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

Watermans Solicitors Limited is in favour of the introduction of a mandatory pre-action protocol. We welcome and support a compulsory protocol that is transparent, allows evidence to be exchanged at the earliest possible opportunity between the parties and which also safeguards the interests and proper representation of injured people.

Our firm exclusively specialises in all types of personal injury work. We act for pursuers who have been injured in accidents due to the fault and negligence of others. We wish to see the quality of the pre-litigation process between insurance companies and solicitors achieve consistency and become a level playing field in terms of both process and the expected outcome.

We also support that any compulsory protocol should encourage and facilitate the early exchange of information and that penalties (including Court sanction) should apply for non-compliance with the protocol.

The stated aims and purposes of the current voluntary pre-action protocol is not adequate to comply with the recommendations of the Scottish Civil Courts review should the current pre-action protocol be made compulsory.

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?**

The existing voluntary pre- action protocol whilst useful is currently exploited by a number of insurers and self-insured organisations on the basis that it is not compulsory. It is used as an opportunity by some insurers to avoid playing fairly or paying the injured pursuer's reasonable legal costs. This acts as a positive barrier to settling cases early and avoiding the need to embark on litigation.

Electing not to comply with the protocol and paying reasonable costs could also potentially prohibit access to justice for an injured pursuer. Ultimately firms could choose not to represent those clients whose claims will be against an insurer which is unwilling to meet the pursuer's legal costs.

Specific changes should be that a compulsory protocol must be precise and clear regarding the extent of the sanctions that will apply to parties who do not comply with the protocol. It would be beneficial to allow scope for the court to place sanctions on parties who do not follow the protocol or its spirit without reasonable justification.

Reference to the word "voluntary" should be removed from the protocol altogether.

Reference to the word "after" in the stated aim -To enable appropriate offers to be made either before or after litigation commences should also be removed. This should be reworded – To enable appropriate offers to be made before litigation.

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

☒ Yes ☐ No ☐ No Preference

Changes are not necessarily required. However Party Litigants should be issued with additional guidance to improve their understanding of the pre-action protocol and what is required to fully comply with it.

Clear language should be used at all times to enhance understanding and abolish ambiguity.

Crucially it is important to bear in mind that injured Party Litigants are highly vulnerable against an insurer whose primary focus is on saving money and increasing shareholders dividends. Party Litigants should not be discouraged from seeking independent specialist representation (to which they are entitled) to ensure that access to justice is achieved.

We strongly support that Party Litigants must be reminded of their right to have independent specialist representation in personal injury claims. Party Litigants should not be blindly exposed to the dangers of dealing directly with an insurer. In accordance with the protocol an insurer is likely to make the Party Litigant a settlement offer, however this offer could potentially place the Party Litigants claim in real danger of settling at an under value. The result of which ultimately defeats real justice being served to the Party Litigant.

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 support a protocol that encourages decisions to be made as soon as is reasonably possible for all types of personal injury cases, including those of higher value.

Higher value and catastrophic cases would greatly benefit having a decision made early in respect of liability. This would allow the injured pursuer access to rehabilitation and potentially receipt of interim payments to help ease financial burdens.

We support a 3 month time limit being afforded to insurers in all types of personal injury cases to make a decision in relation to liability.

There should be a recognition that these types of cases are significantly more complex and demanding in terms of time and resources. As such, any protocol must ensure that this additional complexity is rewarded with an associated increase the fees applicable.

We would suggest that a three tiered approach could be utilised to deal with expenses on these claims. Ultimately the higher the overall settlement value of the claim, the higher the amount of fees which are awarded for pursuing that action.

One fee scale should apply for claims which settle up to £10,000 (as the current Protocol intends). An additional fee structure should be in place for cases which settle between £10,001 to £25,000 (with an increased scale of fees applying to these cases). Finally cases which settle at £25,001 and above should attract fees to be paid on the highest fee scale possible.

In keeping with the Protocol in England and Wales, it seems sensible to pitch the boundary for higher value claims as those which exceed the sum of £25,000.

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 believe it is appropriate to have different protocols in place for different types of claims such as personal injury, fatal / catastrophic, medical negligence and disease / mesothelioma claims.

A one size fits all protocol does not take into account the different claim types and their varied complexities. All claims are different and a standard protocol will not always serve in the best interests of each claim type.

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

Separate pre-action protocol guidance has been received from the Court of Session on asbestos / mesothelioma claims. This advice has been beneficial.

Before this guidance was issued there was a greater degree of uncertainty. This is a situation which has now been eliminated and improved by having a clear set of procedures requirements put in place for all parties.

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

☒ Yes.
☐ No ☐ No Preference

In principle we do not have any objections to having a separate protocol for medical negligence claims.

However the protocol must be flexible (more so than in ordinary personal injury cases) and it must appreciate the various complexities which can arise in these types of cases.

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

The key feature of a protocol for medical negligence cases should be that it allows a degree of flexibility in time scales.

One of the key differences that we would suggest for pre-action protocols for medical negligence claims would be leniency and relief from sanctions for non-compliance where there is reasonable justification.

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?**

☒ Yes ☐ No ☐ No Preference

The Pre-action Protocol for the Resolution of Clinical Disputes in England and Wales is a good template on which to build a pre-action protocol that applies to medical negligence claims in the Scottish jurisdiction.

In Scotland the pre-action protocol should be compulsory as opposed to simply being a good practice guide like in England and Wales.

This pre-action protocol allows for predictability of time scales for steps to be completed pre-litigation and it also allows for relevant information to be disclosed as early as possible.

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

We support the introduction of a compulsory pre- action protocol as well as specialist PI courts in Scotland. We would also support these changes being implemented at the same time together. The purpose of this is so that interpretation of any sanctions contained within the compulsory pre-action protocol is consistent with no variance across the 6 Sheriffdoms.

If for any reason the introduction of a specialist PI court is delayed then we consider that this should not preclude the introduction of new (and compulsory) pre-action protocols.

We also have significant concerns about the ability of a two Sheriff Specialist PI Court to cope with the number of cases it is likely to receive. Therefore, any improvement to the pre-litigation procedures which encourages parties to reach settlement is a welcome move.

In respect of the specialist PI courts it is also our submission that these courts must be given sufficient funding, personnel and resources to ensure the aims of the Gill review are met. The overall aim is to ensure that cases can proceed quickly, without delay, and ensure a fair and equitable outcome between parties.

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 are aware of various insurers offering arbitrary expenses in cases when they have not agreed to adhere to the voluntary pre-action protocol. Insurers see non-agreement to the voluntary pre-action protocol as an opportunity to gain a windfall on expenses. This approach is also taken by certain local authorities [redacted]

The net result of this is that litigation against these various insurers has increased. Courts are now burdened dealing with an increased number of cases whereby insurers are refusing to agree with the voluntary pre-action protocol and its associated fee scale.

When insurers refuse to deal with cases in accordance with the protocol is also leads to uncertainty for clients and lack of consistency for awards of expenses.

The variation in awards of expenses between different Sheriff Courts and Sherrifdoms has been problematic and meant that we have not been able to achieve consistency with decisions on expenses.

We strongly support that a compulsory pre-action protocol should ensure parties are clear on the level of expenses awarded in accordance with the protocol ensuring consistency for all.