Success fee agreements in Scotland

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

November 2018

Scottish Government
Riaghaltas na h-Alba
gov.scot

Contents

About the consultation

The objective of this paper is to offer an opportunity for views to be aired on the decisions that it is necessary for the Scottish Government to take in order to implement Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 which provides for the regulation of success fee agreements. Success fee agreements including speculative fee agreements and damages based agreements are already in use in Scotland and the purpose of their regulation will be to safeguard and enhance access to justice.

Responding to this consultation

Please respond to this consultation using the online platform 'Citizen Space' which can be found at: https://consult.scotland.gov.uk/. You can save and return to your responses whilst the consultation is still open. Please ensure that consultation responses are submitted before the closing date.

If you are unable to respond using Citizen Space, please send your views and comments either by email to courtsreform@gov.scot or by posting a paper copy to:

Michael Green
Civil Law and Legal System Division
Scottish Government
GW-15 St Andrew's House
Regent Road
Edinburgh
EH1 3DG

However you respond, please complete the Respondent Information Form (see 'Handling your response' below). Responses should reach us by **Thursday, 31 January 2019**. Earlier responses would be welcome.

Handling your response

If you respond using 'Citizen Space', you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via 'Citizen Space', please complete and return the **Respondent Information Form** attached to the end of this document. This will ensure that we treat your response appropriately.

All respondents need to be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the 2002 Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at http://consult.gov.scot. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to michael.green@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: http://consult.gov.scot. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and/or
- be used to finalise legislation before it is implemented.

Whilst details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Ministerial foreword

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 received Royal Assent on 5 June 2018. The Act represents the final stage in reforms of the Civil Justice system in Scotland recommended by the Scottish Civil Courts Review headed by Lord Gill, which reported in 2009, and the Review of Expenses and Funding of Civil Litigation in Scotland carried out by Sheriff Principal James Taylor, which reported in 2013.

The civil court system in Scotland has been undergoing a period of comprehensive change. Over the last few years we have undertaken a significant programme of reform, the combined effect of which is reinvigorating the whole civil justice system in Scotland. Implementation of the Courts Reform (Scotland) Act 2014 has produced a system where, through the appropriate streaming of cases and appeals to the right courts, cases are dealt with swiftly and efficiently, and delays minimised.

However, even if the court system is more efficient, that will not fully support access to justice if people are unable to exercise their legal rights because they fear that they will not be able to afford to pay their own lawyer, or they fear potential bankruptcy as a result of the expenses that they may be liable to pay to the defender if a personal injury case is lost.

The principal policy objective of the 2018 Act is to increase access to justice by creating a more accessible, affordable and equitable civil justice system. The Scottish Government aims to make the costs of court action more predictable, increase the funding options for pursuers of civil actions, and introduce a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

Part 1 of the 2018 Act relates to success fee agreements which will be the main method of extending funding options to potential litigants. For personal injury claimants these will be simple to understand “no win no fee” agreements. This consultation relates to the detailed regulation of such agreements, including the appropriate caps on success fees to make the costs of litigation more predictable.

Ash Denham
Minister for Community Safety

Terms used in this consultation

Act of sederunt

Delegated legislation passed by the Court of Session to regulate civil procedure by rules of court in the Court of Session, the Sheriff Appeal Court and the sheriff court.

Civil litigation

Court action regarding a civil claim for damages or another civil remedy as opposed to a criminal case.

Claims management company or 'CMC'

Companies or other bodies which provide 'claims management services' which, under section 1(2) of the 2018 Act, means services consisting of the provision of advice or services, other than legal services, in connection with the making of a claim for damages or other financial benefit, including—

(a) advice or services in relation to—

(i) legal representation,

(ii) the payment or funding of costs associated with making the claim,

(b) referring or introducing one person to another,

(c) making inquiries,

Counsel

An advocate or a solicitor-advocate instructed by a solicitor.

Damages

A sum of money awarded by a court or agreed by settlement between the parties to civil litigation as compensation for a wrong or injury.

Damages based agreement

A type of success fee agreement under which the success fee of a lawyer or claims management company is calculated as percentage of their client's damages received if the case is won, but no fee is payable if it is lost (though a lower fee may be payable in commercial cases). The calculation of the success fee is more straightforward than under a speculative fee agreement. The success fee will be

subject to the caps to be set in regulations by Scottish Ministers under section 4 of the 2018 Act.

Defender

The individual against whom or the body against which a claim is made.

Future loss damages

Future loss damages are the part of damages which may be awarded by the court (or which form part of a settlement) in personal injury cases which are intended to compensate the pursuer for loss of future earnings or future care as a result of their injuries – they therefore relate to future, rather than past, loss.

Judicial expenses

The expenses of raising and conducting a case which a successful party will seek to recover from the unsuccessful party in litigation on the basis of an award of court.

Outlays

The cost of raising and conducting a case, including matters such as the court fees and any fees of expert witnesses. Under section 6(2) of the 2018 Act, such outlays must be borne by the provider of relevant services under a success fee agreement in a personal injury case and not the recipient.

Provider

The body which conducts the case on behalf of a pursuer under a success fee agreement, who is the recipient of those services. The provider will usually be a firm of solicitors or a claims management company.

Pursuer

The person making the claim. Sometimes known as a claimant.

Recipient

The person who is receiving relevant services from a provider under a success fee agreement. The recipient is therefore the pursuer who is making the claim.

Speculative fee agreement

A type of success fee agreement introduced by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 in terms of which an enhanced fee

will normally be charged by a solicitor in the event of success. The success fee is calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client. The success fee under a speculative fee agreement is not damages based, but it will still be subject to the caps to be set in regulations by Scottish Ministers under section 4 of the 2018 Act.

Success fees

Fees that will be paid out of damages awarded or agreed by successful parties to their lawyers or claims management companies under a success fee agreement.

Success fee agreements

Success fee agreements can be either speculative fee agreements or damages based agreements – both are kinds of 'no win, no fee' agreement. In Scotland success fee agreements offered by lawyers have until now been in the form of speculative fee agreements, but following implementation of Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, lawyers will be able to offer damages based agreements. Claims management companies can also continue to offer damages based agreements. Except in the case of personal injury cases, success fee agreements may be entered into on a 'no win, lower fee' basis.

Tenders

In order to avoid the expense of a full court hearing of the case, a defender might make a formal offer to a pursuer to settle a case. Such offers are known as 'tenders' in Scotland.

Abbreviations

CMC	claims management company
FCA	Financial Conduct Authority

Chapter 1: Introduction

Background

1. A review of the Civil Justice System was undertaken in 2007-2009. It was chaired by Lord Gill, then the Lord Justice Clerk, and the outcome was published in September 2009 as the 'Report of the Scottish Civil Courts Review'[1]. The Scottish Government broadly accepted the recommendations of the Review and much of it was implemented in the Courts Reform (Scotland) Act 2014 ('the 2014 Act') and in rules and other secondary legislation under the 2014 Act.

2. In the Scottish Civil Courts Review, Lord Gill recommended that there be a further review of the expenses and funding of civil litigation. The then Minister for Community Safety and Legal Affairs, Fergus Ewing MSP, announced on 4 March 2011 that Sheriff Principal James Taylor had been asked to undertake 'The Review of Expenses and Funding of Civil Litigation in Scotland'. Sheriff Principal Taylor began the review in May 2011 and the final report was presented in September 2013[2].

3. The Scottish Government broadly accepted this review and approximately half of its recommendations have been provided for in primary legislation through the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ('the 2018 Act'). Recommendations on sanction for counsel in the sheriff court were implemented in the 2014 Act. Most of the other recommendations are more suitable for implementation through court rules and other secondary legislation and are being, or have been, considered by the Scottish Civil Justice Council.

4. In parallel to the legislative process for the Bill for the 2018 Act, the Scottish Parliament gave legislative consent to the introduction of claims management regulation in Scotland by means of the Westminster Financial Guidance and Claims Act 2018. The regulatory authority will be the Financial Conduct Authority who, in the case of England and Wales, is taking over the regulatory functions of the Claims Management Regulator. This new regulatory regime is expected to be operational from April 2019 and thus claims management companies' provision of success fee agreements will be regulated in Scotland for the first time by both the 2018 Act and by rules of the Financial Conduct Authority. Similarly, legal services providers will be regulated by both the 2018 Act and by the professional rules of their professional body.

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[1] Volume 1 can be viewed at: https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4 and Volume 2 at: https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4

[2] See: https://www2.gov.scot/Resource/0043/00438205.pdf

5. HM Treasury consulted on the regulation of claims management services in secondary legislation under the Financial Guidance and Claims Act 2018 from April to June 2018 and its response to views expressed is now available along with an updated draft statutory instrument[3]. The FCA consulted between June and August 2018 on draft rules on how it plans to regulate claims management companies from 1 April 2019[4]. FCA has already held meetings with interested parties in Scotland to inform its new role north of the Border.

Purpose of this paper

6. This consultation is concerned with powers conferred on the Scottish Ministers in Part 1 of the 2018 Act to make the secondary legislation necessary to fully implement the provisions of Part 1. Part 1 is not yet commenced and the Government proposes to fully commence it at the same time as the regulations described in this consultation paper.

7. In Chapter 2 of this paper, we describe the background to success fee agreements before seeking views on the level of caps that will restrict the amount that providers of relevant services can charge their clients and thus make the expense of litigation more predictable for the client.

8. In Chapter 3 of this paper, we consider one particular type of success fee agreement, the damages based agreement. These are already popular with those considering civil action due to their basic simplicity and Sheriff Principal Taylor believed that their use would further increase. The Scottish Government does not, however, consider that damages based agreements will be suitable for all types of civil cases and seeks views on what types of case should be excluded.

9. Finally, in Chapter 4, we look at what further regulatory provisions might be required for success fee agreements. The purpose is to ensure that all such agreements meet minimum standards so that, firstly, pursuers are protected, and secondly, anyone who is 'shopping around' may be reasonably confident that they are comparing 'like for like'.

[3] https://www.gov.uk/government/consultations/claims-management-regulation-consultation-on-secondary-regulations

[4] https://www.fca.org.uk/firms/claims-management-companies

Chapter 2: Proposed caps on success fees

Introduction

10. In Scotland, civil litigation has traditionally been financed in three ways – through private funding, civil legal aid, and trade union funding. In the last 20 to 30 years this situation has changed. The accessibility of other kinds of payment arrangements with solicitors such as speculative fee arrangements, as well as claims management companies using damages based agreements, and a reduction in trade union membership, has resulted in a decline in the traditional types of funding for civil cases. Whilst third party funding by firms of litigation funders is becoming more common in relation to commercial cases, these are unknown in personal injury actions. Another evolving funding option is crowdfunding.

11. Under a speculative fee agreement, the lawyer does not generally receive a fee from the client if the case is lost. However, if the case is won, the lawyer's costs (the 'base costs') are generally recoverable from the losing party. In these cases, the lawyer can charge an uplift on these base costs, known as the 'success fee', which is payable by the client.

12. The maximum success fee that may be charged under a speculative fee agreement is prescribed by secondary legislation (the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992). In all cases, the current maximum uplift that may be charged is 100% of the base costs.

13. Damages based agreements are a different form of success fee agreement under which a provider's fee is calculated as a percentage of the client's damages if the case is won. They are easy for potential litigants to understand; the service provider simply takes a percentage of damages won or agreed if the case is successful. If the case is not successful the service provider receives nothing. In personal injury actions, the 2018 Act ensures that the percentage uplift (i.e., the success fee) from damages awarded or received is the only cost to pursuers as section 6(2) provides that the service provider is liable to pay the outlays necessary to progress the case. In other words, a damages based agreement for a personal injury claim must operate on a "no win no fee" basis.

14. Commonplace in the USA, most frequently in personal injury cases but also available in commercial actions, damages based agreements cannot currently be enforced by solicitors in Scotland. Advocates are also expressly forbidden by the Faculty of Advocates from entering into damages based agreements. Claims management companies ('CMCs') are, however, able to offer such agreements. Unlike a solicitor, a CMC cannot raise court proceedings, cannot appear in court on behalf of a pursuer, and cannot instruct counsel. The activities of such firms have become more prominent in Scotland as they can enter into damages based agreements whilst such agreements cannot be

enforced by a solicitor. Some of claims management companies in Scotland are wholly owned by solicitor firms which are regulated by the Law Society of Scotland. As mentioned, claims management companies will be regulated in Scotland by the Financial Conduct Authority under the Financial Guidance and Claims Act 2018[5].

15. Section 2 of the 2018 Act when commenced will permit solicitors to enter into damages based agreements and so solicitors as well as claims management companies will be able to offer these.

16. There is little doubt about the popularity of damages based agreements with personal injury litigants. Sheriff Principal Taylor stated in his evidence to the Justice Committee in October 2017 that one solicitor-owned claims management company had entered into 17,600 new damages-based agreements in the last three years and 23,800 in the last five[6]. In 2015-16, there were 8766 personal injury cases raised as court actions in Scotland, but only 114 were fully legally aided. This suggests that the vast majority of personal injury cases which are not supported by a trade union are funded by means of some kind of success fee agreement, likely a damages based agreement.

17. The option of entering into speculative fee agreements will remain, but these are more complex arrangements than damages based agreements and the Scottish Government envisages that damages based agreements will be the most prominent and popular form of success fee agreement.

18. The traditional objection to damages based agreements – that the client is not receiving 100% of the damages achieved – has limited force in the Scottish Government's view, since potential litigants appear to like the simplicity and predictability of damages based agreements as they know that they are likely to receive a set percentage of the damages achieved. If they were unable to raise proceedings by any other means (for example, if they are ineligible for legal aid), they may receive 100% of nothing since they may be unable to litigate at all.

Levels of fee caps

19. In considering whether there should be a cap on the percentage which can be taken as a success fee (in both speculative fee agreements and damages based agreements, both of which the 2018 Act treats as 'success fee agreements'), Sheriff Principal Taylor believed that a "proper balance must be struck between sufficient remuneration for solicitors and justice for clients

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5 http://www.legislation.gov.uk/ukpga/2018/10/contents

6 See: http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165

awarded damages"[7]. He went on: "[Previously], it is the market that governs the percentage cap on damages which different claims management companies charge. It has been represented to us that the market is working….however, several concerns remain. Even if the market would appear to be working at present, we cannot pretend to know the future. So, for example, it has been suggested to us that with the introduction of alternative business structures, a few 'big players' may dominate the market in personal injury work. If healthy competition is restricted in this way, the need to protect clients may become greater."[8]

20. Sheriff Principal Taylor did not therefore believe that market forces should be the sole determinant of what percentage can legitimately be taken forward from an award of damages in such cases. Market forces have not in any case prevented some claims management companies from charging up to 33% of damages achieved.

21. Sheriff Principal Taylor continued:

> "The cap requires to be set at a level which is fair to solicitors and counsel on the one hand and the pursuer on the other. Any cap has to reflect the risk which the lawyers are taking that the case might not succeed after proof and they end up receiving nothing for their work. This may not be a great risk since only a very small number of actions raised in Scotland actually go to proof. However, what court-based statistics do not disclose is the number of cases in which the solicitor has to advise the client that, after consideration of the defences lodged, there is little prospect of success, and the client eventually instructs that the case be withdrawn on the basis that each party bears their own expenses. Consideration must also be given to the work undertaken by the solicitor in vetting those claims in which the solicitor ends up advising, before proceedings are raised, that the prospects of success are sufficiently poor that the solicitor is not prepared to commence proceedings regardless of the means of funding the litigation.
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> "At the same time, consideration must be given to the fact that I am not recommending a model whereby judicial expenses are used to off-set the success fee. If the solicitor is to retain judicial expenses, the pursuer must also be left with sufficient damages to warrant the trouble and anxiety which most litigants experience. I consider that balance is struck by a sliding scale."[9]

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7 Report of the Review of the Expenses and Funding of Civil Litigation in Scotland, chapter 9, paragraph 82. See: https://www2.gov.scot/Resource/0043/00438205.pdf.

8 ibid, chapter 9, paragraph 85.

9 ibid, chapter 9, paragraphs 87 and 88.

Sheriff Principal Taylor therefore 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

22. Sheriff Principal Taylor stressed that these percentage caps should be maxima. There is clearly a danger that, in time, these caps may be viewed as the going rate, and not maxima. He argued, however, that from the evidence before him, that it was likely that, with members of the public becoming increasingly aware of different funding mechanisms, competition will determine the actual rates used.

23. It should be noted that since the cap is inclusive of VAT, no more than 20% is deducted from the client's first £100,000 of damages, but the solicitor receives a success fee of considerably less. So, for example, if a client is awarded £100,000, the success fee is set at 20% and VAT remains at 20%, then the client receives £80,000 in damages, the solicitor receives £16,667 and VAT is paid at £3,333. Counsel's success fee (plus VAT) and any outlays not recovered from the other side in the judicial account of expenses must be met out of the £16,667 received by the solicitor,

24. In circumstances where some claims management companies are currently taking up to 33% (of the **whole** damages payment, not just the first £100,000), then even a 20% cap on the first £100,000 (and 10% on the next £400,000 and 2.5% on anything above £500,000) may be viewed as a considerable improvement on the current position.

Employment tribunals

25. Sheriff Principal Taylor pointed out that there was a similarity between employment and personal injury cases in that there is usually an asymmetry between the financial standing of the parties. The claimant in an employment tribunal case, like the pursuer in a personal injury case, may very well be in a vulnerable position. He therefore recommended that the maximum success fee which can be charged in a success fee agreement in relation to an application to an employment tribunal should be capped at 35% (inclusive of VAT) of the monetary award recovered. He stated:

> "If I were only to have regard to the supply side of legal services, I would set a higher cap than 35% as there are seldom awards of judicial expenses in such cases. However, I am mindful that more than a 35% deduction from damages may not serve the interests of justice with respect to individuals."[10]

Commercial actions

26. In England and Wales, the Civil Justice Council's Working Party recommended that there should be no cap on the percentage which can be taken from damages in commercial actions. The view was that commercial entities may not require such protection.

27. Sheriff Principal Taylor was at first minded to follow that proposal. After further consideration he concluded, however, that there could be unfortunate consequences in relation to the motivation for bringing cases:

> "Nevertheless, I acknowledge that if there should be no cap on damages in commercial actions, cases may be bought from clients and pursued for the sole benefit of solicitors. I find such distasteful and it would also change the dynamic between the lawyer and the court. It has been and should remain the position that the lawyer appearing in a case is an officer of the court and owes duties to the court. If the lawyer became the only party who could benefit from a potential decision of the court, this relationship will be brought under considerable pressure. There is a need to obviate this risk."[11]
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> Sheriff Principal Taylor recommended a cap of 50% (inclusive of VAT) on the percentage which can be deducted as a success fee in commercial actions.

28. It is proposed that 50% should be the default cap for all cases in which a success fee agreement has been entered into, including commercial actions, but excluding personal injury and employment cases. The Government is concerned that if no default cap is provided then there is a danger that efforts may be made to circumvent the caps set.

29. **In relation to the levels of the caps to be specified for success fees, the Scottish Government is minded to follow Sheriff Principal Taylor's recommendations on the levels of percentage caps in making provision in regulations about the maximum amounts of success fees that may be provided for under success fee agreements.** During evidence on the Bill before the Justice Committee of the Scottish Parliament, no witness challenged those levels.

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10 ibid, chapter 7, paragraph 68.

11 ibid, chapter 9, paragraph 90.

Chapter 3: Cases not suitable to be funded by damages based agreements

30. Sheriff Principal Taylor, when considering success fee agreements, concluded that damages based agreements in particular were not suited to all types of litigation. Section 5 of the 2018 Act gives a power to the Scottish Ministers to exclude those types of cases that are not suitable to be funded by a success fee agreements of a kind to be specified in regulations. The power can be used to exclude certain types of litigation from success fee agreements as a whole, or to exclude certain types of litigation from either damages based agreements or speculative fee agreements.

Family proceedings

31. Sheriff Principal Taylor noted that damages based agreements were not available for family proceedings in England and Wales and recommended that they should also not be available for family actions in Scotland.[12] He argued that it was much more difficult to define success in family proceedings since the court may require to make a range of different orders dealing with various aspects of, for example, matrimonial breakdown aside from purely financial matters and 'success' may therefore be divided. It does not therefore seem appropriate that damages based agreements, which are predicated on the provider of the relevant services taking a percentage of damages awarded or agreed, should be used in such cases.

32. The Faculty of Advocates submitted evidence to the Justice Committee during the Bill's Parliamentary stages that speculative fee agreements were sometimes used in family proceedings and argued that this funding option should not become unavailable to litigants.

33. There is some uncertainty over what types of family proceedings speculative fee agreements are used in connection with, and what types of agreements are used.

34. The Scottish Government fully intends to implement Sheriff Principal Taylor's recommendation that damages based agreements should not be used in family proceedings.

35. The 2018 Act therefore gives Scottish Ministers power to make regulations so as to specify what kinds of litigation should be capable of being dealt with by certain kinds of such agreements. This was intended to permit consultation on what should be included in regulations to ensure the correct result is reached for family proceedings. Further, this will allow for future proofing since the regulations can change as practice changes.

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[12] ibid, chapter 9 paragraph 65.

36. The question arises as to whether other kinds of success fee agreements should be excluded from certain other kinds of litigation.

37. The Scottish Government therefore wishes to ask three questions in relation to the use of success fee agreements including damages based agreements.

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

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

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

Chapter 4: Further regulatory provision about success fee agreements

38. Section 7(1) of the 2018 Act stipulates that a success fee agreement must be in writing. Section 7(2) provides that a success fee agreement must specify the basis on which the amount of the success fee is to be determined.

39. Section 7(3) and (4) 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 subsections (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).

40. The Scottish Government is mindful that a degree of regulation will be provided by the professional rules of the Law Society of Scotland (for solicitors) and of the Financial Conduct Authority (for claims management companies) and general consumer protection legislation will also apply, for example, a 'cooling off period' may apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Sheriff Principal Taylor recommended that there should be a 14-day cooling off period after a client enters into a damages based agreement which would be mandatory, save in circumstances where a client's interest would be prejudiced, for example, a claim being time-barred should it not be raised before the expiry of the 14-day period. Scottish Government regulations do not require to cover matters that are adequately provided for by other means. If, of course, it emerges for one reason or another that the initial affirmative regulations made by Scottish Ministers are not sufficiently prescriptive, then it is open to the Scottish Government to bring forward more robust affirmative regulations.

41. **The Scottish Government believes that regulations should require that the following obligations must be included in a success fee agreement:**

a) Success fee agreements must be probative, that is, self-proving under the Requirements of Writing (Scotland) Act 1995, as amended by the

Land Registration etc. (Scotland) Act 2012, with particular reference to electronic documents.

b) Details of the claim or proceedings to which the agreement relates, including:

- the circumstances out of which the claim arises; and
- the anticipated damages and/or other civil remedy sought in the claim.

c) A statement of what is covered by the agreement. This will normally be the work carried out by the provider of the relevant services to the recipient of those services in relation to the recipient's claim. This could relate to a personal injury action, but could be any kind of civil litigation other than those discussed in section 3 of this consultation.

d) 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.

Success fee calculation

e) Details of how the success fee is to be calculated under either a damages based agreement or a speculative fee agreement, both of which are success fee agreements. In both cases, the success fee will be subject to the cap discussed in chapter 2 of this consultation.

f) In circumstances where there is more than one provider of the relevant services in relation to the same claim, only one success fee will be payable by the recipient and this will the equivalent of the sum payable under the regulations on success fee caps **and as if there had only been one provider of relevant services**.

g) In some commercial cases, where the agreement is for a lower fee to be paid (rather than no fee) in the event of the claim being unsuccessful, details of how the lower fee is to be calculated.

h) If the value of the claim should change as a result of further information from experts or other reliable sources, the provider of the relevant services must inform the recipient in writing.

Statement of indicative payments

i) Statement of indicative likely payments due by the recipient to the provider of the relevant services.

Obligations of recipient to provider

j) The obligations of the recipient to the provider to enable the provider to progress the claim.

Obligations of provider to recipient

k) The Scottish Government believes that the obligations of the provider to the recipient should include the following:

- Provision of regular updates to the recipient and consultation with them on any major developments including offers from the defender.
- In personal injury claims, a statement that the only cost to the recipient of the relevant services will be (1) the success fee and (2) insurance premiums payable for After the Event Legal Expenses Insurance (if any).
- In personal injury claims, a statement that the provider will be entitled to retain any judicial expenses recovered from the opponent, but will also be liable to pay all outlays incurred in the case.
- In personal injury claims, a statement that any damages for future loss (for example in relation to future income loss or the cost of personal care) obtained in connection with the claim will be included in the amount of damages if the future element is awarded as a lump sum of over £1 million, but only if the conditions in section 6(5) and (6) of the 2018 Act are met.

Complaints and dispute resolution

l) A statement of the complaints procedure to be followed in the event of the recipient considering that the provider of the relevant services is failing in their obligations.

m) Provision for the resolution of disputes between the provider of the relevant services and the recipient of those services. The Scottish Government believes that the use of a form of alternative dispute resolution such as arbitration or mediation by an independent arbitrator or mediator with experience of success fee agreements should be the default method of resolution, but would welcome views on how best to resolve disputes regarding success fee agreements should be resolved.

Failure to comply

n) In circumstances where there is failure by the provider of a success fee agreement to comply with section 7(1) or (2) of the 2018 Act or the regulations made by Scottish Ministers under section 7(3), regulations will provide for:

- The success fee agreement and any obligation to pay a fee or charge under the agreement being unenforceable or unenforceable to a specified extent;
- The recovery of any amounts paid under the agreement; and
- The payment of any compensation for any losses incurred as a result of paying amounts under the agreement.

Termination

o) Details of the circumstances in which **a provider** may terminate the agreement and charge the recipient.

p) The provider must provide in the agreement details of the rates to be charged in such an event and must provide details to the pursuer if those rates change.

q) Any other expenses due to be paid by the recipient, for example, expenses awarded by the court to the defender in the event of inappropriate conduct by the recipient in connection with the claim or proceedings as specified in section 8(4) of the 2018 Act, or premiums for after the event insurance.

r) Provision that **the recipient** may terminate the agreement and will not be responsible for any expenses awarded by the court to the defender in the event of inappropriate conduct by the provider of relevant services in connection with the claim or proceedings as specified in section 8(4) of the 2018 Act.

s) Details of when the recipient may otherwise terminate the agreement and not incur charges from the provider. This might include where the provider is judged to have provided an inadequate service or is found guilty of misconduct by its professional regulator or the Scottish Legal Complaints Commission.

Inappropriate arrangements for success fee agreements

42. The Scottish Government does not consider that it is appropriate for the following kind of arrangement to be included in a success fee agreement.

43. 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.

44. The Scottish Government would welcome views on this, but it seems inappropriate that, in circumstances where one provider has taken a decision, based on their professional judgment, to withdraw from an agreement because they do not feel that the claim is going to be successful, they may still benefit financially as a result of the successful perseverance of another provider, but **at the expense of the recipient of the relevant services**. In other words, the client may receive less of his or her financial benefit because they may have to pay part of the damages received to a provider who withdrew from the agreement because they made a misjudgement that the claim would not be successful. This introduces the sort of uncertainty that the 2018 Act is trying to eliminate.

45. It is possible that arrangements may be put in place whereby the original provider may be paid an reasonable proportion of the expenses recovered by the successful agent from the defender if these relate to work done by the original provider.

46. As noted above, however, it is proposed that in circumstances where there is more than one provider of the relevant services in relation to the same claim, only one success fee will be payable by the recipient and this will the equivalent of the sum payable under the regulations on success fee caps **and as if there had only been one provider of relevant services**.

Legal aid

47. The Scottish Government wishes to make it clear that it does not believe that personal injury or any other kind of action should be funded by a combination of legal aid and a success fee agreement. In other words, it does not think that legal aid and a success fee agreement should co-exist in the same case.

48. The reason for this is quite simple. If an injured party who is seeking damages enters into a success fee agreement with a provider of relevant services, then, under section 6(2) of the 2018 Act, that party is not liable to make any payment, including the outlays incurred in providing the service,

regardless of whether damages are obtained other than the success fee if the case is successful. The party therefore has no need to apply for legal aid as he or she will not have to pay anything to the provider of relevant services apart from the success fee under the success fee agreement and only then if the case is successful. There is therefore no reason for the provider to apply for legal aid funding.

49. A provider of relevant services will be entitled to receive both the success fee under a success fee agreement and expenses recovered from the opponent in the event of success. There is therefore no justification for that provider to receive funding from the Legal Aid Fund which the client does not actually require because of the provisions of section 6(2).

50. In other kinds of cases (that is, non-personal injury), the success fee payable will be up to 50% of the damages obtained if the case is successful. In view of this level of reward for the provider, it seems reasonable that the provider of the relevant services should fund the case themselves, with no state funding, potentially with the assistance of a commercial third party funder.

51. The Scottish Government is mindful in this regard that success fee agreements are not new, and in practice it has not been necessary for the beneficiaries of success fee agreements to have recourse to the Legal Aid Fund. Further, the Scottish Government takes the view that section 32(a) of the Legal Aid (Scotland) Act 1986 already has the effect of precluding a solicitor or counsel providing legal aid from taking a success fee during any period when legal aid was available.

Regulation

52. The Scottish Government considers it desirable that professional and regulatory bodies make it clear that it is not appropriate for providers of relevant services to apply for legal aid when a success fee agreement is in prospect. The Government would welcome views on whether formal Government regulation is required: that possibility is still available in the light of experience even if it were to be decided that no formal Government regulation was required at least for the time being.

Change in the basis of funding

53. It is possible that a client may begin a claim or action with assistance from a solicitor who is able and willing to undertake the work under advice and assistance or civil legal aid, as appropriate. If the client, for whatever reason, moves to another solicitor or provider of relevant services, the second solicitor may enter into a success fee agreement with the client. It would be important for all parties, and the Scottish Legal Aid Board, to be sighted on the change and any applicable consequences. For example, a change in the basis of funding has potential consequences for the application of section 3(2) and

3(3) of the 2018 Act. It may also be useful for case-end responsibilities to be clearly designated.

54. It does not seem likely that a client would move from funding by success fee agreement to legal aid, but the Scottish Government would welcome any views on whether this ever occurs.

55. The Government would also welcome views on whether changes in funding requires formal Government regulation, whether in relation to notification and information requirements, or the mechanics of administration of case-end formalities, on the same basis as noted previously that this may not be required at present, but the possibility remains in the locker should it be deemed necessary.

Questions

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

☐ content.

☐ not content

If you are not content, please provide reasons for your response and suggest what you think the success fee caps should be in the box below.

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?

Please provide your answers and any reasoning in the box below.

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?

☐ yes
☐ no

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

☐ yes
☐ no

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

☐ yes
☐ no

Please provide reasons for your response in the box below.

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

☐ yes

☐ no

Please provide reasons for your response in the box below.

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?

☐ yes

☐ no

Please provide reasons for your response in the box below.

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?

☐ yes

☐ no

Please provide reasons for your response in the box below.

Scottish Government
Riaghaltas na h-Alba
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Success fee agreements in Scotland

Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy: https://beta.gov.scot/privacy/

Are you responding as an individual or an organisation?

☐ Individual

☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

☐ Publish response with name

☐ Publish response only (without name)

☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☐ Yes

☐ No

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