

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

RESPONDENT INFORMATION FORM

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

1. Name/Organisation

Organisation Name

Sheriffs' Association

Title Mr Ms Mrs Miss Dr SHERIFF Please tick as appropriate

Surname

O'Carroll

Forename

Derek

2. Postal Address

Sheriff's Chambers

Sheriff Courthouse

Graham Street

Airdrie

Postcode ML6 6EE

Phone 01236 751121

Email SheriffDOcarroll@scotcourts.gov.uk

3. Permissions - I am responding as...

Individual

Group/Organisation

Please tick as appropriate

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

Please tick as appropriate

Yes No

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

Please tick ONE of the following boxes

Yes, make my response,

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

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

Please tick as appropriate

Yes No

name and address all available

or

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

or

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

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

CONSULTATION QUESTIONS

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

A. SPECULATIVE FEE AGREEMENTS

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

Please give reasons for your answers.

This is not a question to which the Sheriffs' Association feels able to respond. We do not have access to current data which would allow us to add anything meaningful by way of response to any of the parts of questions 2 - 5.

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

(i) Pursuers of actions

Comments

and why, and what would they look like

Comments

(ii) Defenders of actions

Comments

and why, and what would they look like

Comments

(iii) You or your organisation

Comments

and why, and what would they look like

Comments

(iii) Other organisations:

Comments

and why, and what would they look like

Comments

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

Comments

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

Comments

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

Comments

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

Comments

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

Comments

B. DAMAGES BASED AGREEMENTS

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

Please give reasons for your answers.

The Sheriffs' Association does not consider that it has access to sufficient current information as to the pre-court experience of potential litigants to allow us to comment meaningfully.

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

Please quantify, if possible.

For the reason already outlined the Sheriffs' Association is not in a position to comment.

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

Please give reasons for your answers.

For the reason outlined at response 6, the Sheriffs' Association is not in a position to comment on this question or questions 9 - 13.

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

(i) Pursuers of actions

Comments

and why, and what would they look like

Comments

(ii) Defenders of actions

Comments

and why, and what would they look like

Comments

(iii) You or your organisation

Comments

and why, and what would they look like

Comments

(iii) Other organisations:

Comments

and why, and what would they look like

Comments

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

Comments

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

Comments

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

Comments

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

Comments

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

Comments

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

Comments

Claims Management Companies

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

Please give reasons for your answer.

This is a matter of policy but the Association considers that it is difficult to justify not applying such statutory controls, as there are, to everyone offering such agreements as recommended by Sheriff Principal Taylor in recommendation 68.

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

We consider that it is difficult to respond to this question and question 16 in the absence of a clear exposition of what the statutory controls are and how the proposed framework will operate when part of the industry is non-regulated.

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

Please give reasons for your answer.

See above

Future Loss

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

Please give reasons for your answer.

Whether or not future damages are ring-fenced as happens in England and Wales or are not ring-fenced as suggested by Sheriff Principal Taylor is very much a matter of policy on which the Association would not normally comment. We can see no objection in principle to

not ring-fencing future loss damages and if that removes a disincentive to cases being settled, is something to be welcomed

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

(i) Pursuers of actions

The Association does not consider that our members have sufficient current exposure to the issues raised to allow any helpful responses to any parts of this question

and why, and what would they look like

Comments

(ii) Defenders of actions

Comments

and why, and what would they look like

Comments

(iii) You or your organisation

Comments

and why, and what would they look like

Comments

(iii) Other organisations:

Comments

and why, and what would they look like

Comments

Information and Good Guidance

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

Please give reasons for your answer.

Essentially this is a policy issue. However if a code of good practice is to be adopted it should apply to all groups and individuals offering such agreements.

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

Please give reasons for your answer.

Again this is essentially a policy issue on which the Association would not normally comment. The Association can see advantages to both. It may be that in the first instance a non-statutory code should be developed by service providers taking into account the views of users (through representative organisations) and only if this is assessed as failing to provide appropriate consumer protection should a statutory scheme be considered.

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

Please give reasons for your answer.

See answer 20.

C. QUALIFIED ONE-WAY COST SHIFTING

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

Please give reasons for your answer

Again members of the Association have limited current experience of the factors influencing pre-litigation decisions but we consider it at least possible that potential litigants will be 'encouraged' to raise proceedings because of the removal of an element of uncertainty about costs.

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

(i) Pursuers of actions

The Sheriffs' Association does not consider that it has access to sufficiently current data to allow an informed response to any parts of this question or to questions 24 to 26.

and why, and what would they look like

Comments

(ii) Defenders of actions

Comments

and why, and what would they look like

Comments

(iii) You or your organisation

Comments

and why, and what would they look like

Comments

(iii) Other organisations:

Comments

and why, and what would they look like

Comments

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

See above

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

Comments

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

See above.

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

Comments

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

See above

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

Please give reasons for your answer.

The Sheriffs' Association agrees with the justification for this approach set out by Sheriff Principal Taylor at paragraph 78 of Chapter 8 of his report. The Wednesbury test is readily understood by judges.

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

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

We do not consider that the Association is well placed to comment on this question or questions 29 and 30.

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

See above

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

a) The general level of claims?

See above

b) The general level of litigation?

Comments

c) The trajectory of claims, and settlement rates?

Comments

d) Pursuers of actions?

Comments

e) Defenders of actions?

Comments

f) Pursuers solicitors?

Comments

g) Defenders solicitors?

Comments

h) Insurance companies?

Comments

i) Case management companies?

Comments

j) The courts?

Comments

k) Scottish Legal Aid Board?

Comments

l) The general public?

Comments

m) Others?

Comments

D. COUNSEL'S FEES

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

Please give reasons for your answer

This would provide clarity for potential litigants

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

Please give reasons for your answer

Yes as this already applies for solicitors

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

Please give reasons for your answer

This would provide for a level playing field. We do not consider that members of the Association have sufficient recent experience of the economic realities of the businesses of Solicitors or counsel or of the economic pressures experienced pre-litigation by potential litigants to comment meaningfully on question 35.

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

Please give reasons for your answer

Comments

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

a) Pursuers of actions?

Comments

b) Defenders of actions?

Comments

c) Solicitors?

Comments

d) Solicitor advocates?

Comments

e) Counsel?

Comments

f) Scottish Legal Aid Board?

Comments

g) Others?

Comments

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

A. MULTI-PARTY ACTIONS

Option 1

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

The Association takes the view that the issues raised in questions 36 – 45 are intended to allow the Government “to be clear about the overriding policy objective that it should be pursuing”. The Association does not normally comment on such policy issues. The time available for consultation is relatively short and this area may benefit from some further consultation once the overriding policy objective has been identified.

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

Comments

Option 2

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

Comments

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

Comments

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

Comments

Option 3

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

Please give reasons for your answer

Comments

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

Please give reasons for your answer

Comments

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

Comments

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

Comments

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

Comments

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

Please give reasons for your answers.

Comments

B. AUDITOR OF COURT

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

a) The Auditor of the Court of Session?

Comments

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

Comments

c) Pursuers of actions?

Comments

d) Defenders of actions?

Comments

e) Solicitors?

Comments

f) Counsel?

Comments

g) Scottish Legal Aid Board?

Comments

h) Other?

Comments

Please give reasons for your answers

Comments

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

a) Sheriff court auditors?

Comments

b) Independent practitioners who currently hold commissions as auditors?

Comments

c) Pursuers of actions?

Comments

d) Defenders of actions?

Comments

e) Solicitors?

Comments

f) Counsel?

Comments

g) Scottish Legal Aid Board?

Comments

h) Other?

Comments

Please give reasons for your answers

Comments

C. CONDUCT OF LEGAL REPRESENTATIVES

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

Please give reasons for your answer.

Comments

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

This would encourage focus on the real issues involved in a case and in settling cases without unnecessary work and expense.

CHAPTER 3: LEGAL AID PROVISIONS

A. LEGAL AID FOR LEGAL PERSONS

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

Please give reasons for your answer.

These are essentially issues of policy and a matter for the executive branch of Government

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

Please give reasons for your answer.

See above

B. Funder of Last Resort

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

Please give reasons for your answer

See above

CHAPTER 4: ASSESSING THE IMPACT

EQUALITY

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

The Association does not consider that it can comment on this.

BUSINESS AND REGULATION

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

The Association does not consider that it can comment on this.