Review of Expenses and Funding of Civil Litigation in Scotland: A Report by Sheriff Principal James A Taylor

Scottish Government Response

The Scottish Government
Riaghaltas na h-Alba

FOREWORD FROM CABINET SECRETARY FOR JUSTICE

The Scottish Government is committed to ensuring access to justice and expenses have a fundamental role to play in this. It is not acceptable for the answer to "how much will it cost me to litigate" to be "how long is a piece of string", from either an individual or a business perspective. Therefore, I welcome the outcome of this review of expenses and costs of civil litigation in Scotland.

Sheriff Principal Taylor rightly comments that the unpredictability of the costs of civil litigation represents a barrier to access to justice and I commend his conclusions. Having considered Sheriff Principal Taylor's recommendations, I am convinced that they will go a long way to changing that situation and delivering greater predictability and certainty in relation to the cost of litigation. I am grateful for his thorough consideration of the subject and his commitment to being informed by consultation, discussion and research.

The principles which underpin the recommendations resonate with my vision for the justice system in Scotland; one that contributes positively to a flourishing Scotland, helping to create an inclusive and respectful society in which all people and communities live in safety and security, where individual and collective rights are supported, and where disputes are resolved fairly and swiftly.

Sheriff Principal Taylor also sets out clearly the very different contexts which apply in Scotland, compared to the landscape in England and Wales, not least the very different approach to publicly funded legal assistance for civil justice in Scotland. Protecting the future sustainability of civil legal aid is an issue very close to my heart, and I consider that the implementation of these recommendations plays an important part in maintaining the current scope of civil legal aid within the current challenging financial climate.

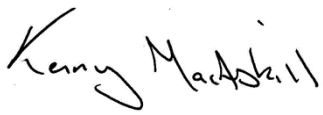
Sheriff Principal Taylor presented me with his final report of his review of expenses and funding of civil litigation in Scotland in September 2013. Since receipt of the report, the Scottish Government has conducted an analysis of the recommendations, discussed with partners and agreed our proposed way forward. It is a significant report in terms of scale and potential impact and it is important that we move ahead in a way which supports collaboration and takes account of the various reforms underway in the justice system in Scotland.

When discussing the report with Sheriff Principal Taylor, he envisaged his recommendations being taken forward incrementally. I would agree with this pragmatic approach which will allow for the implementation agenda to be co-ordinated with other justice reforms, not least the successful passage of the Courts Reform (Scotland) Bill which will lay the critical foundation on which to deliver implementation.

This response therefore sets out an incremental plan of activity that takes account of multiple responsibilities and other interdependencies. The Scottish Civil Justice Council clearly has a key role to play. Further detail in relation to that role is discussed in later parts of this response. The Scottish Government is keen to work with the Costs and Funding Committee and facilitate discussions with other justice partners taking forward recommendations.

In summary, while the Scottish Government will look to deliver on its responsibilities, it will also endeavour to draw together the range of activity across the justice system that is required to take forward all of the recommendations. This response sets out our commitment to that which will be the basis for collaborative working with justice partners.

Finally, I would like to thank Sheriff Principal Taylor for this well-considered and timely report and join him in commending the contributions made by the Review Group and consultation respondees. I'd also like to thank, in advance, the justice partners that we will continue to work with to take this vision through to reality.



INTRODUCTION

Sheriff Principal Taylor presented his report[1] to the Scottish Ministers in September 2013. The report is very thorough and contains 85 recommendations. The Review has its origins in Lord Gill's Scottish Civil Courts Review ("the SCCR")[2] of which it was originally intended to be a part. Due to the size of the topic, however, and to the fact that during the course of the SCCR it was announced that Lord Justice Jackson was to undertake a similar review in England and Wales which might have implications for Scotland, it was decided to leave the matter to a separate review. The resulting report by Sheriff Principal Taylor is, however, inextricably interlinked with the SCCR and should be seen as a continuation of that work.

Since receipt of the report, the Scottish Government has scrutinised the discussion and recommendations and had informal discussions with key stakeholders, particularly those who have a role to play in implementing the recommendations. These discussions will continue as we would want to work in partnership with others such as the Scottish Civil Justice Council ("the SCJC"), the Faculty of Advocates, the Law Society of Scotland and Scottish Legal Aid Board as we move forward with implementation of some aspects of the recommendations, and further consider others. Sheriff Principal Taylor has suggested in his report that implementation should be incremental and the Scottish Government would agree that implementation should be staged to coincide with other developments across the justice system to avoid either duplication of effort or overburdening a system that is undergoing significant and essential reform.

This response to Sheriff Principal Taylor sets out our plans for implementation and also those recommendations that would merit further consideration with partners. This document sets out the Scottish Government's response in principle to the main recommendations in chapters 2-4, chapters 7-9 and chapters 10 and 13.

During the evidence sessions for the Courts Reform (Scotland) Bill ("the Courts Reform Bill"[3]), the Justice Committee raised the connections between some of Sheriff Principal Taylor's recommendations and the provisions in the Bill. This document aims to address these matters by setting out the Scottish Government's views on issues such as sanction for counsel, for example. The chapters which this response does not cover in detail are chapter 5 (protective expenses orders), chapter 6 (before the event insurance), chapter 11 (alternative sources of funding) and chapter 12 (multi-party actions). These are both less directly relevant to the Bill and will require further consideration. We have set out how we intend to take forward consideration of and consultation on these issues.

We would anticipate taking an incremental approach to implementation. We do not intend to undertake formal consultation on our overall intended approach as set out in this response. That is on the basis that Sheriff Principal Taylor has already

[1] http://scotland.gov.uk/About/Review/taylor-review/Report

[2] www.scotcourts.gov.uk/about-the-scottish-court-service/the-scottish-civil-courts-review

[3] http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx

consulted widely to inform his review and there would be little to be gained by repeating that consultation. We would intend to engage with partners as we move through the full process of implementation, undertaking formal further consultation where appropriate, for example, as part of the development of primary legislation. On that basis this report sets out the Scottish Government's response in principle to the key recommendations in Sheriff Principal Taylor's Report rather than a line by line response.

IMPLEMENTATION OF THE TAYLOR REPORT: POLICY CONTEXT

Making Justice Work

Like the SCCR, with which it is linked, the Scottish Government sees the implementation of the Taylor Report as part of its "Making Justice Work" strategy.

The Scottish Government Justice Directorate has recognised that justice reform is best done in a properly joined up and managed way, with all the essential organisations involved in making the reforms happen brought into the process from the beginning. Therefore, in 2010, the Scottish Government established a formal four year reform programme called Making Justice Work,[4] with the vision that:

"The Scottish justice system will be fair and accessible, cost-effective and efficient, and make proportionate use of resources. Disputes and prosecutions will be resolved quickly and secure just outcomes."

The programme has evolved and is now a portfolio of programmes, projects and initiatives. The portfolio covers six areas: (1) Effective Courts & Tribunals; (2) Improving Procedures & Case Management; (3) Access to Justice; (4) Justice Digital Strategy; (5) Tribunals Reform; and (6) Parole Change. Each area has its own governance arrangements including representation from: Scottish Government; Police Scotland; Crown Office and Procurator Fiscal Service; Scottish Legal Aid Board; Scottish Court Service; and Scottish Prison Service. Along with the other national change programmes, Making Justice Work reports to the Justice Board which includes Scottish Government Directors and heads of partner organisations in the justice system.

The Review of Expenses and Funding of Litigation in Scotland falls within Project 3, enabling access to justice, and that project board will take a keen interest in the progress of action in response to Sheriff Principal Taylor's recommendations as well as the Justice Board.

Approach to Reform under Making Justice Work and approach to Taylor Review

The programme of reform under Making Justice Work has been moving forward incrementally.

[4] http://www.scotland.gov.uk/Topics/Justice/legal/mjw

In the context of Sheriff Principal Taylor's report, the most significant developments have been first of all the establishment of the SCJC by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. The SCJC, the establishment of which was one of the SCCR recommendations, has been set up to prepare the new rules of court which will be required to implement many of the recommendations as well as to have oversight of the entire civil justice system. Its committees are now moving ahead with their respective interests, including a committee with specific interest in the Taylor Review (Costs and Funding Committee). The SCJC has published its intended work programme and an interim report of its priorities, and these include the response to Taylor.

Following the establishment of the SCJC, the Scottish Government introduced the Courts Reform (Scotland) Bill into the Scottish Parliament to implement many of the recommendations in the SCCR. This is currently going through the Parliamentary process.

Implementation of Sheriff Principal Taylor's report under the auspices of Making Justice Work is the next step in this journey.

In this response, the Scottish Government sets out its views on chapters 2-4 (cost of litigation) which are matters mainly for the SCJC to implement and chapters 7-9 (speculative fee agreement, qualified one way costs shifting and damages based agreements) which are for the Scottish Government. This response also deals with chapter 10 (referral fees) and chapter 13 (regulation) which are for the Scottish Government and professional bodies.

In relation to the remaining chapters in the Report the Scottish Government has set out that how it intends to take these forward including its plans for consultation. This includes chapter 5 (protective expenses orders), chapter 6 (before the event insurance), chapter 11 (alternative sources of funding) and chapter 12 (multiparty actions).

The narrative under each of these headings sets out our current thinking and intended approach to developing firm workplans.

Summary

The Taylor recommendations can be divided into three distinct categories:

> **1) Chapters 2-4 (cost of litigation). The recommendations in these chapters are mainly for the SCJC to consider and implement. Some of the recommendations will be dependent on the successful passage of the Courts Reform Bill but others could be taken forward in a shorter timescale.**
>
> **2) Chapters 7-9 (speculative fee agreement and qualified one way costs shifting and damages based agreements), chapter 13 (claims management companies) and chapter 10 (referral fees). These will be taken forward by the Scottish Government through legislation and engagement with the relevant professional bodies.**

3) Other issues – chapter 5 (protective expenses orders), chapter 6 (before the event insurance), chapter 11 (alternative sources of funding) and chapter 12 (multiparty actions). The Scottish Government has set out how it intends to take these matters forward and consult on them.

RESPONSE TO KEY RECOMMENDATIONS

Part 1 – General issues

The Scottish Government's starting point in relation to the Taylor recommendations is that our justice system is meant to be one in which anyone with a genuine claim has the opportunity to vindicate his or her rights. Clearly, the cost of litigation cannot be allowed to act as a barrier which prevents the system from working. The Scottish Government sees Sheriff Principal Taylor's recommendations in relation to damages based agreements, speculative fee agreements and qualified one way costs shifting as being the lynchpins of his report and which are directly aimed at tackling this issue. These reforms are key to increasing access to justice for the general public but they do not exclude and are complementary to the role of the legal aid fund and before the event insurance. These recommendations are supported by the recommendations relating to judicial expenses in chapters 2-4 and the more speculative or longer term recommendations in the rest of the report.

The foreword to the Review identifies the issues facing potential litigants in Scotland when making a decision on whether to pursue their case. It states that one of the main themes to emerge from the consultation process could be summarised as the impact which expenses have on access to justice. Potential litigants worry what the costs will be to them should they lose an action. Not only will they have to pay their own legal costs but also those of their opponents, the amount of which it is currently almost impossible to predict with any accuracy.

The Review outlines how it is often said that in Scotland there is no meaningful right of access to the courts unless one is sufficiently poor to qualify for legal aid (albeit the present upper limit for disposable income is £26,239) or very rich. It quotes a recent letter to the Financial Times, which commented:

"*Worse still, those in the "excluded middle" have no choice but to accept 'out of court' settlements on all manner of insurance and negligence cases."* [5]

A further problem identified is the level of expenses which, in Scotland, the successful party can recover from the unsuccessful party in a judicial account of expenses. It identifies that this is particularly acute in commercial cases where pursuers often have a choice of raising the action in Scotland or in England and Wales. It cites higher levels of recoverability south of the border as often being an influencing factor, although seldom the sole reason, that litigants choose to raise an action there.

[5] Taylor Report, *page iv*

The Scottish Government accepts Sheriff Principal Taylor's diagnosis of the potential impact of these issues on access to justice. It is unsatisfactory that litigants with genuine cases should be dissuaded from litigating because of concerns of being almost bankrupted by an adverse award of expenses. It is unsatisfactory that it is virtually impossible to predict with any accuracy the costs to an individual or business of losing an action.

Furthermore, it is accepted that lower levels of recoverability in Scotland may contribute to litigants raising proceedings in England and Wales and that this has potentially negative consequences for the Scottish economy as well as for the development of Scots Law.

The Scottish Government therefore accepts the principal drivers of the recommendations made by Sheriff Principal Taylor. Our intended response to the individual recommendations is set out in the following sections.

Part 2 – Specific recommendations

Category 1 – Chapters 2-4 (Cost of litigation)

Chapters 2-4 of the Report are concerned with the cost of litigation and the way in which it may be made more predictable.

These recommendations fall mainly within the remit of the SCJC and the Court of Session to implement by act of sederunt and could be taken forward as a package.[6]

While some recommendations could be taken forward under existing powers, there are others which are dependent on the successful passage of the Courts Reform Bill.

The Courts Reform Bill will, for example, include provisions that clarify the role of the SCJC in regulating fees and provides an Order making power allowing the Scottish Government to specify persons whose fees the Court is able to regulate. The Order could be used, for example, to allow the SCJC to set a table of fees for counsel or bar reporters. The specific issue of advocates' fees was raised by both the SCCR and the Taylor Review and merits further consultation on how it might best be taken forward, if at all. A table of fees for advocates could naturally sit within the remit of the SCJC, but the nature of the issue is not straightforward and so further consultation will be undertaken before laying any Order.

The Scottish Government's role in relation to chapters 2-4 is to ensure that the Lord President/SCJC have the appropriate powers, or will have them once the Courts Reform Bill is enacted, to take forward the recommendations.

[6] There are some exceptions to that, most notably recommendations 30 and 31 (expenses in small claims/simple procedure). Currently in relation to small claims (and the new simple procedure proposed by the Courts Reform Bill) the power to regulate expenses in small claims sits with Scottish Ministers, and it is proposed that this should remain the case following the passage of the Courts Reform Bill. The Scottish Government will take the regulation of expenses in the new simple procedure forward following the passage of the Courts Reform Bill.

Matters of consultation and timing for the recommendations falling to the SCJC are for the Lord President and SCJC although the Scottish Government will continue to liaise closely with them.

Sanction for counsel

It should be noted that these chapters contain a number of important recommendations including Sheriff Principal Taylor's recommendations in relation to sanction for counsel in the sheriff court. Sheriff Principal Taylor recommends:

> *"17. The current test for granting sanction for the employment of counsel in the sheriff court should remain one based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied.*
>
> *"18. When deciding a motion for sanction for the employment of counsel in the sheriff court, the court should have regard, amongst other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them."*[7]

These recommendations have been the subject of considerable interest due to the link between them and the anticipated transfer of business from the Court of Session to the sheriff court, should the Courts Reform Bill be enacted in its current form.

As is true of much of the rest of chapters 2-4, implementation of these recommendations falls to the SCJC. Nonetheless, given the level of interest that there has been in this topic the Scottish Government thinks that it would be helpful to set out its views on the issue.

The Scottish Government believes that the test suggested by Sheriff Principal Taylor has much to commend it.

Sheriff Principal Taylor noted in his Review that:

"Those actions raised in the sheriff court are very often conducted by solicitors in a most efficient and competent manner. I do not accept the argument…that…, by definition, all personal injury actions are of such importance and value to the pursuer that counsel requires to be instructed in every case."[8]

The Scottish Government agrees with this view.

It is understood that applications for sanction for counsel are rarely refused in the sheriff courts, particularly in circumstances where the other side employ counsel. Indeed it appears that Sheriff Principal Taylor's recommendation that the current test should be retained with an additional test of reasonableness and the need to have regard to the resources deployed by the other party ("equality of arms") merely

[7] Taylor Report, page 325
[8] Taylor Report, page 46, paragraph 18.

reflects the reality of current practice in the sheriff court. The Scottish Government understands that equality of arms is a concern for many stakeholders and therefore accepts that there is an argument that this should be explicitly stated as one of the factors to be taken into account by sheriffs.

The granting of sanction is a discretionary decision for the sheriff and Sheriff Principal Taylor does not seek to change that. The Scottish Government also agrees with Sheriff Principal Taylor's comments to the effect that, should the Courts Reform Bill become law, in the early days of the new exclusive competence limit, sheriffs should be encouraged to grant leave to appeal in circumstances where they might not otherwise do so in order for a body of jurisprudence to be developed which establishes what types of case ought to attract sanction.[9]

The Scottish Government agrees that motions for sanction should be made at the start of proceedings (recommendation 19).

The revised test suggested by Sheriff Principal Taylor is therefore a good starting point. The Scottish Government is, however, also very aware that practice is constantly evolving and that the test that is eventually agreed must reflect the most recent developments in practice. For example, since Sheriff Principal Taylor wrote his report, the Faculty of Advocates has changed its practice so that counsel will no longer require to have an instructing solicitor sitting behind them whenever they appear in civil courts or tribunals as long as certain pre-conditions are met.[10] During the Stage 1 proceedings on the Courts Reform Bill some have argued that automatic sanction for counsel should be granted for certain types of cases.

The test for sanction for counsel in the sheriff court has until now been based on case law. Given the range of views expressed by stakeholders and given the fact that practice is constantly evolving, the Scottish Government believes that it is appropriate – and indeed arguably more essential than ever – that the test for sanction for counsel be provided for in rules of court made by the SCJC/Lord President. Court rules may be amended more easily and more quickly than primary legislation, if it is considered necessary in the light of experience or future reforms. Furthermore, the SCJC is a body made up of representatives of different stakeholder interests and has the power to consult. It was formed for this very purpose.

Finally, it should also be noted that there is no intention on the part of the Scottish Government that the test for sanction for counsel in the sheriff court should be applied more stringently. The Scottish Government believes that parties should have access to the court and representation that is appropriate to their case.

[9] Taylor Report, page 43
[10] http://www.advocates.org.uk/news/news_20130823_deansruling.html

Summary

Implementation of chapters 2-4 is mainly for the Lord President/SCJC, which has put in place a Costs and Funding Committee to assist with its consideration. The Scottish Government's role in relation to these chapters is to ensure that the Lord President and SCJC have the appropriate powers, or will have them if the Courts Reform Bill is enacted, to take forward the recommendations.

The Scottish Government agrees that the revised version of the test as proposed by Sheriff Principal Taylor in relation to sanction for counsel is a good starting point. The Scottish Government, however, believes that given the range of views expressed on this subject by stakeholders and given the fact that practice continues to evolve, the matter is best dealt with by the SCJC/Lord President by means of court rules.

Category 2

Damages Based Agreements, Speculative Fee Agreements and Qualified One Way Costs Shifting (Chapters 7-9)

These chapters contain recommendations on speculative fee agreements; damages based agreements and qualified one way costs shifting.

A speculative fee agreement is a type of "no win, no fee agreement" whereby the client is only required to pay his solicitor's legal fees if the litigation is successful. An enhanced fee is normally charged in the event of success. These types of agreements have been enforceable in Scotland since the introduction of section 61A of the Solicitors (Scotland) Act 1980.[11]

Speculative fee agreements contrast with damages based agreements which are another type of "no win, no fee agreement" not currently enforceable in Scotland. Under a damages based agreement a lawyer's fee is calculated as a percentage of the client's damages if the case is won but no fee is payable if the case is lost.

Speculative fee agreements and damages based agreements provide alternative arrangements which a pursuer can enter into with his or her own lawyer to fund litigation; but neither speculative fee nor damages based agreements provide automatic protection against liability for the other side's expenses. As Sheriff Principal Taylor has said:

"For reasons already outlined, dependence on "no win, no fee" funding arrangements is likely to grow over the next decades. It is not readily appreciated by members of the public that such arrangements provide no automatic protection against liability for the other side's expenses. While speculative fee agreements may have broadened access to justice in Scotland over the past decade, their impact has been restricted by the absence of such protection."[12]

[11] Inserted by the Law Reform Miscellaneous Provisions (Scotland) Act 1990 c.40, s36
[12] Taylor Report, page 161, paragraph 2

What does address this issue, however, is qualified one way costs shifting ("QOCS"). This is a regime under which the opponent pays the pursuer's expenses if the action is successful but the pursuer does not pay the opponent's expenses if the action is unsuccessful except in certain limited circumstances, such as where the pursuer has acted unreasonably.

Taken together, these recommendations form a package which is aimed at addressing the issue of a potential pursuer deciding not to bring a genuine claim because of fears relating to cost.

In relation to these recommendations the Scottish Government's guiding principle is that it should be affordable for an individual to pursue a genuine claim. Otherwise, access to justice is illusory. This is set against a background of the Scottish Legal Aid Board's stated aim of being a funder of last resort.

Damages Based Agreements and Speculative Fee Agreements

Bearing in mind the principles set out above, the Scottish Government is persuaded that damages based agreements should be enforceable by solicitors in cases where a monetary award is sought other than in family actions (Recommendation 55). This is on the basis that this is likely to increase access to justice. In particular, it is likely to increase access to justice for the "*excluded middle",* i.e. those who neither qualify for legal aid nor have the means to fund a litigation privately. The introduction of damages based agreements will require primary legislation.

The Scottish Government also accepts that, in contrast to the current position in England and Wales, solicitors should be entitled to retain judicial expenses in addition to the agreed success fee (Recommendation 56). This is in order to encourage solicitors to offer damages based agreements in lower value cases.

In accepting that damages based agreements should in principle be enforceable by solicitors and therefore more widely available than at present, the Scottish Government also accepts that there are concerns in relation to damages based agreements.

These concerns centre on issues of conflict of interest, and specific issues around damages based agreements eating into damages for future care. It is also understood that there are issues around the fact that while the concept of damages based agreements is on the face of it easy to understand, the apparent simplicity can lure individuals into having a larger sum of money deducted from their damages than might have been likely under a speculative fee agreement.

The Scottish Government therefore accepts that there is a need for protections for the public to be built into the system.

It also accepts that, as is currently the case in relation to claims management companies who provide damages based agreements, the market will determine the percentage cap on damages that is charged. Nonetheless and particularly given that the market in this area is likely to develop, the Scottish Government's view is that in

order to provide protection to the public it would be prudent to have a cap on damages which can be taken to satisfy the success fee as a backstop (paragraphs 57-59). It is accepted that equivalent caps should apply to speculative fee agreements (Recommendations 42-44). Speculative fee agreements are already established in primary legislation and court rules, both of which will require to be amended.

The Scottish Government also notes Sheriff Taylor's recommendations around damages for future loss and periodical payments (recommendations 64-66).

The Scottish Government will give further consideration to these recommendations in light of any provision made in the proposed Damages Bill in relation to periodical payments.

It is of vital importance that members of the public who are signing up for damages based agreements are clear as to the nature of the terms to which they are agreeing. Similar issues apply in respect of speculative fee agreements which are, by their nature, more complex than damages based agreements.

In order to safeguard clients' interests, Sheriff Principal Taylor has recommended that a lawyer or claims management company should be obliged to write to clients setting out the terms and conditions of a damages based agreement in clear language and a 14 day "cooling off" period (Recommendations 69 and 70).

While accepting that there is merit in these suggestions, the Scottish Government wishes to give further consideration to the issue of how best to ensure members of the public understand the nature and implications of damages based agreements and speculative fee agreements. It is not enough for the terms and conditions relating to such agreements to be hidden in terms of business without further explanation. Nonetheless, the Scottish Government does not want members of the public to be obliged to obtain separate legal advice on the terms of damages based agreements/speculative fee agreements.

The Scottish Government will consider this matter further in partnership with the legal profession/Law Society of Scotland and consumer groups.

Summary

The Scottish Government intends to legislate to allow damages based agreements to be enforceable by solicitors in Scotland. It is agreed that there should be a cap on the damages which can be taken to satisfy the success fee as a backstop. The same cap should apply to speculative fee agreements. The Scottish Government will bring forward primary legislation at the earliest opportunity. Further consideration will be given to the issues around damages for future loss and periodical payments as well as how best to ensure members of the public understand the nature and implications of damages based agreements and speculative fee agreements.

Qualified one way costs shifting (QOCS)

The other element of the package recommended by Sheriff Principal Taylor is the introduction of a system of QOCS (recommendation 46).

The Scottish Government accepts as a matter of principle that such a system should be introduced in Scotland in personal injury cases for the same reason that it accepts in principle that damages based agreements should be enforceable by solicitors. That reason is that such a system is likely to increase access to justice and provide an important safeguard in the context of damages based agreements and speculative fee agreements.

In terms of qualifications to the rules on one way costs shifting, the Scottish Government acknowledges the importance of the system of tenders in promoting settlement of cases. This, however, requires to be balanced against the fact that the benefits of QOCS will be largely illusory should protection against liability for expenses be lost completely by the pursuer's failure to beat a tender. The Scottish Government therefore accepts Sheriff Principal Taylor's recommendation that the pursuer's liability to meet the defender's post tender judicial expenses should be limited to 75% of the damages awarded.

The Scottish Government also accepts that there will be cases where the conduct of the pursuer is such that he or she should lose the benefit of QOCS. Examples of such conduct would be where there has been fraud or abuse of process on the part of the pursuer or he or she has raised or conducted the litigation unreasonably.

The exact nature of the unreasonable conduct and the test that should be used to determine when it has taken place should be subject to further consideration.

The Scottish Government understands that there is concern that the recommendations on speculative fee agreements, QOCS and damages based agreements will lead to a flood of frivolous claims being brought to the Scottish Courts. Paragraphs 62-64 of Chapter 8 of the Report set out a number of factors which suggest that this will not be the case. In order further to discourage frivolous litigation and encourage expeditious progress of cases, the Scottish Government would suggest that the SCJC give further consideration to the use of pre-action protocols. There are currently no compulsory pre-action protocols in Scotland. The Courts Reform Bill proposes to give the Court of Session the power to introduce, by means of rules, compulsory pre-action protocols. The Personal Injury Committee of the SCJC is undertaking an information and evidence gathering exercise around the current use of voluntary pre-action protocols and the possible introduction of compulsory pre-action protocols in order to assist its consideration of the matter of the relevant rules should the proposed powers become law.

Summary

The Scottish Government accepts as a matter of principle that a system of QOCS should be introduced in Scotland. As mentioned previously it will take this forward through primary legislation as soon as possible.

Speculative Fee Agreement, Damages Based Agreements and Qualified One Way Costs Shifting – implementation of the package

The Scottish Government intends to implement the recommendations on speculative fee agreements; damages based agreements and QOCS by means of primary legislation. There are a number of reasons for this.

The introduction of damages based agreements and the adjustment of the rules relating to speculative fee agreements will require primary legislation. The Scottish Government considers that QOCS should also be introduced by primary legislation in order to ensure that this important safeguard is introduced alongside the other reforms and implementation of those reforms can take place as a package.

Furthermore, QOCS is much more than a technical rule change. It is a fundamental qualification to the principle that expenses follows success. It is therefore more appropriate for it to receive the increased level of scrutiny afforded to primary legislation. The Scottish Government therefore intends for this matter to be taken forward by primary legislation at the earliest possible opportunity.

In taking forward legislation to progress this package of reform (damages based agreements, speculative fee agreements and QOCS), the Scottish Government would intend that the primary legislation set out the structure and principles of the reforms, with the detail left to court rules and secondary legislation. The balance between primary and secondary legislation will be for further consideration in the context of draft Bill provisions. A slot for primary legislation is currently being considered.

Summary

The Scottish Government intends to implement the recommendations on speculative fee agreements, QOCS and damages based agreements through primary legislation as a package.

The Scottish Government will consult on these matters as part of its usual practice of consultation on proposed primary legislation.

Claims Management Companies

Sheriff Principal Taylor has recommended that there be a regulator of claims management companies (recommendation 85). The main rationale for this is that there requires to be a level playing field between solicitors, who are subject to professional regulation, and with whom some claims management companies are in competition.

The Scottish Government consulted on the issue of whether there should be a regulator of claims management companies in its consultation on legal services "Wider choice and better protection: A consultation paper on the regulation of legal services in Scotland" (December 2008), Chapter 9.[13] At that time the Scottish Government decided not to proceed with regulation for a number of reasons. Most importantly, the consultation reinforced the Scottish Government's view that there is little hard evidence of malpractice in Scotland and that it was difficult, therefore, to justify the expense to the taxpayer of establishing a new regulatory framework. It was pointed out that legal aid is still available for personal injury cases in Scotland and that appears to have inhibited the widespread growth of claims management companies. The Scottish Ministers undertook to keep the situation under review and did not rule out legislation in future.

While the arguments rehearsed in 2009 in relation to there being little evidence of malpractice[14] and claims management companies having a much more restricted impact on the marketplace in Scotland than in England are still relevant, the regulatory landscape has moved on considerably since then.

The Legal Services (Scotland) Act 2010 set up a framework for introducing alternative business structures in Scotland which, when it becomes a reality, will signal the advent of multidisciplinary practices.

As Sheriff Principal Taylor correctly points out, we do not know exactly what the impact of alternative business structures will be on the marketplace but with our regulatory landscape more complex than ever and still evolving, the Scottish Government does not consider the time is right to set up another regulatory regime for claims management companies. Instead the Scottish Government wishes to consider further whether claims management companies should be regulated as part of a wider review of regulation of legal services.

Of course, it is recognised that this leaves a number of outstanding inconsistencies, namely that of the level playing field with solicitors and cross-border inconsistency between Scotland and England, where claims management companies are regulated and Scotland, where they are not.

As outlined above, the Scottish Government is proposing that solicitors will be able to offer damages based agreements. This should go some way to levelling the playing field. It is unclear what effect this development will have on the claims management sector in Scotland in any event.

The Scottish Government notes that some claims management companies operating in Scotland are *de facto* regulated – either because solicitors involved in them or benefiting from them are already subject to regulation by the Law Society of Scotland or because they are part of UK based businesses which are subject to the Claims Management Regulator in England and Wales.

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[13] http://www.scotland.gov.uk/Publications/2008/12/29155017/0

[14] Taylor Report, page 309, paragraph 1.

The Scottish Government wishes, however, to consider further the issue of what it could do, in the absence of establishing a regulator for claims management companies prior to its wider review of regulation, to level the playing field further between claims management companies and solicitors and to curb unacceptable practices which may disadvantage vulnerable clients. The Scottish Government will consider the legislative controls which should be established around damages based agreements including the rules and sanctions which should apply to any person or entity offering these agreements. It will also consider whether it would be worthwhile to engage with the claims management industry with a view to establishing a voluntary code of practice.

Summary

The Scottish Government will consider the question of whether claims management companies should be regulated as part of a wider review of legal services regulation. The Scottish Government intends to turn its attention to this issue following the delivery of primary legislation to implement Sheriff Principal Taylor's recommendations on damages based agreements, speculative fee agreements and QOCS.

In the meantime the Scottish Government will consider whether further action should be taken to curb unacceptable practices and if so the nature of that action.

Referral Fees

In contrast to the position taken by Lord Justice Jackson, Sheriff Principal Taylor has not recommended that referral fees be banned but that those involved in paying and receiving referral fees should be properly regulated.

The Scottish Government agrees that there is something inherently uncomfortable in the commodification of personal injury claims. The Scottish Government also accepts, however, that referral fees are a fact of life and that the current rules are difficult to police and easy to circumvent. It also accepts that a ban on referral fees would be difficult to police and would have to include "payments in kind." This would mean that practices which arguably increase access to justice (such as solicitors firms offering free advice, representation and other services to trade unions and other organisations in return for regular flow of remunerative work) would be caught by the ban.

The Scottish Government therefore agrees with Sheriff Principal Taylor that the practical solution is to permit referral fees but subject to safeguards to address concerns about legal work being sold to the highest bidder with no reference to quality and unacceptable advertising. The nature of those safeguards should be subject to further consideration including consideration of recommendations 72, 73 and 75 of the Taylor Report.

In light of the Scottish Government's intention not to establish a regulator of claims management companies prior to its wider review of regulation, the rules to be established relating to referral fees will only apply to solicitors. As noted above,

however, the Scottish Government is giving separate consideration as to whether further action should be taken to curb any unacceptable practices in the interim.

The Scottish Government intends to take forward this issue in conjunction with the Law Society of Scotland who would require to change its rules to permit referral fees.

Summary

The Scottish Government will engage with the Law Society of Scotland on this issue.

Category 3

Chapter 5 – Protective Expenses Orders

A "protective expenses order" (PEO) is a court order which limits a litigant's liability to pay the expenses of an opponent or third party to a particular sum whatever the outcome of the case. It therefore provides a degree of certainty and predictability in relation to a litigant's potential exposure to an opponent's expenses.

Rules of Court currently regulate the award of PEOs in judicial review cases and statutory reviews which fall within the scope of the Public Participation Directive (broadly cases concerning environmental matters).[15]

It has been established separately by case law that the courts may grant a PEO in public interest cases which are not concerned with environmental matters.

Sheriff Principal Taylor has recommended that the power to apply for a PEO should be established in all public interest cases with the decision on whether to award the PEO and the amount to be a matter for judicial discretion unless otherwise prescribed in rules of court (such as for example the levels prescribed for environmental cases).

This is a complex issue and one where case law is developing. It would seem prudent to review current and recent case law to inform policy decisions and to liaise with the SCJC. If it were to be considered that legislation was necessary to bring current practice into line with the recommendations made by Sheriff Principal Taylor then that would be for the SCJC to take forward under existing powers.

Chapter 6 – Before the event insurance

Before the event insurance is a product which provides cover in the event that the insured has to bring or defend a legal action in the future.

The Scottish Government is considering its response in principle to Sheriff Principal Taylor's recommendations in relation to before the event insurance. The law of insurance is currently reserved and engagement with the UK Government will be required to the extent that the recommendations may relate to reserved matters and would require primary legislation.

Chapter 11 – Alternative sources of funding

This chapter of the Report considers alternative mechanisms for funding litigation outwith the main recommendations in the rest of the report. It includes consideration of third party funding, legal aid for family actions, self-funding schemes and pro-bono funding. The Scottish Government considers many of these recommendations to be very speculative in nature. For example, Sheriff Principal Taylor recommends that there should be a voluntary code of practice to which third party funders should

[15] Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 SSI 2013/81.

conform. There is, however, currently little evidence of third party funding being used in Scotland.

To the extent that certain recommendations – for example recommendation 79 in relation to a contingent legal aid fund – may be interconnected with other recommendations being taken forward by the Scottish Government by primary legislation, the Scottish Government will consider these as part of the development of primary legislation. Options for moving forward will be consulted upon before provisions are finalised.

Chapter 12- Multi-Party Actions

A multi-party action is an action where a number of potential litigants have closely related or similar claims arising from the same event. The SCCR recommended the introduction of such a procedure.

In the consultation to the Courts Reform Bill, the Scottish Government agreed in principle that there should be a multi-party procedure taking into account the outcome of Sheriff Principal Taylor's Review. However, provisions of this nature have not been included in that Bill as the outcome of Sheriff Principal Taylor's review was not known at the time of consultation.

The Scottish Government remains committed to introducing such a procedure and intends to give it further consideration with partners, including the Scottish Legal Aid Board. That consideration will cover the question of how such actions are funded, taking account of Sheriff Principal Taylor's recommendations. Again, to the extent that multi-party actions are interconnected with matters that we have committed to take forward by primary legislation such as damages based agreements, we intend to develop, and to consult on our proposed approach as part of that consultation.

Conclusion

Category 1

Chapters 2-4 (Cost of litigation)

The recommendations in these chapters are for the Lord President/SCJC, which has put in place a Costs and Funding Committee to assist with its consideration. The Scottish Government's role in relation to these chapters is to ensure that the Lord President and SCJC have the appropriate powers or, will have them if the Courts Reform Bill is enacted, to take forward the recommendations.

The Scottish Government agrees with the revised version of the test as proposed by Sheriff Principal Taylor in relation to sanction for counsel. Implementation of this is, however, for the SCJC.

Category 2

Damages Based Agreements, Speculative Fee Agreements and Qualified One Way Costs Shifting (Chapters 7-9)

The Scottish Government intends to implement the recommendations on speculative fee agreements, QOCS and damages based agreements through primary legislation as a package.

Regulation (Chapter 13)

The Scottish Government will consider the question of whether claims management companies should be regulated as part of a wider review of legal services regulation. The Scottish Government intends to turn its attention to this issue following the delivery of primary legislation to implement Sheriff Principal Taylor's recommendations on damages based agreements, speculative fee agreements and QOCS.

Referral Fees (Chapter 10)

The Scottish Government will engage with the Law Society of Scotland on this issue.

Category 3

The Scottish Government has set out how intends to take forward and consult on chapter 5 (protective expenses orders), chapter 6 (before the event insurance), chapter 11 (alternative sources of funding) and chapter 12 (multiparty actions).

How the Scottish Government will go forward

The Scottish Government will continue to work with partners to take forward those recommendations that do not require primary legislation. The work has already begun, most pertinently with the Scottish Civil Justice Council. Our priority partners will continue to be the Scottish Civil Justice Council and its Costs and Funding Committee which is broadly representative of the interested parties. Others will include the Law Society of Scotland on regulatory matters, the Scottish Legal Aid Board on alternative sources of funding and the Contingent Legal Aid Fund, and our colleagues in the UK Government to explore handling of reserved matters, such as insurance.

We will develop proposals for the legislation necessary to implement those recommendations, as we have indicated throughout this report. Those will be informed by the preparatory work already underway, the continuing discussions and engagement with justice partners and the implementation of the Courts Reform Bill. Those proposals will be subject to a public consultation and a Bill introduced to the Scottish Parliament at the earliest opportunity.

Throughout, the Scottish Government will report progress to the Costs and Funding Committee of the Scottish Civil Justice Council, the project board for Making Justice Work: Enabling Access to Justice, and the Justice Board.

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