FACULTY OF ADVOCATES

RESPONSE

by

FACULTY OF ADVOCATES

to

IMPACT REFERENCE GROUP PAPER

FOR THE PROPOSED EXPENSES AND FUNDING OF CIVIL LITIGATION BILL

SPECULATIVE FEE AGREEMENTS

1. There is a limited extent to which the Faculty can provide evidence in response to the majority of the questions posed as Counsel are not involved in arranging funding. However, the Faculty makes the following comments in response to the questions.
2. Reference has also been made to the Faculty's earlier consultation response for further detail, where appropriate.

Questions

- ***Do you agree with the potential impacts highlighted above? What other impacts might there be and which other groups might be affected?***

3. Solicitors and Counsel have been representing clients on a speculative fee basis for many years. They have enabled litigants to pursue successful claims, which would otherwise have been unaffordable. In practice, most Counsel do not seek

any percentage increase at all, which reflects the extent to which Counsel act on a speculative basis in the public interest, and not their own.

4. The Faculty considers that the proposed reforms may impact on clients with particularly difficult or unusual cases, especially if the proposed reforms lead to a restriction in the availability of legal aid. This will apply to Solicitors, Counsel and expert witnesses equally. It is assumed civil claims for financial provision on divorce, dissolution of civil partnership or cessation of cohabitation will be expressly excluded from the legislation relating to SFAs given these are not straightforward claims by one party against another.

- ***Will the introduction of caps restrict the number of solicitors who may take on complex cases? Are the level of caps SPT recommends pitched correctly?***

5. The Faculty does not have sufficient evidence or collective experience to respond to this question.

- ***What data is available on the share currently taken from the damages awarded? Is there evidence that fees as a percentage of damages have increased over time?***

6. The Faculty does not have sufficient evidence or collective experience to respond to this question.

- ***What evidence is there that the personal injury market is constrained (are there fewer cases going forward than we would expect there to be if people could fund litigation)?***

7. The Faculty is not aware of any particular constraint in the personal injury market. However, this may simply reflect the fact that Counsel are not generally involved in arranging funding.

- ***What evidence is there to show how often clients are offered multiple variations of funding options, and the range of costs that might be offered in the same case?***

8. The Faculty does not have sufficient evidence or collective experience to respond to this question.

- ***What data is available on average costs and volumes of ATE insurance take up? Why isn't the ATE market providing affordable insurance cover and how does that impact on options for claimants?***

9. The Faculty does not have sufficient evidence or collective experience to respond to this question.

- ***It has been suggested that the omission of the word 'unrecovered' directly before "Counsel's fees" in Taylor recommendations 45 and 67 must be an error? Do you agree? What issues would a literal reading present? It has been argued that if Counsel has been sanctioned the [unrecovered?] costs should not be included in solicitor's success fee.***

10. In its earlier consultation response to the Bill the Faculty expressed concern about the proposal that Counsels' fees in personal injury actions should be met by the Solicitor out of their success fee. That could cause Solicitors to advise against instructing Counsel on account of the effect it might have on the final level of their fee, instead of what might otherwise be in the best interests of their client. This would be particularly unfortunate because independent Counsel have an important role to play in advising on settlement in such claims.
11. If the use of Counsel has been sanctioned then those expenses should be recovered from the other party and paid over to Counsel. Insofar as Counsels' fees are not recovered from the other side (either because sanction for Counsel has not been granted or a particular item of work is not recoverable) then they could be paid out of the success fee, depending on what had been agreed between Counsel and the Solicitor.

DAMAGES BASED AGREEMENTS

Questions

- ***Do you agree with the potential impacts highlighted above? What other impacts might there be and which other groups might be affected?***

12. The Faculty's principal concern relates to the proposed exclusion of periodic payments from DBAs. There is a risk that solicitors will be reluctant to take on

particular cases if DBAs do not apply to periodic payment orders. Separately, differentiating between periodic payment and lump sums could distort settlements by creating an incentive for the pursuers' team to hold out for lump sum payments if they are capable of falling within the scope of a DBA. Periodic payments are gaining favour in high value cases because they remove the uncertainty for both pursuers and defenders in relation to the highly contentious issue of life expectancy. It would be unfortunate if the arrangements for DBAs jeopardised this beneficial development in the computation of damages.

13. The Faculty acknowledges that the proposal for the intervention of an independent actuary would mitigate these concerns to some extent, while still leaving the solicitor's position uncertain until a very late stage in the litigation. However, it would also involve significant expense. The Faculty proposes that reference could instead be made to a table or formula for capitalisation. This would give a lump sum equivalent of periodic payments, to which the relevant DBA percentage(s) could be applied. That would make the personal interests of the legal representatives irrelevant to the decision on whether or not they should recommend a periodic payment arrangement and would provide more certainty for solicitors.

- ***Will we see an increase in claims, and/or litigation as these agreements become more available, especially when they are combined with QOCS, as a lot of the risk is being removed from the pursuer?***

14. The Faculty considers that there is no reason to suggest that it will make any significant difference. The cap on fees might reduce the attractiveness of certain cases but the effect of QOCS is likely to have a certain balancing effect. It is very difficult to predict the extent to which the various proposed reforms, including Court reforms, will combine to affect the number of claims.

- ***What are damages case numbers now, and levels claimed – will the cap drive up not only the number of claims, but amounts claimed?***

15. The Faculty has no particular evidence or reason to suggest that this will be the case.

- ***Is there data available on the trajectories of claims currently? i.e. claims raised, how many settled before solicitors become involved, how many resolved solicitor-solicitor, how many reach court, how many settle before a court decision is reached, at what stage, and how (tenders, out of court settlements, etc).***

16. The Faculty does not have sufficient evidence to respond to this question. Much of this information should be available from Scottish Courts Service.

- ***What is likely to happen to the number of claims and settlements post legislation?***

17. The Faculty has no particular reason to expect a significant increase or decrease in the number of claims.

- ***Views are divided on Sheriff Principal Taylor's proposal not to ring-fence the element of damages awarded for future loss. Is the evidence balanced in favour of this proposal? Should the provider under a DBA be prevented from including the element for future loss in the calculation of the success fee in periodical payments?***

18. The Faculty submits that any attempt to ring-fence or strip out particular elements of future loss would be too complicated and ultimately problematic. Many cases are settled on the basis of a lump sum without any particular breakdown of the heads of damage, particularly where there is a dispute as to primary liability or contributory negligence. Future loss (lump sum or periodic payment) should either be included or excluded completely.
19. As submitted previously the Faculty is concerned that differentiating between past and future loss would introduce a perverse incentive to delay settlement. In the absence of evidence of abuse it would be preferable to apply caps which relate to the aggregate award of the damages and without differentiating between types of award.
20. The Faculty considers that the tapering of the percentage cap addresses many of the concerns raised in relation to the inclusion of awards for future loss.

- ***Should the proposed code of practice for DBAs be statutory/non-statutory/sector-led?***

21. The Faculty considers that it would initially be best to have a non-statutory scheme, which would apply equally to solicitors, Counsel and claims management companies. Experience under this scheme could then inform any subsequent intervention.

- ***What will new business models look like and how will businesses alter the service that they offer to clients?***

22. The Faculty does not have sufficient evidence or collective experience to respond to this question.

- ***How do we ensure the post-reform landscape is not too complicated for claimants? How will they understand the options available to them and the various merits or otherwise?***

23. The Faculty considers that what is being proposed will in many ways be simpler for clients than what currently exists. In particular, there will be greater uniformity in what clients will have deducted from their damages. Information packs could be produced by key organisations such as the Law Society, Scottish Government and Citizens Advice Bureau.

- ***Why are DBAs not proving popular in E&W? Is there anything we can learn/guard against in Scotland?***

24. The Faculty understands that the system in England is more generous to claimants in terms of recoverable expenses (costs). There is also greater recoverability of success fees and insurance premiums. Consequently there is less of an incentive for claimants in England to agree a DBA which will result in the loss of a percentage of damages.
25. The Faculty also understands that it is more common for the level of expenses to outweigh the level of damages in England.

- ***What data is available on the current proportion of DBAs to SFAs.***

26. The Faculty does not have sufficient evidence or collective experience to respond to this question.

QUALIFIED ONE-WAY COSTS SHIFTING

Questions

- ***Do you agree with the potential impacts highlighted above? What other impacts might there be and which other groups might be affected?***

27. The Faculty agrees that the major implications have been identified.

- ***What evidence is there that QOCS will increase number of claims without merit and put pressure on court system? How will mandatory pre-action protocols help? Are there any lessons to be learned from England and Wales e.g. the electronic portal?***

28. Taken in conjunction with a cap on the amount of expenses that can be taken from the pursuer's damages, the Faculty considers that the introduction of QOCS will not significantly increase the number of claims without merit.
29. As regards lessons from England and Wales, the Faculty recommends that consideration should be given to the introduction of a regime for making offers similar to that which exists in England under Part 36 of the Civil Procedure Rules. Any party to an action can make an offer under Part 36, and if it is not beaten costs are awarded on an indemnity basis. This allows Pursuers to tender in a similar way to Defenders.

- ***Would the proposal for legal representatives to be personally liable for expenses as a result of their own conduct issues provide an additional safeguard/comfort with regard to the introduction of QOCS?***

30. The Faculty considers that this proposal would provide a further safeguard in the event of the introduction of QOCS. It should also be remembered that neither Counsel nor any Solicitor would want to pursue a case that had little prospect of success and therefore little prospect of payment.

- ***It has been suggested in consultation responses that a Wednesbury test is too vague/problematic to apply to PI cases? Is the test too complex to be understood by pursuers? If so, what other test would fulfil the proposal of a high bar?***

31. As previously submitted, the Faculty considers that it would be an unnecessary complication to include 'Wednesbury unreasonableness' as a ground of disqualification. While that term is well understood in the context of Judicial Review, it would require precise definition if it were to be adopted in the different context of personal injuries. It would be better for the legislation to be more specific on the test to be applied. It is submitted that a party should only be disqualified on account of fraud, abuse of process or summary dismissal.

- ***Some consultation responses say limiting the pursuer's liability to meet the defender's post tender judicial expenses to 75% is too low. Is this a concern?***

32. The Faculty does not have sufficient evidence or collective experience to respond to this question. The issue could be reviewed once the new regime has been in force for some time.

- ***Will ATE insurance continue to exist, at least to cover the costs risk of not beating a defendant's tender?***

33. There may still be a limited market for ATE insurance, for example, where the pursuer has a particularly strong case and would prefer to pay the unrecoverable premium rather than a percentage of the damages, and perhaps also for group actions.

- ***Are all personal injury litigations of a David and Goliath character? Do we have profiles of pursuers and defenders? What % settle out of court; of those that don't in what percentage defender gets an award of expenses?***

34. The Faculty considers that not all personal injury litigations are of a 'David and Goliath' character. It is not unknown for defenders to include uninsured private individuals of limited financial means.

- ***Should any measures be introduced as part of QOCS provisions to protect the defender who is not a corporate 'repeat player'?***

35. The Faculty considers that QOCS should apply only where the potentially liable party is a public body, an insured person or the Motor Insurers' Bureau. This would mirror the provisions in relation to awards of provisional damages. The Faculty considers that that would cover the vast majority of personal injuries cases in Scotland.

- ***Are there any other spheres of litigation where the asymmetric power relationship may prevail and should be considered for QOCS?***

36. The Faculty considers that one should see how QOCS works in practice in personal injuries cases before considering extending it to other spheres of litigation.

- ***There are suggestions that the QOCS proposals could encourage a greater influx of claims management companies in Scotland. Is this a concern? Do we need to mitigate?***

37. The Faculty considers that these arrangements should make it easier for Scottish solicitors to take on cases without the need for claims management companies in the market. The Faculty does not see why this reform would see an influx of such companies.

THIRD PARTY AND PRO BONO FUNDING

Third Party funding

(i) that there should be a rule that professional third-party funders against whom awards of expenses are made should be liable for judicial expenses on a joint and several basis, to the extent of the funding provided.

38. The Faculty wishes there to be clarification that this proposal will not extend to include family/child actions. There is a particular concern about the effect it

could have on adoption proceedings where placing agencies may meet the expenses of approved adopters.

(ii) that, in all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or notification given that a case is to be defended.

39. If this recommendation is implemented, there should also be a duty of disclosure if the means of funding changes during the course of an action. As far as the substance of the recommendation is concerned, we note that this appears to have been welcomed more by defenders and those who tend to represent them, as is recorded by Sheriff Principal Taylor in chapter 11, paragraph 29 of his review. Funders also apparently expressed support (paragraph 62), but the requirement may be more of a difficulty for some pursuers and those who represent them; the funding arrangements can be quite sensitive information.

Pro bono funding

40. The Faculty does not have sufficient evidence or collective experience to respond to this question.

CONDUCT OF LEGAL REPRESENTATIVES

41. With reference to the more detailed submission in its consultation response, the Faculty submits that the test "any improper, unreasonable or negligent act or omission" is inappropriate. The test of liability for a wasted costs order should be whether there has been a "serious dereliction of duty to the court".

FUNDER OF LAST RESORT

42. The Faculty is concerned about SLAB being defined as the "funder of last resort". It is agreed that SLAB should have power to test that the party meets the

financial eligibility criteria and that the party does not have ready access to alternative funding (for example, via a Trade Union or insurance policy). However, to introduce a statutory statement that SLAB is the funder of last resort could have unintended consequences, particularly when combined with other reforms. What attitude will SLAB take to a pursuer in a personal injury case who has the protection of QOCS? Could SLAB's policy lead to undue pressure on the legal profession to pursue speculative actions?

LEGAL AID FOR LEGAL PERSONS

43. The Faculty does not have sufficient evidence or collective experience to respond to this question.