

LIST OF QUESTIONS

CHAPTER 2: ACCESS TO JUSTICE

1. What are the main reasons relating to the cost of litigation that discourage potential litigants from court action?

There is a general concern that the cost of litigation can spiral out of control. In addition clients often feel that even if their action is successful the financial benefits will be significantly diminished following upon their liability to meet their Solicitor's costs. If it were possible for a greater percentage of the solicitor/client costs to be recoverable from the opponent then this would go some way to resolving the problem.

CHAPTER 3: THE COST OF LITIGATION

2. Should solicitors' fees for litigation be recovered as expenses on the basis of time expended, value of the claim or some other basis?

Broadly speaking litigation fees should be based on the time involved. Consideration should also be given to the complexity involved with a view to having fees uplifted. The actual value of the claim should not necessarily be a deciding factor.

3. Is LPAC, as currently constituted, an appropriate body to review the level of fees for litigation which may be recovered as expenses? If not, what alternative body should carry out this function and what should be its composition?

Whilst unable to comment on whether the LPAC is the appropriate body should lay representation be introduced consideration should be given to having creditor representation at such a body.

4. Is the test currently applied by the sheriff court in sanctioning the instruction of counsel appropriate? If the sanction of the Court of Session were to be required prior to the instruction of senior counsel, what test should be applied?

No comment

5. What test should the court apply when considering a motion for certification of an expert witness – should it be necessity, reasonableness or some other test?

No comment

6. In the sheriff court, should counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of counsel?

No comment

7. In the Court of Session, should senior counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of senior counsel?

No comment

8. Should the presiding judicial office holder assess what would be a reasonable fee for counsel in any account of expenses? If so, at what point in the proceedings should that assessment be made?

No comment

9. From when should the fees of an expert witness be a competent outlay in a judicial account of expenses?

No comment

10. Should the presiding judicial office holder assess what would be a reasonable fee for an expert witness in any account of expenses? If so, at what point in the proceedings should that assessment be made?

No comment

11. Is it reasonable for counsel to be entitled to charge a commitment fee and, if so, should that be prescribed or left to the discretion of the Auditor?

No comment

12. Should the level of fees recoverable by the successful party in a commercial action be greater than in other types of action and, if so, what is the justification?

We can see no justification for this. The only possible justification would be a reflection on the complexity of the dispute which may not, in fact, be apparent. However additional fees should be allowed for specific items of process as described in 3.46.

13. Should a tariff-based system for assessing the level of recoverability of judicial expenses be introduced? If so, how might such a system be structured?

We cannot see the justification for this. It may perhaps be beneficial to re-examine the items contained in the block fee to introduce new chargeable items to reflect the work actually carried out.

14. Should any table of fees provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor and/or for an accredited specialist to recover at a higher rate than a solicitor without accreditation?

This may be worthy of consideration. If adopted it will no doubt lead to a greater incentive for specialisation which will have a positive impact on the quality of legal

service provision. The problem this may introduce is one of certainty. If a case becomes defended it will only at that time become apparent that an opponent's fees could be subject to uplift.

15. Is the ability to request an additional fee a reasonable procedure for regulating the recoverability of judicial expenses?

We think this is a positive concept. Whilst the unpredictability issue is concerning this approach is generally fair and reasonable.

16. If the concept of an additional fee is retained:

- a. at what stage in the proceedings should a motion for an additional fee be made?

It should be permissible at any stage of the proceedings.

- b. should motions for an additional fee, and the percentage increase, be determined by an auditor of court or by the member of the judiciary hearing the motion?

Such a motion should be heard by the judiciary.

17. Should a litigant be entitled to claim interest on an award of judicial expenses and, if so, from what date and at what rate?

Yes, a litigant should be entitled to claim interest on an award of judicial expenses. However, this rate should be at the judicial rate. If it is considered the judicial rate is too high then the judicial rate should be fixed to a percentage over the official dealing rate.

CHAPTER 4: FURTHER ENHANCING THE PREDICTABILITY OF THE COST OF LITIGATION

18. Should the court have a discretion to restrict recoverable expenses in a small claim even in cases where a defender, having stated a defence, has decided not to proceed with it?

Yes

19. Should more cases in Scotland come under the scope of a fixed expenses regime? If so, what types of case should be included?

Possibly. I think it will depend upon what level of expenses are fixed. The concept of certainty is important for the parties.

20. Should each party to a litigation in Scotland bear their own expenses? If so, in what types of litigation? Should the rule be qualified and, if so, in what circumstances? In particular, is the general rule in family cases appropriate?

The current rule that the successful party is entitled to the expenses from the other party should be retained. No comment is made on the position in relation to family actions.

21. Should a procedure for the summary assessment of expenses be introduced into the civil courts in Scotland?

Yes

22. If a procedure for summary assessment was introduced, in what circumstances should the summary assessment of expenses take place and should it be restricted to any particular types of action?

At interlocutory stages where the other party has failed to comply with the court's order.

23. Would there be any benefit in introducing a procedure of submitting schedules of expenditure similar to the pilot scheme operating in the Birmingham Mercantile Court and TCC?

Possibly – however perhaps this could be reserved to perceived more complex litigation.

24. Apart from imposing sanctions, what other powers, if any, should be made available to the courts to promote predictability and certainty of judicial expenses?

Depending on the nature of the case the court could express an opinion as to how they expect the litigation to proceed and an early assessment of the strength and weaknesses of the litigation. Such judicial intervention may lead to early resolution of the dispute.

CHAPTER 5: PROTECTIVE EXPENSES ORDERS

25. Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?

PEOs should be available in all public interest cases.

26. Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?

This should be a matter of judicial discretion.

CHAPTER 6: REFERRAL FEES

27. Should lawyers be permitted to pay a sum of money to a third party in return for referrals or instructions for other business?

No

28. Should lawyers be permitted to provide legal or other services to a third party at no cost to the third party in return for referrals or instructions for other business?

No

29. Should lawyers be permitted to make payment to a company, or some other body, either in money or by some other consideration, in order to have their name placed on a panel for the purpose of securing a flow of instructions in litigation?

No

30. Should the answers to questions 27, 28 and 29 be different, please explain why the situations should be distinguished.

N/A

31. In the event that payment for referrals, whether by money or provision of services, is permitted, should there be a limit upon the value of the referral fee or services provided?

N/A

CHAPTER 7: BEFORE THE EVENT INSURANCE

32. Do BTE insurers adversely influence the conduct of the litigations which they are funding?

Answer unknown

33. Is it appropriate for a lawyer in the direct employment of an insurance company to assess whether a policy holder's claim falls within the terms of the policy?

There is an inherent conflict. Who is the client?

34. Is it reasonably practicable for BTE insurance policy holders to be entitled to instruct any lawyer of their choice, at any stage?

Yes

35. Should BTE insurance be encouraged and, if so, what suggestions would you make to address some of the criticisms levelled against it?

BTE is an excellent concept. However the Pursuer should have the choice to instruct their own agents and not forced to instruct panel members only.

CHAPTER 8: SPECULATIVE FEE AGREEMENTS

36. Are there any aspects of speculative fee agreements that require regulation?

For the sake of clarity I think the whole issue should be regulated.

37. What should be the maximum uplift for success fees in Scotland?

100%

38. Should there be a cap on success fees as a percentage of damages? If so, at what percentage and at what level and heads of damages?

No comment

39. Should success fees be recoverable in Scotland? If so, under what circumstances?

Yes. In the event of it having been held the Defender to have acted unreasonably.

40. Should ATE insurance premiums be recoverable in Scotland? If so, under what circumstances?

Yes. In the event of it having been held the Defender to have acted unreasonably.

41. If success fees and ATE insurance premiums remain irrecoverable in Scotland, is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees and insurance premiums? If not, what are the alternatives?

Yes. It is reasonable for such fees and premiums to be payable by the Pursuer.

CHAPTER 9: DAMAGES BASED AGREEMENTS ('CONTINGENCY FUNDING')

42. Should the law be changed to allow solicitors and counsel to enter into DBAs?

Yes

43. Should claims management companies continue to be entitled to enter into DBAs?

Yes

44. If DBAs are permitted in Scotland:

- a. is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees?

Yes

- b. should there be a cap on the percentage of the damages that lawyers are entitled to charge?

Yes

- c. should the percentage recoverable under a DBA be applicable to all heads of loss?

Yes

- d. should there be an increase in the level of damages awarded? If so, by what percentage and how is this to be achieved?

No

- e. what forms of protection may be required for clients entering into such an agreement?

The fee arrangement should be recorded and compliant with Law Society regulation and further specifically address the issue of potential conflict of interest and how this is to be resolved.

45. If the current prohibition on solicitors and counsel entering into DBAs is retained, should steps be taken to prevent its circumvention by the formation of a claims management company in which solicitors are directors or shareholders?

No

46. Should there be regulation of claims management companies operating in Scotland? If so, what are the mischiefs to be addressed and how should regulation be achieved?

They should remain unregulated. However any solicitors employed by them or benefitting from their services will be subject to Law Society regulation.

CHAPTER 10: THIRD PARTY FUNDING

47. What are the risks/potential abuses involved in third party funding and how might these be addressed?

I think the risks would be low as only potentially legally sound cases will be adopted. This is because the funder will not wish to pursue actions which are unsound. The abuse may be that the funder may wish to withdraw the funding in an arbitrary manner during the course of the litigation. This will leave the Pursuer in difficulty with self funding. Abandoning the action will have serious implications in respect of the Defenders expenses.

48. If regulation is desirable, what form(s) should it take?

Regulation should be by the Law Society. The Regulations should address all issues between the funder and solicitor representing the pursuers addressing all issues including those detailed in answer 47 as well as conflict of interest. Beyond this the business terms of the agreement should be between the parties.

49. Should a party to a litigation who has entered into a funding arrangement be obliged to disclose details of that arrangement to any other party and, if so, in what circumstances?

There should be no obligation to disclose the arrangement.

CHAPTER 11: ALTERNATIVE SOURCES OF FUNDING

50. Is a disproportionate amount of the civil legal aid budget allocated to family actions and, on any view, are there ways in which this might be reduced?

No comment

51. Should a CLAF or SLAS be introduced in Scotland? If so, which is preferable?

SLAS

52. If such schemes were to be introduced, what types of litigation should be covered?

Personal injury

53. If such schemes were to be introduced, what should be the minimum and maximum disposable income of successful applicants?

No known

54. Should such schemes be liable for payment of the expenses of successful opponents?

Yes

55. What further steps, if any, should be taken to promote *pro bono* funding of litigation and by whom?

This should be left to those offering the service to decide.

56. Should the Scottish courts have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented on a *pro bono* basis and, if so, to whom should such a payment be made?

Yes. Payment should be made to the organisation which provided the assistance. It will then be up to the organisation to come to a separate arrangement with the solicitor/advocate whether the representative should be remunerated.

CHAPTER 12: SCOTLAND'S LITIGATION MARKET

57. What steps could be taken to make Scotland the forum of choice for litigation?

This will be difficult to perceive. I have wide experience in this and can say with certainty that English clients do not consider Scotland to be a claimant friendly country. They consider claimant's inability to recover their full costs as well as delay and unfamiliarity with the litigation system as main reasons.

58. Apart from the introduction of a tariff-based system as described in Chapter 3, what measures might be introduced to reduce the difference between the actual cost of a litigation and the amount recoverable as judicial expenses?

The ability to recover the differential from the Defender. This should be subject to such fees being reasonable and the parties acting also being reasonable.

59. If a one way costs shifting regime is introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

Without question.

60. If damages based agreements are introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

Probably

CHAPTER 13: SPECIAL CASES AND CONCLUDING REMARKS

61. Do clinical negligence claimants face particular difficulties in the funding of claims? If so, what measures might be taken to address these difficulties?

Not known

62. In the event that DBAs are not otherwise recommended, should they be available for the funding of multi-party actions?

Yes

63. If DBAs are not recommended for multi-party actions, how else may lawyers be remunerated for the additional responsibility involved in such actions?

By being able to charge an uplift on fees if action is successful.

64. Should the funding arrangements for multi-party actions cover the payment of legal representation and disbursements?

Yes

65. Should the power to apply for a PEO in Scotland extend to multi-party actions and, if so, should there be any restrictions on their availability?

Not known

66. In addition to the cases identified in Chapter 13, are there any other cases that may require special consideration? If so, what are they and why?

I cannot think of any other specific problematic areas which have not been addressed.

67. Can you suggest any means, other than those raised in this consultation paper, which would enable litigation to be more affordable?

No

68. What other recommendations might this Review make to enable individuals to fund a litigation when they are not eligible for legal aid, have no BTE insurance cover or their cover is inadequate, cannot afford the ATE insurance premium and are not members of an organisation that meets its members' legal fees?

I have a slight concern that whilst the review is most welcomed the solution will be multifaceted. It is hoped that the solutions to identified problems can be resolved in such a way that they are not too complex to operate or comprehend. Above all litigating parties want certainty to litigation costs.