

ANNEX C: CONSULTATION PAPER ON EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND BILL

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Forum of Scottish Claims Managers

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

McPhail

Forename

Calum

2. Postal Address

c/o Zurich Insurance plc

215 Bothwell Street

Glasgow

Postcode G2 7ED

Phone 0141 303 7478

Email calum.mcphail@uk.zurich

3. Permissions - I am responding as...

Individual

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response,

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate

Yes No

name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) 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?

Please tick as appropriate

Yes

CONSULTATION QUESTIONS

CHAPTER 1: PROPOSALS ARISING FROM SHERIFF PRINCIPAL TAYLOR'S REVIEW

A. SPECULATIVE FEE AGREEMENTS

1. Do you think that a lack of cap on speculative fee agreements prevents potential pursuers of actions from obtaining access to justice? Yes No

Please give reasons for your answers.

Lack of a cap may have an effect on whether a Pursuer accepts what is otherwise a reasonable offer to settle. FSCM believe that speculative fee arrangements are purely a matter for claimants and their lawyers since they are not recoverable from the paying party in Scotland. We are fundamentally opposed to such costs being recoverable from the paying party as this would lead to increased cost of litigation which would ultimately be met by the consumer

2. What impact would the introduction of a cap on speculative fee agreements have on:

(i) Pursuers of actions

This is outside our area of expertise

and why, and what would they look like

n/a

(ii) Defenders of actions

We have no visibility of speculative fee arrangements so are unable to comment

and why, and what would they look like

n/a

(iii) You or your organisation

We have no visibility of speculative fee arrangements so are unable to comment

and why, and what would they look like

n/a

(iii) Other organisations:

We have no visibility of speculative fee arrangements so are unable to comment

and why, and what would they look like

n/a

3. Which group of individuals/organisations are likely to benefit most from a cap on speculative fee agreements?

Our expectation is that the Pursuer would benefit from a cap on speculative fee arrangements

Please explain how these benefits will accrue, and their likely extent if possible

A cap would provide the Pursuer with certainty over the cost of litigation

4. Which group of individuals are likely to be most disadvantaged from a cap on speculative fee agreements?

This is outside our area of expertise

Please explain how these disadvantages will accrue, and their likely extent if possible

n/a

5. What measures could be considered to both identify and mitigate against disadvantages from a cap on speculative fee agreements?

This is outside our area of expertise but it would seem appropriate that full information on advantages and disadvantages should be provided to the Pursuer to allow an informed choice to be made

B. DAMAGES BASED AGREEMENTS

6. Do you think that the inability of solicitors in Scotland to enter into damages based agreements with their client prevents potential pursuers of actions from obtaining access to justice? Yes No

Please give reasons for your answers.

We understand that many Solicitors in Scotland currently operate claims management companies that already offer damages based agreements to Pursuer clients

7. What is the likely impact on you or your business of allowing damages based agreements to be enforceable by solicitors in Scotland?

Please quantify, if possible.

In our view DBAs are a matter between the claimant, their solicitor and if applicable, the claims management company.

Our concern in relation to DBAs themselves lies in their direct link to the eventual value of any claim. Claims values may be artificially inflated and the direct stake that a solicitor / adviser / counsel / management company would have in the outcome, may call the independence of advice into question.

This clear conflict may give incentive to artificially inflate the damages being sought and in extreme cases encouraging the furtherance of inappropriate actions. Artificially inflated claims may also result in some claims being incorrectly raised in the Court of Session resulting in additional cost and pressure on the Courts service.

If DBAs are to become a feature of Scottish litigation, it is our position that they should remain irrecoverable from the paying party. It is also our view that they should be regulated.

8. Do you think that a lack of cap on damages based agreements prevents potential pursuers of actions from obtaining access to justice? Yes No

Please give reasons for your answers.

Lack of a cap may have an effect on whether a Pursuer accepts what is otherwise a reasonable offer to settle. FSCM believe that damages based agreements are purely a matter for claimants and their lawyers since they are not recoverable from the paying party in Scotland. We are fundamentally opposed to such costs being recoverable from the paying party as this would lead to increased cost of litigation which would ultimately be met by the consumer

9. What impact would the introduction of a cap on damages based agreements have on:

(i) Pursuers of actions

We believe that the Pursuer would have more certainty regarding expected cost of litigation and why, and what would they look like

n/a

(ii) Defenders of actions

We have no visibility of damages based agreements so are unable to comment and why, and what would they look like

n/a

(iii) You or your organisation

We have no visibility of damages based agreements so are unable to comment and why, and what would they look like

n/a

(iii) Other organisations:

We have no visibility of damages based agreements so are unable to comment and why, and what would they look like

n/a

10. Which group of individuals/organisations are likely to benefit most from a cap on damages based agreements?

Our expectation is that the Pursuer would benefit from a cap on damages based agreements

Please explain how these benefits will accrue, and their likely extent if possible

A cap would provide the Pursuer with certainty over the cost of litigation

11. Which group of individuals are likely to be most disadvantaged from a cap on damages based agreements?

This is outside our area of expertise

Please explain how these disadvantages will accrue, and their likely extent if possible

n/a

12. What measures could be considered to both identify and mitigate against disadvantages from a cap on damages based agreements?

In our view there are no disadvantages to a reasonable cap on damages based agreements

13. What impact would these proposals have on excessive charging under damages based agreements?

Our expectation is that a reasonable cap on a % basis would ensure there is no excessive charging

Claims Management Companies

14. Do you agree that the proposed statutory controls should apply to anyone offering a damages based agreement? Yes No

Please give reasons for your answer.

This will provide protection for the Pursuer and avoid unregulated practices

15. What should the sanction be for non-compliance with the statutory controls?

Loss of licence and potential for costs awards against them

16. If any of the provisions of the rules are breached then should the agreement become voidable? Yes No

Please give reasons for your answer.

Whilst it is not directly relevant to the FSCM representing paying parties, in the interests of access to justice we believe that any breach should void the DBA hence encouraging compliance

Future Loss

17. Do you agree that the future loss from the success fee should not be ring-fenced? Yes No

Please give reasons for your answer.

The Pursuer is recovering future losses for a specific purpose such as cost of necessary future care and these should be ring-fenced to avoid unfair deductions. It could also have the effect of putting additional pressure on public care services if funds are taken from future losses awarded leaving them insufficient to meet the care costs as calculated by the Courts when assessing the award.

18. What impact would not ring-fencing future loss have on:

(i) Pursuers of actions

It could leave them financially exposed for future care and living costs

and why, and what would they look like

See 17 above

(ii) Defenders of actions

This could lead to artificially inflated claims to offset any deduction via a DBA from the court awarded future losses. This would in effect introduce an element of DBA recoverability as an unintended consequence.

and why, and what would they look like

n/a

(iii) You or your organisation

This could lead to artificially inflated claims to offset any deduction via a DBA from the court awarded future losses. This would in effect introduce an element of DBA recoverability as an unintended consequence.

and why, and what would they look like

n/a

(iii) Other organisations:

This is outside our area of expertise

and why, and what would they look like

n/a

Information and Good Guidance

19. Do you agree that a new code of good practice, applying to all persons and businesses offering damages based agreements, should be developed? Yes No

Please give reasons for your answer.

This is necessary to ensure that Pursuers will have certainty on cost of litigation, clarity on what % of damages awarded they will ultimately receive and overall maintain access to justice for the Pursuer

20. Should a new code of good practice be statutory or non-statutory (please check box as appropriate)?

Please give reasons for your answer.

We believe that it is imperative that the Pursuer's position is protected and regulation must be effective and provide suitable remedies.

21. Should the development of a new code of good practice be sector-led? Yes No

Please give reasons for your answer.

We believe that this should fall within the remit of the Scottish Civil Justice Council

C. QUALIFIED ONE-WAY COST SHIFTING

22. Do you think that introducing a system of qualified one-way costs shifting will increase access to justice? Yes No

Please give reasons for your answer

We do not believe that this would increase access to justice for meritorious Pursuers. If this is to be introduced in Scotland then it must be in conjunction with a mandatory pre-action protocol to dissuade claims which have no merit that are pursued merely "to have a go" because there are no adverse cost consequences. A key outcome for mandatory pre-action protocols should be transparent process which encourages both sides to have an early exchange of information and evidence, to facilitate dialogue and agreement and create a compulsory legacy that can be used if the case litigates without parties starting the process afresh.

23. What impact would the introduction of a system of qualified one-way costs shifting have on:

(i) Pursuers of actions

We do not believe that this would increase access to justice for meritorious Pursuers

and why, and what would they look like

n/a

(ii) Defenders of actions

If not accompanied by effective mandatory pre-action protocols, this could have the effect of encouraging non-meritorious claims in the absence of adverse cost implications

and why, and what would they look like

n/a

(iii) You or your organisation

If not accompanied by effective mandatory pre-action protocols, this could have the effect of encouraging non-meritorious claims in the absence of adverse cost implications

and why, and what would they look like

n/a

(iii) Other organisations:

If not accompanied by effective mandatory pre-action protocols, this could have the effect of encouraging non-meritorious claims in the absence of adverse cost implications which would increase levels of litigation and would clog up the court system

and why, and what would they look like

n/a

24. Which group of individuals/organisations are likely to benefit most from the introduction of a system of qualified one-way costs shifting?

Pursuers' Agents, as they will be at little or no risk if pursuing unmeritorious claims

Please explain how these benefits will accrue, and their likely extent if possible

n/a

25. Which group of individuals are likely to be most disadvantaged from the introduction of a system of qualified one-way costs shifting?

Defenders, Paying Parties and the Courts Service.

Please explain how these disadvantages will accrue, and their likely extent if possible

Additional costs introduced through increased unmeritorious claims would ultimately be met by private and business consumers

26. What measures could be considered to both identify and mitigate against disadvantages from the introduction of a system of qualified one-way costs shifting?

Introduction of compulsory pre-action protocols which would regulate pre-litigation behaviour, prepare cases for litigation if necessary, restrict the areas of dispute between parties and mitigate against claims without merit taking advantage of QWOCS

27. Do you agree that the test for losing the benefit of qualified one-way costs shifting should be fraud, abuse of process and in cases of Wednesbury unreasonable behaviour? Yes No

Please give reasons for your answer.

We believe that the benefits of QWOCS should be lost if any element of a claim is fundamentally dishonest or where there is fraud or abuse of process

DAMAGES BASED AGREEMENTS, SPECULATIVE FEE AGREEMENTS AND QUALIFIED ONE-WAY COSTS SHIFTING – OVERALL IMPACT OF PACKAGE

28. What is your view on the argument that the reform package removes all risk to pursuers of actions?

We share the concerns stated in this question. We believe the only way to mitigate against the expected increase in claims without merit flowing from this package in isolation, is to introduce compulsory pre-action protocols

29. What is likely to be the overall impact of the package on you or your business? Please quantify, if possible.

If not accompanied by compulsory pre-action protocols we will see an increase in the submission of claims without merit. We are unable to quantify this as we have no insight regarding the level of claims not taken up by Pursuer Solicitors at the present time

30. What do you think the impact of the overall package will be on:

a) The general level of claims?

We anticipate an increase in volumes of claims submitted

b) The general level of litigation?

We anticipate an increase in volumes of claims litigating as there will be more claims without merit

c) The trajectory of claims, and settlement rates?

Claims without merit require more extensive investigation which with finite resources for Defenders and the Court System will lead to delays in settlement of those claims with merit

d) Pursuers of actions?

We believe that the overall impact may be to delay the settlement of claims with merit

e) Defenders of actions?

Increased cost and delays due to demand on finite resources potentially resulting in meritorious Pursuers not receiving damages promptly

f) Pursuers solicitors?

Any increase in costs realised as a result of these proposals will inevitably pass to Pursuer Solicitors

g) Defenders solicitors?

We anticipate increased levels of litigation and associated work for Defenders Solicitors from these proposals as stated in isolation

h) Insurance companies?

Increased cost and delays due to demand on finite resources potentially resulting in meritorious Pursuers not receiving damages promptly. Increased costs will ultimately be passed on by way of increased premiums to private and business consumers

i) Case management companies?

Any increase in costs realised as a result of these proposals will inevitably pass to Claims Management Companies. We believe that these proposals in isolation encourage the growth of adverse activities which England & Wales identified several years ago and the MOJ has actively sought to correct

j) The courts?

We anticipate increased levels of litigation which could overload the Courts and lead to delays in achieving access to justice

k) Scottish Legal Aid Board?

With the expected increase in volume of claims without merit, we anticipate that there may be an increase in the volume of applications for Legal Aid

l) The general public?

Potential for increased insurance premiums and the possibility of loss of confidence in the judicial system appearing to encourage claims without merit

m) Others?

No comment

D. COUNSEL'S FEES

31. Do you agree that there should be a table of fees introduced for counsel in the Court of Session? Yes No

Please give reasons for your answer

Transparency & predictability for all parties involved

32. Do you agree that there should be a table of fees introduced for counsel in the sheriff court for those cases where sanction for counsel has been granted? Yes No

Please give reasons for your answer

Transparency & predictability for all parties involved

33. Do you agree that solicitor advocates should be included in this table of fees? Yes No

Please give reasons for your answer

Subject to the Sheriff Court having sanctioned the use of a solicitor advocate in each case

34. Do you agree that the Scottish Civil Justice Council is best placed to develop and maintain the table of fees? Yes No

Please give reasons for your answer

The SCJC is in our opinion best placed to oversee this area

35. What do you think the impact of introducing a table of fees will be on:

a) Pursuers of actions?

Transparency & predictability

b) Defenders of actions?

Transparency & predictability

c) Solicitors?

Transparency & predictability

d) Solicitor advocates?

Transparency & predictability

e) Counsel?

Transparency & predictability

f) Scottish Legal Aid Board?

Transparency & predictability

g) Others?

Transparency & predictability

CHAPTER 2: PROPOSALS ARISING FROM LORD GILL'S SCOTTISH CIVIL COURTS REVIEW

A. MULTI-PARTY ACTIONS

Option 1

36. What would the impact be on access to justice of introducing a procedure along the lines of option 1?

This would appear to us to be entirely feasible and workable in practice without the complexities and disadvantages of Options 2 & 3 and would improve access to justice

37. Who would be most affected by option 1 and what would that impact look like?
Please give reasons for your answers.

Potential Pursuers, as this would provide a better mechanism for access to justice without funding barriers

Option 2

38. What would the impact be on access to justice of introducing a procedure along the lines of option 2?

Negative impact with challenges around opt-out mechanisms & funding – there would unintended consequences in relation to other statutes eg Prescription and Limitation Act creating legal uncertainty for Pursuers and Defenders alike

39. Who would be most affected by option 2 and what would that impact look like?

Defenders and Pursuers for the reasons stated above

40. Do you have any observations on the technical and funding issues raised in relation to option 2?
Please give reasons for your answers.

We believe it is too complex with sufficient funding difficulties to make it impractical

Option 3

41. Is there a need for 3rd party bodies without a direct legal interest to have the right to bring class actions on behalf of the group they represent or are existing regulatory mechanisms sufficient?
Yes No

Please give reasons for your answer

This is outside our area of expertise

42. Should 3rd party bodies without a direct legal interest have access to public funding for litigation through the proposed multi-party action fund? Yes No

Please give reasons for your answer

This is outside our area of expertise

43. What would the impact be on access to justice of introducing a procedure along the lines of option 3?

Negative impact with challenges around opt-out mechanisms & funding – there would be unintended consequences in relation to other statutes eg Prescription and Limitation Act creating legal uncertainty for Pursuers and Defenders alike

44. Who would be most affected by option 3 and what would that impact look like?

Defenders and Pursuers for the reasons stated above

45. Do you have any observations on the technical and funding issues raised in relation to option 3. Please give reasons for your answers.

We believe it is too complex with sufficient funding difficulties to make it impractical

46. Do you support multi-party action option 1 option 2 or option 3 (please check box as appropriate)?

Please give reasons for your answers.

We believe this is the only practically feasible option

B. AUDITOR OF COURT

47. What impact will the proposal to make the post of the Auditor of the Court of Session a salaried public appointment have on:

a) The Auditor of the Court of Session?

This is beneficial to all parties as would make the Auditor truly independent and impartial

b) Staff of the Auditor of the Court of Session?

We are not in a position to comment

c) Pursuers of actions?

Transparency of legal process

d) Defenders of actions?

Transparency of legal process

e) Solicitors?

Transparency of legal process

f) Counsel?

Transparency of legal process

g) Scottish Legal Aid Board?

Transparency of legal process

h) Other?

No comment

Please give reasons for your answers

n/a

48. What impact would the proposal to make the post of auditor in the sheriff court a salaried public appointment have on:

a) Sheriff court auditors?

This is beneficial to all parties as it would make the Auditor truly independent, impartial and consistent

b) Independent practitioners who currently hold commissions as auditors?

We are unable to comment

c) Pursuers of actions?

Transparency and consistency of legal process

d) Defenders of actions?

Transparency and consistency of legal process

e) Solicitors?

Transparency and consistency of legal process

f) Counsel?

Transparency and consistency of legal process

g) Scottish Legal Aid Board?

Transparency and consistency of legal process

h) Other?

No comment

Please give reasons for your answers

n/a

C. CONDUCT OF LEGAL REPRESENTATIVES

49. Do you support the proposal to make legal representatives personally liable for expenses occasioned by their own conduct? Yes No

Please give reasons for your answer.

We agree that the existing power of the Court should be incorporated into statute to provide greater transparency and accountability

50. What impacts do you think that the proposal to make legal representatives personally liable for expenses occasioned by their own conduct will have on you or your organisation?

No comment to make

CHAPTER 3: LEGAL AID PROVISIONS

A. LEGAL AID FOR LEGAL PERSONS

51. Do you agree that these legal aid for legal persons provisions should be taken forward?
Yes No

Please give reasons for your answer.

We believe that the funds available through Legal Aid should be maintained for the benefit of the vulnerable and those members of society who need it most & have no alternative

52. Do you agree that the Scottish Legal Aid Board should be required to apply the financial eligibility tests set out in paragraph 187 above? Yes No

Please give reasons for your answer.

No comment

B. Funder of Last Resort

53. Do you agree that the Legal Aid Fund should only be used as a funder of last resort in respect of civil litigation? Yes No

Please give reasons for your answer

In times when the Legal Aid budget is under pressure we believe it is appropriate that the funds available are as a last resort for the people that need it most

CHAPTER 4: ASSESSING THE IMPACT

EQUALITY

Please tell us about any potential impacts, either positive or negative, you feel any of the proposals for the Bill may have on particular groups of people, with reference to the "protected characteristics" listed above.

No comment

BUSINESS AND REGULATION

Please tell us about any potential costs or savings that may occur as a result of the proposals for the Bill, and any increase or reduction in the burden of regulation for any sector. Please be as specific as possible.

No Comment