



# FACULTY OF ADVOCATES

RESPONSE

*by*

FACULTY OF ADVOCATES

*to*

CONSULTATION

*on*

PART 1 of the CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS)  
(SCOTLAND) ACT 2018

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## **INTRODUCTION**

1. The Faculty has been an active contributor to the review of the expenses and funding of civil litigation in Scotland<sup>1</sup>, and welcomes the opportunity to participate in the Scottish Government's consultation on the decisions it requires to make in order to implement Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the Act"), which provides for the regulation of success fee agreements<sup>2</sup>.

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<sup>1</sup> Particular reference is made to the Faculty's recent written responses to (i) the Consultation Paper on Expenses and Funding of Civil Litigation in Scotland Bill, (ii) the Impact Reference Group Paper for the proposed Expenses and Funding of Civil Litigation Bill, and (iii) the call for evidence on the Expenses and Funding of Civil Litigation Bill (now the 2018 Act)

<sup>2</sup> Speculative fee agreements and damages based agreements

## SUCCESS FEE CAPS

*Qu.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. The Faculty is generally content with the success fee caps recommended by Sheriff Principal Taylor, as set out at paragraph 21 of the consultation paper. However, the Faculty wishes to reaffirm its previous evidence regarding the practical difficulty that could be caused by the distinction between periodic payment orders and lump sum awards. The Faculty remains concerned that there should be no financial incentive to choose a lump sum rather than a periodical payment and urges the Scottish Government to review this particular matter at the end of the 5 year period, in terms of Part 5 of the Act.

## FAMILY PROCEEDINGS

*Qu.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. The Faculty explained in its response to the Scottish Government's call for evidence that speculative fee arrangements are used in a small number of cases with very

particular circumstances, but where they are used they are used to good effect, and enable access to specialist representation (and therefore justice), where it might otherwise not be readily available. The particular circumstances concern financial provision on divorce, and more particularly where one party has the financial resources to litigate and the other does not. The Faculty is of the view that speculative fee arrangements should remain available to litigants in family law proceedings concerning financial provision on divorce, ie. that no fee would be charged unless a capital award were made, but any fee (if payable) might be uplifted to reflect the risk carried by counsel and agents. It is highly unlikely that parties would seek to enter into a damages based agreement where the extent of the fee is contingent on the size of any capital sum achieved, and the Faculty considers that such an arrangement would be inappropriate in family law proceedings concerning financial provision on divorce.

### **REGULATORY PROVISION**

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. The Faculty agrees with the proposed scope and content of regulations in this regard.

### **ENTITLEMENT TO SUCCESS FEE ON WITHDRAWAL FROM AGREEMENT**

**Qu.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. The Faculty respectfully disagrees with the views expressed at paragraphs 42 to 46 of the consultation paper that it would be inappropriate to allow a provider who withdraws from their agreement to benefit financially if the recipient of the service subsequently enters into an agreement with another provider and is ultimately successful. Solicitors and counsel must be able to part company with their clients for good reason. Indeed, their professional obligations, including as officers of the court, may require them to do so in certain circumstances. Depriving the provider of their fee entitlement in those circumstances could induce them to act unreasonably (and potentially even unprofessionally) and penalise agents and counsel who do their job properly. An ordinary example of where such a tension would arise would be where a client refuses to take advice on a tender, and agents and counsel responsibly consider that they should withdraw from acting.

## **LEGAL AID**

**Qu.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. The Faculty considers that this is covered by the existing statutory framework for legal aid and further regulation is unnecessary.

## **CHANGES IN FUNDING**

*Qu.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.*

7. The Faculty considers that whilst formal regulation might not be necessary, it should be clear to providers and recipients that it is possible to change from one source of funding to another. In particular, it needs to be made clear to litigants that they can surrender a legal aid certificate and continue under another form of funding during an action.