Success fee agreements in Scotland

A consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

Analysis of consultation responses

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Contents

Acronyms and abbreviations

ABI	The Association of British Insurers
APIL	The Association of Personal Injury Lawyers
CICA	Criminal Injuries Compensation Authority
The Faculty	The Faculty of Advocates
FOIL	Forum of Insurance Lawyers
FSCM	The Forum of Scottish Claims Managers
GBA	The Glasgow Bar Association
The Law Society	The Law Society of Scotland

Introduction and summary

1. The Scottish Government launched its consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 on 8 November 2018. The consultation, which dealt with success fee agreements, closed on 31 January 2019. As the Government proposals for the content of the secondary legislation necessary to fully implement the provisions of Part 1 have not been consulted upon, it was considered appropriate to seek stakeholders' views on its thinking.

2. There were twenty-five responses to the consultation. The breakdown of respondents is as follows:

Type	Number
Lawyer regulatory and representative body	2
Solicitor representative body	3
Solicitor firm	11
Advocate chambers	1
Claims management company	1
Insurance representative body	2
Insurance company	1
Human rights non-departmental public body	1
Government agency	1
Individuals	2

As the two individuals were also solicitors, though one was not a practising solicitor, over three-quarters of the responses came from the legal sector.

3. The Scottish Government is grateful to all those who responded. These responses will be taken into account as the Government takes the next step which is to draw up the regulations that will implement Part 1. These will in due course be laid before the Scottish Parliament.

4. Question 1 was concerned with the caps on the amount of success fee that the service provider will be allowed to uplift. The general trend was that pursuer groups were content with the caps recommended by Sheriff Principal Taylor in the Review and that defender groups considered that the suggested caps were too high. The one claims management company suggested that the caps were too low.

5. Question 2 related to the prohibition of success fee agreements in relation to family proceedings but possibly other kinds of proceedings as well. Only the Faculty provided information on speculative fee agreements and family proceedings. There were more views expressed in other kind of proceedings which are not appropriate for the use of success fee agreements and particularly damages based agreements.

Those representing defenders suggested that success fee agreements were not appropriate when the pursuer does not have legal capacity or where liability has been admitted in full pre-litigation. Two respondents were concerned about success fee agreements being used where the success of an action was not about an award of damages. Finally, the one claims management respondent appeared to consider that damages based agreements were suitable for family proceedings.

6. Section 7(3) and (4) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 gives the Scottish Ministers power to make further provision about success fee agreements by regulations. Question 3 sought views on what further regulatory provision about success fee agreements. Unlike the responses to questions 1 and 2 where pursuer and defender respondents showed marked differences of opinion, there was no clear similar pattern in the responses relating to this question. However, it should be noted that there was general agreement that it is not possible to calculate what the anticipated damages might be at the outset of a success fee agreement.

7. Paragraph 43 of the consultation considered the situation where the provider comes to the conclusion that the recipient is unlikely to win and the provider withdraws from the agreement but where the recipient engages another provider and is successful. The question was whether the recipient should be responsible for the original provider's fees and outlays up to the point when the agreement is terminated by the provider. This was an arrangement generally opposed by respondents with only 3 out of 14 responses favouring this arrangement. None of the defender respondents were in favour and there was also some opposition to the arrangement from some of the pursuer respondents.

8. Question 5 asked whether formal Government regulation is required to make it clear that providers of relevant services may not provide legal aid when a success fee agreement is in prospect or in place. Just over 70% thought that formal government regulation was required. Some of the pursuer respondents made the distinction between advice and assistance on the one hand and civil legal aid on the other with advice and assistance being available for the investigation of potential claims whereas some defender responses were opposed to this. There was general agreement that civil legal aid should not be available once a success fee agreement was in place, though three pursuer respondents considered it should be available in clinical negligence cases owing to their complexity.

9. Question 6 was concerned with whether formal Government regulation was required in relation to any change in funding, whether from legal aid to a success fee agreement, or the other way about, requires in relation to information/notification requirements or case-end formalities. The responses to this question were split. Some, including SLAB (the Scottish Legal Aid Board) considered that Government regulation was necessary, others were not convinced with the suggestion from one pursuer solicitor and the Law Society that guidance from SLAB and the Law Society was sufficient.

Question 1: Please indicate if you are content with the success fee caps recommended by Sheriff Principal Taylor.

10. Sheriff Principal Taylor recommended the following caps on success fees.

Type of case	Cap (all caps include VAT)
Personal injury cases	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
Employment Tribunal cases	Up to 35% of the monetary award recovered
Commercial and all other actions	Up to 50% of the monetary award recovered

11. Fourteen respondents indicated that they were content[1] with Sheriff Principal Taylor's recommendation and ten were not content. The Law Society of Scotland and the Faculty of Advocates were amongst those who were content.

12. The Association of Personal Injury Lawyers ("APIL") and Digby Brown, which were both content with Sheriff Principal Taylor's recommendations on caps in civil cases, suggested that the caps should be extended to match Criminal Injuries Compensation Authority ("CICA") cases with the cap set at 35%.

13. Professor Alan Paterson, who served on the advisory panel to Sheriff Principal Taylor's Review, was content with the recommendations which he stated "were the outcome of long and detailed debates leading to a fully considered compromise and accordingly that his proposals were to be taken as a package. It follows that Taylor's proposals on caps were not meant to be minima as well as maxima. As his report indicates, Taylor expected competition, shopping around etc. to be encouraged to prevent the caps becoming the *de facto* norm".

14. Digby Brown, who were also content commented: "It is important to remember that the recommendations made by [Sheriff Principal Taylor], after a comprehensive review process, were a package of measures designed primarily to increase access to justice. A number of the recommendations interlock and it is necessary to view them in that light. We would also confirm, from our own experience, that clients are very happy with the simplicity and certainty provided by damages based agreements. It is our view that these have enhanced access to justice, and the balance of factors set out by Sheriff Principal Taylor is entirely apposite."

15. Some of those who were not content also commented on the issue of the caps becoming the norm rather than the maximum. For example, the Association of British Insurers ("ABI") stated: "Unfortunately charging the maximum percentage allowed will become the norm as the public are unlikely to understand the available funding options and Providers are unlikely to compete. Sheriff Principal Taylor's

[1] Dentons indicated that their response only considered the caps on success fees in civil and commercial litigation.

assumption that the public will become increasingly aware of different funding mechanisms relies upon the public being familiar with and engaged in the sector. Most pursuers will not be familiar with the various funding mechanisms as it will be their first, and maybe only, exposure to civil litigation and will be dependent upon the provider to explain the options." Others considered that the caps were rather high as solicitors in successful cases subject to success fee agreements will recover base costs, the percentage agreed with the pursuer in the agreement, and in some cases, an additional fee awarded by the court on application in difficult and complex cases.

16. The Forum of Scottish Claims Managers ("FSCM") argued that "summary cause and ordinary cause scale fees (which apply when a case litigates) do not reflect proportionality, discourage early settlement and encourage duplication of work by incentivising the amount of work done on a case. Success fees on top of these current fee scales will only widen the gulf of disproportionality on lower value cases, in particular cases brought in the All-Scotland Personal Injury Sheriff Court".

17. Various suggestions were made as to different caps. Two respondents, including the ABI, made the following suggestion in relation to personal injury cases:

Up to 10% of the first £100,000 of damages

Up to 5% for the next £400,000

Up to 0.5% of damages over £500,000

Kennedy's proposal was:

Up to 20% of the first £50,000 of damages

Up to 10% for the next £100,000

Up to 2.5% of damages over £150,000

18. The only respondent suggesting higher caps was responding on behalf of a claims management company. Quantum Claims' proposition was that there should be a flat rate of 20% plus VAT for personal injury claims, "with no variation on the level of damages or class of damages it applies to", together with 35% plus VAT for both employment and personal cases.

19. The general trend was that pursuer groups were content with the caps recommended in the Review and that defender groups considered that the suggested caps were too high.

Question 2: This paper outlines reasons why it may be necessary to prohibit the use of success fee agreements in relation to family proceedings but possibly other kinds of proceedings as well. In order to assist in the drafting of regulations in this regard: we ask three questions.

a. In connection with what types of family proceedings are speculative fee agreements used?

b. What types of speculative fee agreements are presently used in family proceedings?

c. Are there any other kind of proceedings which are not appropriate for the use of success fee agreements and particularly damages based agreements, apart from family proceedings?

20. Few of the respondents provided an answer to the various elements in question 2. Only the Faculty of Advocates ("the Faculty") answered question 2a. It noted that "speculative fee arrangements are used in a small number of cases with very particular circumstances, but where they are used they are used to good effect". The cases concerned involve "financial provision on divorce, and more particularly where one party has the financial resources to litigate and the other does not". The Faculty proposed that speculative fee arrangements should remain available to litigants in family law proceedings concerning financial provision on divorce. However, it considered that damages based agreements were not suitable for such cases.

21. Despite not answering the question, there was comment on 2a from three other respondents. These, including the Law Society of Scotland and Digby Brown, stated that they were unaware of speculative fee agreements being used in family proceedings. In addition, Digby Brown did not think it appropriate for family proceedings to be subject to success fee arrangements as "the dynamics of family proceedings are at odds with the nature of such agreements".

22. None of the respondents answered question 2b.

23. Seven respondents provided an answer to question 2c:

- Three respondents, including the Forum of Insurance Lawyers ("FOIL") and the ABI, considered that success fee agreements were inappropriate when the pursuer does not have legal capacity.
- Four respondents also thought success fee agreements inappropriate where liability has been admitted in full pre-litigation. The reasoning given by FOIL was that 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".

- Alan Paterson suggested that success fee agreements were not appropriate "where the primary object of the litigation is to get a ruling on a point of law from the court".
- The Glasgow Bar Association ("GBA") considered that damages-based agreements are not appropriate for any claims where the main objective is to get a non-monetary remedy and where it is extremely difficult to quantify the value of success, e.g., cases for interdict, non-harassment orders, lawburrows, or powers of arrest. It also thought that actions seeking orders *ad factum praestandum,* multiplepoinding, or eviction are probably unsuited to success fee agreements, together with any action seeking anything other than payment.
- Quantum Claims queried the Scottish Government's view that damages based agreements were unsuitable for family proceedings.

24. In summary, question 2 attracted relatively little interest. Only the Faculty provided information on speculative fee agreements and family proceedings. There was slightly more interest in other kind of proceedings which are not appropriate for the use of success fee agreements and particularly damages based agreements. Those representing defenders suggested that success fee agreements were not appropriate when the pursuer does not have legal capacity or where liability has been admitted in full pre-litigation. Two respondents were concerned about success fee agreements being used where the success of an action was not about an award of damages. Finally, the one claims management respondent appeared to consider that damages based agreements were suitable for family proceedings.

Question 3: We are seeking your views on further regulatory provision about success fee agreements.

a. Do you agree with the proposed content of regulations to make further regulatory provision about success fee agreements in Scotland?

b. Do you think that any of the material need not be included?

c. Do you think that there are other areas which should be covered?

25. Section 7(3) and (4) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 gives the Scottish Ministers power to make further provision about success fee agreements by regulations, including:

- their form and content;
- the manner in which they may be entered into;
- their modification and termination;
- the resolution of disputes in relation to such agreements;
- the consequences of failure to comply with the requirements of sections (1) or (2) or the regulations; and
- the application of Part 1 of the 2018 Act or any provision made under it, where a recipient receives relevant services from more than one provider in connection with the same matter (such as where a recipient of such services receives them from both a solicitor and a claims management company in relation to the same claim).

26. Fifteen respondents answered question 3a. Fourteen were from the legal sector, the other being the claims management company. There was no particular pattern to the responses depending on whether they represented pursuers or defenders. Ten thought the Scottish Government should make further regulatory provision in Scotland and five thought not. The same fifteen respondents answered question 3B. Four thought that some of the material proposed by the Scottish Government need not be included and the other eleven were content with the content of success fee agreements suggested by the Government. With one exception, each respondent which answered “yes” to question 3a answered “no” to 3b and *vice versa*. Fourteen respondents answered question 3c. Ten thought other areas should be covered and four thought otherwise.

27. The Faculty was content with regulations proposed by the Scottish Government, the former stating that it “agrees with the proposed scope and content of regulations in this regard”. Kennedys was also mainly content simply adding that there must be scrutiny of providers and robust sanctions against those who do not comply with the rules and that “additional provisions are in place for vulnerable pursuers and the most seriously injured”.

Self-proving form (paragraph 41(a))

28. Dentons was not convinced that a success fee agreement should be in self-proving form. Firstly, it considers that a success fee agreement is similar to the vast majority of other agreements that are entered into in Scotland. Secondly, it suggests that a success fee agreement could be entered into before the litigating parties have reached a final decision on choice of forum to resolve the dispute. It went on to state: "In a complex action, it is possible that parties could have in mind litigating before the English courts, or a tribunal such as the Competition Appeal Tribunal, or simply be undecided at the time the success fee agreement is entered into. As such, the success fee agreement could well be entered into without reference to the Scottish self-proving requirements. It would [be] preferable if any such agreement was enforceable should the parties subsequently decide to litigate before the Scottish Courts." On the other hand three respondents, including the Law Society stated that they agreed with paragraph 41(a) and that a success fee should be "probative".

Valuation of claim at the outset (paragraph 41(b))

29. There was considerable concern amongst those who responded to the question about the proposal that the success fee agreement should state the value of the claim at the outset. Nine of the respondents made the point that it was impractical to assess the value of a claim at such an early stage. The problem with an estimation of the claim at the beginning is that there are too many unknowns. Iain Nicol stated: "The calculation can only be done once all quantum information is ingathered." Lanarkshire Accident Law said: "The proposal to state 'anticipated damages' in a success fee agreement is fundamentally flawed." APIL wrote: "There is no objective basis on which an accurate predictive value can be made, and no information is better than the wrong information."

30. As regards the provider keeping the recipient appraised of any changes to the value of the claim, there were some who saw difficulties arising from this. For example, the Law Society wrote: "It leaves scope for the recipient to either attempt to hold the contract unenforceable or avoid paying a success fee if they claim that they were not updated as often as they would have liked." It was submitted that there was a professional duty on solicitors to keep their clients appraised of any developments and that often this was done by face-to-face meetings or by telephone.

General provision (paragraph 41(c) and (d))

31. These provisions would require a statement of what is covered by the agreement and a statement that the terms of the success fee agreement take precedence over the provider's normal terms and conditions in situations where there is a conflict. Few respondents commented, but the Law Society and the Faculty both agreed with the suggested requirement.

Success fee calculation (paragraph 41(e) to (g))

32. Paragraph 41(e) to (h) was concerned with success fee calculation; subparagraph (h) is dealt with in paragraph 24 below. The other provisions relating to how the success fee is to be calculated and circumstances where there is more than one provider of the relevant services in relation to the same claim attracted very little comment. Once again, the Law Society and the Faculty agreed with the suggested provision.

Updates on the claim (paragraph 41(h) and (k))

33. Paragraph 41(h) provides that the provider must inform the recipient in writing if the value of the claim should change. The first bullet point in paragraph 41(k) places obligations on the provider to give regular updates and consult with them on any major developments including offers from the defender. Alan Paterson argued that although it is widely accepted that these encapsulate the current ethical obligation of a personal injury, they should be retained. The Glasgow Bar Association considered the obligations to provide regular updates and to consult with clients on any major developments including offers from the defenders as set out in 41(k) to be very important.

34. APIL took a different view arguing in relation to 41(h) that there "is no definition of 'value' and no qualification of materiality here. In a large and complex claim, information in the form of expert reports, wages information etc. can come in frequently and may potentially alter the value of a client's claim. The defenders will also produce information and their own reports and version of value. Those may be discussed at meetings or on the telephone but having to report any potential change, however small, in writing, is not helpful". Digby Brown agreed with this stance.

35. Iain Nicol and the Law Society both argued that these requirements are unnecessary as contractual requirements as they form part of a solicitor's duty under the Society's Practice Rules. Iain Nicol wrote: "The Law Society Practice rules impose a duty on solicitors to provide adequate information to their clients and keep them updated. There is no need to impose a contractual duty to do so and indeed it may prove extremely contentious if the client's perception is that the solicitor has not kept them sufficiently up to date and they try to avoid paying the success fee or otherwise hold the contract to be unenforceable."

Statement of indicative payments (paragraph 41(i))

36. The Scottish Government considered that the success fee agreement should contain a statement of likely payments due by the recipient to the provider. This was intended to be a statement of what payments would be required above the success fee, for example, after the event insurance premiums. Alan Paterson and the Law Society agreed that this should be in the agreement. Others took the view that this would include the likely amount due at settlement, that is the calculation of the actual figure as a percentage of damages expected. It was not the Government's intention that this would be required.

Obligations of recipient to provider (paragraph 41(j))

37. Paragraph 41(j) was concerned with a statement of the obligations of the recipient to the provider to enable the provider to progress the claim. None of the respondents commented on this.

Complaints and disputes (paragraph 41(l) and (m))

38. There were seven respondents who commented on the Scottish Government suggestion that alternative dispute resolution should be the default method of resolving disputes relating to success fee agreements (paragraph 41(m)). Professor Alan Paterson said: "This is difficult. The [Scottish Legal Complaints Commission] uses mediation in complaints but this is limited to £20,000 and the mediators may lack the necessary expertise. There may be scope for mediation/arbitration in some disputes, provided it's not too expensive." Dentons was supportive of the idea as long as it did not exclude an action for payment.

39. The others who commented thought it unnecessary as there are already complaints procedures in place through the Scottish Legal Complaints Commission and the Financial Ombudsman Service. Arbitration or mediation were seen as expensive alternatives. There were also questions about whether mediators had sufficient expertise and experience to deal with such disputes. For example FOIL wrote: "We do not agree that these types of case are special cases only suited to mediation/arbitration. There is a cost associated with that which should not be imposed over and above the normal complaints procedure for legal services which is quite suitable for this type of case. There is not to our knowledge any other area in which mediation/arbitration is imposed for complaints and claims. There is nothing in this work type which makes it inherently suitable for mediation/arbitration."

Failure by the provider to comply with success fee agreement (41(n))

40. Paragraph 41(n) provided that the success fee agreement should contain reference to the regulations made by the Scottish Ministers under section 7(3) of the 2018 Act where there is failure by the provider of a success fee agreement to comply with section 7(1) or (2). Six respondents commented that the failure should be a material breach. For example APIL stated: "This should be qualified as being for material breaches only, not minor or inconsequential breaches."

Termination (paragraph 41(o) to (q))

41. Paragraph 41(o) to (s) of the consultation provided for termination situations. The responses to subparagraphs (r) and (s) are considered in paragraph 43 below.

42. Subparagraphs (o) to (q) attracted very little comment. Three respondents, including the Law Society of Scotland, agreed with all three suggested provisions. Dentons commented on (q) stating: "Any requirement being placed on providers to specify the expenses due to be paid by the recipient (para 41(q)) will have to take account of the unpredictable nature of litigation. Expenses may arise, particularly in complex cases, that could not have been foreseen at the early stages of preparing for court action (for example, the cost of sending a dispute or part of a dispute to

expert determination). In some types of action, providers will need to able to include wide wording in order to accommodate unforeseen circumstances."

Unilateral withdrawal from DBA (paragraph 41(r) and (s))

43. Iain Nicol, the Law Society, and Thompsons considered that there was an omission in paragraphs 41(r) and (s) of the consultation; there was no consideration in the consultation document concerning situations where the recipient terminates the agreement unilaterally. The Law Society wrote that the Scottish Government's provisions "do not recognise the Recipient terminating the agreement unilaterally without just cause". Thompsons expanded on this: "We are concerned particularly about circumstances … where a client simply chooses to exercise their right of consumer choice to switch provider of legal services because the level of service that they receive falls short of what they would expect. In those circumstances, we think that it is important that regulations provide that the original provider of legal service is entitled to some share of the legal fees ultimately achieved at the successful conclusion of the case but only a level of fees that is proportionate to the amount of work that that original legal service provider contributed to the overall work undertaken to bring the matter to a successful conclusion."

Other comments

44. There was concern expressed by defenders and defender solicitors about solicitor remuneration. It was noted that it was possible for solicitors to be paid three times in a successful action. They would be in receipt of judicial expenses, the success fee, and, in some cases, additional fees which might be awarded by the court on application in complex and difficult cases. For example, FOIL noted that Sheriff Principal Taylor had suggested reform of additional fees was needed. "FOIL agrees and submits that reformed rules on additional fees should be in place before the success fee provisions of the Act are brought into force." The Cost and Funding Committee of the Scottish Civil Justice Council has considered the suggested reforms of additional fees.

45. FOIL also suggested that there should be a duty of disclosure by the provider of the success fee agreement. "It would not be enough for that duty to be limited to disclosure to the court. The duty of disclosure should be to both the court and the opponent." FOIL had in mind a similar disclosure arrangement to that used in legal aid cases. Such disclosure is provided for in section 10 of the 2018 Act.

46. Four of the respondents suggested that there should be a standard form for quotations related to a success fee agreement. FOIL noted that Sheriff Principal Taylor recommended this: "It is in my opinion necessary for such comparison that the quotations are in a standard form." The respondents' point was that a standard form would be desirable, both for the recipient to enable meaningful comparison and, separately, for the court and defender. It was considered that such a standard form would help generate competition in the legal services market.

47. Four respondents considered that regulations should address how conflicts of interest are dealt with and consider that this was an omission in the consultation. For example, FOIL wrote: "Taylor concludes 'How conflicts of interest are to be

managed should they arise must also be specified'. FOIL agrees. The proposed regulations do not expressly deal with conflicts of interest."

48. The ABI made various other comments:

- It considered that providers should undertake risk assessments in every claim to justify the success fee charged, that the success fee must reflect the true risk borne by the provider, and that the provider must obtain the pursuer's informed consent to the proposed deductions.
- It suggested that if a success fee agreement replaces legal aid, the provider should explain why legal aid was no longer appropriate and what prompted the move to a success fee agreement and any funding discussions with the SLAB.
- It suggested that providers should be given recommended wording which they can tailor to their specific needs.

49. Compass Chambers was concerned about the introduction of DBAs from the point of view of advocates. Advocates are not providers as defined in the 2018 Act. They are instructed by solicitors either on a speculative basis or, more commonly, a speculative/judicial expenses only" basis. They do not have a contract with the pursuer and do not have details of any success fee agreement entered into. Their fee is therefore part of the "outlays" for which the solicitor is responsible. If the case is unsuccessful, they are not paid. If the case is successful in court, they are paid on the basis of the judicial expenses awarded by the auditor of court. This often means that they are not remunerated for all the work they do, just for the work that the auditor awards expenses on. It argues that this system can act as a deterrent to advocates being instructed in personal injury cases and it is not in the best interests of access to justice.

50. Compass Chambers asked the Scottish Government to bring regulations to the effect that:

- "where a solicitor has entered into a success fee arrangement with a client, the existence and terms of that arrangement should be disclosed to counsel in any case where counsel is instructed";
- "in any case where counsel is instructed, the fees of counsel must either constitute an outlay to be paid by the solicitor whether the case is successful or not or, alternatively, if counsel is to be instructed upon a speculative basis, instructions to counsel could not be upon the existing basis of speculative/judicial recovery fees"; and
- "where a solicitor enters into a success fee arrangement with a client, and chooses to instruct counsel on a speculative basis, the Scottish Government should consider passing Regulations providing that counsel must be afforded the opportunity of, likewise, entering into a success fee arrangement with the solicitor". In any such case, the pursuer would only be liable to pay the success fee to the solicitor.

Question 4: Do you agree that the kind of arrangement described in paragraph 43 above should not be permitted in a success fee agreement?

51. In paragraph 43, the Scottish Government stated: "In circumstances where the provider has come to the conclusion that the recipient is unlikely to win, the provider may withdraw from the agreement. It is understood that under some existing success fee agreements, the recipient may be responsible for the original provider's fees and outlays up to the point when the agreement is terminated by the provider, but only if the recipient does ultimately receive a financial benefit from the claim as a result of it being pursued by another provider." Eleven respondents agreed with this suggestion and three opposed it.

52. In support of this, the ABI wrote: "The ABI fully supports the Scottish Government's position that the arrangement described in paragraph 43 should not be permitted in a success fee agreement. The withdrawing provider will have made a commercial decision not to proceed based upon their assessment of the case. The successful pursuer has not let the withdrawing provider's decision to withdraw from the case weaken their resolve to proceed with their case and find alternative representation. The pursuer is likely to have experienced some inconvenience following the withdrawing provider's decision to cease acting. Further, the withdrawing provider has not had to bear the litigation risk which success fees are intended to reward."

53. Whilst not agreeing totally with the proposition, some gave a more qualified answer. For example Alan Paterson wrote: "This is a difficult area. If the work done by the first solicitor did not contribute significantly to the eventual outcome, it is not clear why they should be financially rewarded in this situation. Otherwise a pro rata split of expenses should occur with the second provider."

54. APIL agreed with paragraph 43 only in the more specific situation where the provider has come to the conclusion that the recipient is unlikely to win at court because they have been made a reasonable offer that they have then rejected, rather than because the prospects of success are low. In other cases, where the provider does not believe that the pursuer has a case, and that liability cannot be established, APIL agreed with Clyde and Co that the provider should not be paid any success fee if the pursuer subsequently takes the case to a different solicitor and succeeds. However, there should be a refund of recovered outlays paid by the first solicitor in that event.

55. Most of those who agreed thought that the provider who terminates the agreement should be able to receive reasonable disbursements in the event of the pursuer's success with another provider. Most thought that this should be agreed between the providers and come out of the success fee or the judicial expenses. In these situations the pursuer should only be liable for the success fee of the successful provider. Clyde and Co took a different view arguing that the pursuer should be responsible for provider's expenses up to the point of termination.

56. The Law Society and Iain Nicol disagreed with the paragraph 43 proposal. They pointed to the fact that the scenario has been provided for in the Law Society's Conditional Fee Agreement style for the last 20 years and worked well in practice. They both noted that in speculative fee agreements it is necessary to have 50% or more chance of success to have Legal Expenses Insurance cover. Assessing the prospects of success are down to the professional judgment and will differ from provider to provider. They argue that if the original provider has not acted negligently in rating prospects of success 50% or less and the recipient rejects their advice, then the original solicitor is entitled to be paid for the work they did if the case settles. The obligation to pay those expenses should lie with the recipient. They both also raised the situation where the recipient whose provider has taken the decision to withdraw goes on to represent themselves. In the event of success, under paragraph 43, they would not only receive all the damages but also the judicial expenses. Iain Nicol went on to say: "So either the client gets a windfall in recovering court expenses that he doesn't have to pay to the solicitor or the new agent gets to keep all the judicial expenses for work they haven't done."

57. The Law Society suggested that the "level of expenses due by the recipient to the provider … shall be capped at the level of judicial expenses due by the opponent, with the obligation on the recipient to take all reasonable steps to seek and recover those expenses".

58. Clyde and Co considered that the recipient should be responsible for the provider's fees and outlays up to the point of termination. Dentons objected to the Government's use of the word "misjudgment". It argued that prospects of success can shift as a result of documentary evidence or witness evidence and that litigation is by nature unpredictable.

59. The Faculty indicated that it disagreed with the views expressed at paragraphs 42 to 46 of the consultation paper. "Solicitors and counsel must be able to part company with their clients for good reason. Indeed, their professional obligations, including as officers of the court, may require them to do so in certain circumstances. Depriving the provider of their fee entitlement in those circumstances could induce them to act unreasonably (and potentially even unprofessionally) and penalise agents and counsel who do their job properly. An ordinary example of where such a tension would arise would be where a client refuses to take advice on a tender, and agents and counsel responsibly consider that they should withdraw from acting."

Question 5: Do you think that formal Government regulation is required to make it clear that providers of relevant services may not provide legal aid, whether in the form of advice and assistance or civil legal aid, when a success fee agreement is in prospect or in place?

60. Twenty-three of the respondents answered this question or made a comment. Twelve agreed and five disagreed that Scottish Government regulation is required to make it clear that providers of relevant services may not provide legal aid when a success fee agreement is in prospect or in place. One respondent was neutral on the point.

61. There was general agreement that legal aid and a success fee agreement should not co-exist.

62. Some, for example, the ABI and Clyde and Co thought it inappropriate to use public funds to investigate a claim where a success fee is envisaged and then move to the success fee once assured that there is a reasonable prospect of success. This removes the risk for a provider and the view is that the Scottish Government should provide regulations to prevent it.

63. Eleven respondents, took a different view considering that a distinction should be drawn here between advice and assistance on the one hand and civil legal aid on the other. At the investigation stage, advice and assistance should be available to those who qualify for it as using advice and assistance may be the only way that some firms can properly investigate a claim. It is only when the claim has been investigated that the provider is in a position to say whether they should enter into a success fee agreement. At that point, full civil legal aid should not be available. Kennedys made the point that it should "not work the other way – once a success fee is in place we do not believe there should be an option to revert back".

64. Three respondents comment that it was imperative that both advice and assistance and full legal aid must continue to be available for clinical negligence cases. APIL wrote: "These cases require a lot of initial and early investigation, and require expert opinions to be gathered early on, so that a view can be taken on prospects. [After the event] premiums will not be recoverable, and premiums to fund these investigations are expensive. Advice and assistance alone is not sufficient, however, and full legal aid must remain an option for funding of clinical negligence cases. Pursuers often instruct solicitors in a clinical negligence case close to the time bar, and the solicitor needs to raise proceedings to protect the client's position. Full legal aid must be available to allow proceedings to be raised."

65. SLAB thought it important that it is emphasised that the policy objective that "legal aid is and should be an alternative method of funding, and that legal aid and a success fee arrangement may not coexist contemporaneously". It stressed the importance of transparency on this issue and was of the view that if "provision is to include stipulation about matters which must be included either in the agreement itself or accompanying material, then it would be important to include relevant reference to the legal aid position, and specifically to the fact that there can be no

legal aid cover so that clients in particular understand the position and are left in no uncertainty".

66. An alternative view was taken by the Faculty, Iain Nicol, and the Law Society, all of whom thought that further regulations were unnecessary as the position is covered by the existing statutory framework for legal aid.

67. The Law Society added another scenario. This is where the prospects of success do not reach a certain percentage level of 50-60% required for legal expenses insurance cover. It noted that legal aid only requires 51%. If the prospects do not reach the level required by the legal expense's insurers, then the cover will be cancelled. The recipient may however reach 51% prospects of success and therefore should be able to apply for legal aid.

Question 6: Do you think that any change in funding, whether from legal aid to a success fee agreement, or the other way about, requires formal Government regulation in relation to information/notification requirements or case-end formalities?

68. Twenty respondents either answered the question or commented on it. Eight respondents were in favour of formal government regulation and six against.

69. The ABI stated that there has been an increase in pursuers bringing claims against providers challenging the deductions made by the provider at the conclusion of a case. It considers that clear procedures set down by regulations are needed to prevent a further rise in satellite litigation focusing on success fee deductions.

70. A number of respondents, including APIL, Digby Brown and SLAB, raised the issue of situations where a solicitor has obtained a legal aid certificate for the client, and then the client changes solicitor. The current position is that in the event that a pursuer has had the benefit of a legal aid certificate, at any point during litigation, and for however short a period, then if there is any recovery of judicial expenses, these require to be paid to the SLAB. SLAB then distributes the expenses to solicitors and counsel, but technically has no power to pay any expenses to solicitors who have not acted under the legal aid certificate. This means that if a pursuer has an original solicitor who obtains a legal aid certificate but then transfers to solicitors who undertake the work under a success fee agreement, if the case is successful, the second firm will receive no payment for the work carried out by them, regardless of the fact they may have carried out the bulk of the work. SLAB went on to say: "It is thus of paramount importance to those entering success fee arrangement or concluding the formalities of a successful claim, that there is visibility and transparency as to what will or requires to happen, and that there is adequate provision for implementing these formalities. Solicitors need to be aware, as it has an effect on the remuneration procedure and outcome for them. Clients need to be aware as it may impact on their expectations. Quite separately for both it may have an impact for whether and how the case is concluded at all. The preferred options for what terms of settlement might be may be influenced by any legal aid consequences and formalities that will follow."

71. SLAB considered that there are two areas that need thinking about. Firstly, how sufficient information, awareness and visibility of the legal provisions and their effects both generally and in the specific cases is achieved. SLAB takes the view that the most effective way of ensuring there is adequate provision is through regulations. Secondly, SLAB is concerned about how adequate and sufficient case-end procedures, mechanisms and formalities are established. It concedes there are a range of ways this could be done, but considers that regulatory provision would appear best as it would ensure the level of certainty that is important matter for the pursuer at the same time as safeguarding the proper stewardship of public funds. SLAB concludes: "In summary it is realistic to suggest that without a clear and defined regime, there will be clients involved, and solicitors acting, in successful cases in which sight may have been lost, or never adequately existed, as to legal aid consequences. It would be unfortunate if a client or a solicitor was unpleasantly surprised and impacted by recoupment where that was always capable of being

known about and managed. There is also scope for misunderstanding of the legal aid regime even causing disputes which could be avoided with sufficient levels of information, awareness and transparency. A further benefit is the reduction of cost to the public purse, whether by recoupment or the avoidance of unnecessary costs of administration, and in some cases, enforcement."

72. FOIL, FSCM, and Zurich linked the question to the issue of disclosure raised in the answers to question 4 above. They all consider that formal Government regulation is required for funding arrangements.

73. The Faculty was not convinced that formal regulation is necessary, but it needs to be clear to pursuers that it is possible to change from one source of funding to another, and in particular, that litigants can surrender a legal aid certificate and continue under another form of funding during an action.

74. Iain Nicol and the Law Society both considered that this "is a matter for the Legal Aid Board and the Law Society to issue appropriate guidance to the profession on. That should be entirely sufficient to achieve the desired aim. The more regulation issued by the Government, the less inclined lawyers will be to offer success fee agreements (as has happened in England where they are hardly used)".

75. In summary, the responses to this question were split. Some, including SLAB considered that Government regulation was necessary, others were not convinced with the suggestion from one pursuer solicitor and the Law Society that guidance from SLAB and the Law Society was sufficient.

Appendix: list of respondents

Professor Alan Paterson
The Association of British Insurers (“ABI”)
The Association of Personal Injury Lawyers (“APIL”)
Clyde and Co (Scotland) LLP
Compass Chambers
Dentons UK and Middle East LLP
Digby Brown LLP
Drummond Miller LLP
DWF LLP
Equality and Human Rights Commission (“EHRC”)
The Faculty of Advocates
Forum of Insurance Lawyers (“FOIL”)
The Forum of Scottish Claims Managers (“FSCM”)
The Glasgow Bar Association (“GBA”)
Iain Nicol
Kennedys
Lanarkshire Accident Law
The Law Society of Scotland (“the Law Society”)
Morton Fraser LLP
Quantum Claims
The Scottish Legal Aid Board (“SLAB”)
Slater and Gordon Lawyers
Thompsons Solicitors
Thorntons LLP
Zurich Insurance PLC

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