the various reforms of personal injury claims in England and Wales have encouraged the more dubious CMCs to move their claims generating activities into Scotland. We have been able to meet with numerous stakeholders, MPs, civil servants and members of the Scottish Parliament, to seek to demonstrate the case for reform.

21. An opportunity to present our concerns arose when Andrew Lothian, DWF Head of General Insurance, Scotland, gave evidence on behalf of FOIL to the Justice Committee of the Scottish Parliament in September on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. This Bill will introduce Qualified One-Way Costs Shifting (QOCS) and Damages Based Agreements (DBAs) into Scotland.

22. We were able to provide detailed statistics on the claims landscape in Scotland which demonstrate that, from 2011 to 2016, injury claims in Scotland had increased by 16.6% and we are convinced that this is because Scotland has become a more attractive jurisdiction for claimant solicitors and CMCs to operate in. This unfortunately includes the more unscrupulous CMCs, whom we have been able to track moving operations from the north-west of England into Scotland.

23. During his evidence, Andrew Lothian argued that regulation was needed for CMCs in Scotland to tackle the current problems seen in the market. Regulation of CMCs is even more necessary given the introduction of QOCS and DBAs, both of which are likely to further increase claims numbers in Scotland and make the jurisdiction even more attractive to CMCs and claimant solicitors to operate in.

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