



Law Society  
of Scotland

# Consultation Response

Success Fee Agreements: Consultation on Part 1 of  
the Civil Litigation (Expenses and Group  
Proceedings) (Scotland) Act 2018

31 January 2019



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Civil Justice committee, together with our Success Fee Agreement Working Party who invested a considerable amount of time and effort into drafting a Success Fee Agreement welcomes the opportunity to consider and respond to the Scottish Government's consultation: Success Fee Agreements: Consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The committee has the following comments to put forward for consideration.

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

#### **Content**

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

We are not aware of speculative fee agreements being used in family proceedings.

- b. What types of speculative fee agreements are presently used in family proceedings?

The only similar type of arrangement is the deferral of payment of fees until such times that the client's house is sold, and the house net proceeds are used to repay fees. This is not done by formal agreement or on a speculative basis. The other scenario is where the client takes a loan from a Provider and it is repaid once the client reaches settlement. This is usually on deferral of payment of the loan and not speculative.

- c. Are there any other kind of proceedings which are not appropriate for the use of success fee agreements and particularly damage based agreements, apart from family proceedings?

No

### **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?

**No**

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

**Yes**

- 3c. Do you think that there are other areas which should be covered?

**No**

Please provide reasons for your response below.

The response from the Law Society of Scotland should be considered against the background of and wording of the draft Success Fee Agreement and Cooling Off letter already submitted to the Scottish Government. Copies are attached for information.

The Law Society of Scotland agrees with paragraph 41(a) that Success Fee Agreements should be probative, together with clauses (c) to (g).

Paragraph 41(i) statement of indicative likely payments due by the recipient to the provider of the relevant services. This is agreed if all it means is that the provider will confirm that the only

deductions from damages will be the success fee and the After The Event Insurance premium, if any.

Agreed Paragraph 41 clauses (j), (o), (p) and (q).

Areas that the Law Society of Scotland disagrees with or has comment to make are as follows:

**Paragraph 41(b)** the circumstances out of which the claim arises and estimate of damages claimed. This should not be included in the Success Fee Agreement. In the case of a Solicitor, the Provider is required to issue a terms of business letter. This is set out in terms of Rule B4.2(a) of the Law Society of Scotland Practice Rules 2011. The rule is mandatory. The rule requires the Solicitor/Provider to set out clearly what they are instructed to do. There is no need for the Success Fee Agreement to do anymore than set out the general nature of the case. The agreement should be simple and succinct for the Recipient to understand.

It is impractical for the Provider to calculate the level of damages at the outset. Only once all the quantum information is gathered can the calculation be done. It is accepted that the Recipient requires some certainty. However, it may of use to point out some of the practical points which make this difficult to achieve or potentially cause more problems.

Very often information that Solicitors/Providers get from a new client is varied and mostly not the full picture. It is often only once the Provider makes a request for information or expert reports are obtained that an estimate of the value of a claim can be given. Other scenarios that arise are that Recipients do not know after an accident how the accident will impact on their employability or what their potential wage loss will be. It also is dependant upon which stage a Recipient instructs a Solicitor/Provider e.g if a Recipient instructs a provider shortly after an accident when still suffering from their injuries or still incurring wage loss it is much harder to form a view on the value of the claim than if the instructions comes 2 -3 years after the accident when a full recovery has been made.

In addition, the assessment of damages is necessarily evidence based e.g. medical reports, wage information, pension loss documentation etc all have to be ingathered before a valuation can be instructed.

Another difficulty that can be foreseen is that if the Provider is forced to provide a value for a claim by taking a guess at the outset, and if after investigation the estimated value turns out to be much higher than the claim is worth, it is entirely conceivable that such a situation will give rise to complaints to the appropriate regulator.

It is respectfully suggested that for the above reasons that Paragraph 41 clause (b) be removed.

In terms of **paragraph 41 clauses (h) and (k)** if the value of the claim should change and the obligations of the Provider to Recipient to provide regular updates and consult with them on any major developments including offers from the defender.

Solicitors/Providers already have a duty to provide adequate information to their clients and keep them updated. It is respectfully submitted that there is no necessity to make this a contractual duty. Imposing such duty may cause considerable difficulties for the Provider. It leaves scope for the Recipient to either attempt to hold the contract unenforceable or avoid paying a success fee if they claim that they were not updated as often as they would have liked. The Recipient currently can complain through the Provider's complaints procedure and the Scottish Legal Complaints Commission. This is the appropriate recourse.

It is the Law Society of Scotland's view that as mentioned above the Success Fee Agreement should be simple and succinct. It is impractical and unhelpful to the Recipient to have various professional obligations included within the agreement which are already adequately dealt with under Law Society Practice Rules. It will make the Success Fee Agreement lengthy, cumbersome, and not consumer friendly.

The draft Success Fee Agreement and Cooling Off letter contains an obligation on the Provider to adhere to current professional standards applicable to the legal profession in Scotland. The obligations which Paragraph 41 clauses (h) and (k) deal with are covered in general terms within the draft and therefore do not specifically need to be referred to in the Success Fee Agreement.

In practice, a Provider will very often have telephone discussions with the recipient if there is a significant change in the prospects of success with a claim, the value of the claim or any other significant development. The Society's view is that there is no good reason to require this issue to be reflected in the Success Fee Agreement given that the professional obligations mentioned above already exist.

**Paragraph 41 clause (l)** a statement of the complaints procedure to be followed. This should be removed from the Success Fee Agreement for the sake of brevity and to avoid duplication. Under the Law Society of Scotland's Practice Rules 2011 Solicitors/Providers are required to detail their complaint's procedure in their terms of business letters. To add this to the Success Fee Agreement would make it lengthy and not consumer friendly.

**Paragraph 41 clause (m)** provision for the resolution of dispute between the Provider and Recipient and the use of arbitration or mediation. It is submitted that this should be removed from the Success Fee Agreement. It is expected that disputes will be few and far between. The use of this mechanism will be costly, quite possibly running into thousands of pounds for a day's mediation or arbitration. Who is to bear the cost of such mechanisms? There are already complaints procedures in place which can be resolved through the Provider's complaints procedure or the

Scottish Legal Complaints Commission. In any event there is an anticipated practical difficulty that there is a dearth of expertise in relation to possible arbiters or mediators on this specific subject.

Paragraph 41 clause (n) failure by the Provider to comply with the Success Fee Agreement. This clause should only apply where there is a material breach which would have influenced the decision of a reasonable Recipient. This is to avoid unjust situations which could arise from minor and inconsequential breaches. For example, if there is a minor technical breach and the Recipient claims that the Success Fee Agreement is unenforceable. If the breach is material, then this is reasonable.

It is acknowledged that the draft Success Fee Agreement and Cooling Off letter already submitted to Scottish Government will require to be amended to reflect this.

**Paragraph 41 clauses (r) and (s)** - termination by the Recipient and not incurring judicial expenses awarded to the defender or not incurring charges from the Provider. The scenarios outlined in each clause fail to consider other possible scenarios and are incomplete. They do not recognise the Recipient terminating the agreement unilaterally without just cause. In this scenario the Provider should be able to charge the Recipient all fees, VAT and outlays incurred together with a success fee should they go on to recover compensation. Clauses (r) and (s) are triggered by the Provider's conduct but do not allow for unjustifiable termination by the Recipient.

The Law Society of Scotland respectfully submit that clauses (r) and (s) should be contained within the Success Fee Agreement subject to adding unjustifiable termination by the Recipient. This is also on the basis that clause 5(1) of the draft Success Fee Agreement and Cooling Off letter previously submitted to Scottish Government by the Law Society of Scotland remains.

For administration purposes please note that clause (s) states "the provider is judged to have provided an inadequate service or is found guilty of misconduct by its professional regulator or is found guilty of misconduct by its professional regulator or the Scottish Legal Complaints Commission". It is suggested that it be amended to read "the provider is judged to have provided an inadequate service by the Scottish Legal Complaints Commission or is found guilty of misconduct by its professional regulator".

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

**No**

Please provide reasons for your response in the box below.

The scenario outlined in paragraph 43 has been provided for in the Law Society of Scotland's Conditional Fee Agreement style for the last 20 years and worked well in practice. It is submitted that an erroneous assumption is being made that the original Provider has done something wrong in concluding that the Recipient's prospects of success have diminished below the requisite threshold. Cases which proceed speculatively and have Legal Expenses Insurance cover must have more than 50% chance of success before insurance cover remains in place. Prospects of success are down to the professional judgement of the Provider. Each Provider will take their own view on this. Some may competently consider prospects are less than 50% and are then obliged to notify the legal expenses insurer who will cancel the insurance cover. If a second opinion is sought it may be possible that the second Provider is more optimistic about the Recipient's prospects, and may be able to get the opponent to make an offer. If the original Provider has not acted negligently in rating prospects of success 50% or less and the Recipient rejects their advice, then the original solicitor is entitled to be paid for the work they did if the case settles.

It is submitted that such an obligation should be on the Recipient to pay the Provider. In some situations, Recipients may go on to represent themselves and may be 'bought off' for economic/nuisance purposes. This scenario leaves the Recipient either recovering judicial expenses they don't need to pay to a Provider or the second Provider keeping all judicial expenses for work they have not done. It is therefore essential that paragraph 45 remains.

In order to protect the Recipient from legal costs being in excess of their settlement figure the Law Society of Scotland propose the following qualification to be added to our proposed draft Success Fee Agreement and Cooling Off letter at clause 5(2)(b):

"The level of expenses due by the Recipient to the Provider under clause 5(2)(b) shall be capped at the level of judicial expenses due by the opponent, with the obligation on the Recipient to take all reasonable steps to seek and recover those expense's".

**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?**

**No**

Please provide reasons for your response below.

The Scottish Legal Aid Board rules make it clear and are checked during the legal aid quality assurance process, that private fee charging is not permitted when legal aid is in place.

The consultation paper does recognise scenarios that may exist where a case commences under Legal Aid Advice and Assistance but then converts to a speculative fee case at the time litigation is required. It is respectfully submitted that there should not be any prohibition on a Solicitor/Provider being remunerated for work carried out under Legal Aid Advice and Assistance up until the point that the Success Fee Agreement is signed, if the claim proves to be unsuccessful. If this is not to remain then from a practical point of view there will be many claims turned away by Solicitors/Providers. For example, medical negligence claims require Legal Aid Advice and Assistance to provide assurance that outlay costs will be covered to allow investigations to be carried out.

Providers/Solicitors may not have reasonable information to enter into a Success Fee Agreement and so legal aid is required to operate prior to litigation to ingather that information and properly investigate the prospects of success.

The other scenario which may arise and requires to be considered by the Scottish Government is when there is a Success Fee Agreement from the outset, but then legal aid is sought. This may arise in scenarios where the prospects of success do not reach a certain percentage level. Legal expenses insurance cover generally requires between 50% and 60% prospects of success. Legal aid only requires 51%. If the prospects do not reach the desired level of the legal expense's insurers, then the cover will be cancelled. The Recipient may however reach 51% prospects of success and therefore should be able to apply for legal aid. This has not been considered within the paper and should now be.

**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?**

**No**

Please provide reasons for your response below.

It is a matter for the Scottish Legal Aid Board and the Law Society of Scotland to provide information and guidance to the profession. This is enough to achieve the desired aim. If more regulation is issued by the Scottish Government, then it is less likely that Solicitors/Providers will offer Success Fee Agreements. This is the scenario in England whereby Success Fee Agreements are hardly used.





**For further information, please contact:**

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