

SUBMISSION TO LORD GILL'S ENQUIRY

SUBMISSION BY

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BACKGROUND

1973 – 1976

Trainee Law Accountant, Law Society of Scotland Legal Aid Central Committee,
Drumsheugh Gardens, Edinburgh

1976 -1979

Law Accountant, Nightingale & Bell, Solicitors, Alva Street, Edinburgh

1979 – 2004

Sole Proprietor and later Senior Partner at Mullans, Law Accountants, Edinburgh and
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2004 – PRESENT

Consultant Law Accountant at Mullans Law Accountants, Livingston and Proprietor
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OTHER APPOINTMENTS (CURRENT)

Vice Chair of the Association of Independent Law Accountants
Current Member of the Professional Remuneration Committee of the Law Society of
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SPECIAL AREAS OF INTEREST

**JUDICIAL ACCOUNTING,
APPROACHES TO COSTING LEGAL SERVICE PROVISION
THE FUTURE OF CIVIL LEGAL AID AND ADVICE & ASSISTANCE**

Foreword

This paper has been prepared as a response to the Consultation Paper issued by the Scottish Civil Courts Review in November 2007. Although I am associated with a number of business entities and other bodies at present I wish to make it clear that the views expressed in this response are my own.. I view the current Review as an excellent opportunity of providing a structure for the operation of the court system for many years to come. The foreword in the Paper specifically invites comment and suggestions and I have responded accordingly. Given that my expertise is very much in the area of costing and funding I have restricted my responses to this field. In this connection all of the comments, observations and suggestions in this response reflect the matters raised in Chapter 3 of the published Paper. This Inquiry must take an overview in relation to any changes suggested and I would accept that the issue of Cost and Funding can not be looked at in isolation. However, I did not feel that it was appropriate that I should direct my response towards any other area

Response

Part I

Direct Response to Questions for Discussion posed on Page 25 of the Paper

Part II

General Observations, Comments and Suggestions arising from this Response and issues raised within the Consultation Paper

Part I

Response to Questions posed in Chapter 3 of the Consultation Paper

Question:- What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures

Little hard evidence exists in relation to this aspect. However, looking at the situation over the last 15 years it is clear that total expenditure figures, both gross and recoverable have risen disproportionately when compared to the increase in sums awarded. To a great extent the factors causing this phenomenon have been identified within the Consultation Paper although it is my belief that the relative impact of these various factors is not fully understood by many of the key stakeholders. Taken in chronological order the key factors impacting upon the growing disparity between sums awarded and cost of litigation are:-

- (a) The impact of the Legal Aid (Scotland) Act 1986 which brought about the Scottish Legal Aid Board and a harsher regime in relation to the definition of “Net Liability of the Fund”**
- (b) An increase in Fees charged by Counsel at a rate in excess of either price inflation or wage inflation**
- (c) The reduction in the availability and use of the civil legal aid system caused by a virtual freezing of fee rates in the period from 1992 to 2003**
- (d) The removal of controls on the Solicitor and Client Accounting rates introduced in 1992**
- (e) A tendency to increase the use of third party involvement (Expert Witnesses, Professional Witnesses, Background Reports) in various types in litigation and particularly in Professional Injury Matters**
- (f) An increase in the number of lapsed days per cause, at least until the introduction of Chapter 43 procedures**
- (g) The introduction of “new” judicial fees into both the Court of Session Table of Fees and the Sheriff Court Table of Fees (Block Judicial) and the revisal of all judicial rates introduced with effect from 1st December 1998 resulting in certain fees being increased by sums well in excess of inflation**
- (h) The introduction and increasing use of Speculative Fee Agreements enabling agents to charge a premium on recoverable fees of up to 100%**
- (i) The failure to move the privative limit for proceedings in the Court of Session in line with any of the inflationary indices thereby increasing the scope for litigation in the Court of Session**

- (j) An increasing use of Additional Fee applications and awards on fee uplift at substantially higher figures than the previous norm.**
- (k) A greater awareness throughout the legal profession regarding fee recoverability and how to operate the judicial structures in a more advantageous basis**
- (l) An increasingly liberal interpretation of the terms of Rule 42.10.1 in the Court of Session on the definition of “reasonable” as the concept of economy was abandoned**

(a) The impact of the Legal Aid (Scotland) Act 1986 which brought about the Scottish Legal Aid Board and a harsher regime in relation to the definition of “Net Liability of the Fund”

Prior to the inception of the Scottish Legal Aid Board the Regulations governing the recovery of principal sums and expenses were found within the Legal Aid (Scotland) Act 1967. This Act together with a number of directives issued by the Law Society of Scotland Legal Aid Central Committee governed the way in which practitioners providing civil legal aid in Scotland were paid and also the basis upon which the Legal Aid Fund could require successful assisted person to re-imburse the Legal Aid Fund in relation to recovered Principal Sums, Capital Sums, Expenses and other contributions. Without wishing to go into great detail regarding the various changes made it is difficult to argue with the proposition that the Scottish Legal Aid Board, acting under the powers contained within the 1986 Act require a greater proportion of the recovered funds to be refunded to the central fund than was the case under the previous regime. The net product of this has been to disincentivise the use of the legal aid scheme for certain client groups. These groups have then purchased their legal service provision from the private sector at a higher gross cost thereby increasing the differential between cost of provision and cost of recovery.

(b) An increase in Fees charged by Counsel at a rate in excess of either price inflation or wage inflation

Unlike the Solicitor branch of the profession members of the Faculty of Advocates do not operate against a particular menu of fees. Although many years ago a “judicial table” of fees recoverable by Counsel did exist the modern trend is to assess each item on its merits. In terms of the Faculty Scheme of Accounting 2002 all fees issued by Counsel are rendered to Agents on a Solicitor and Client/Client paying basis and the rendering of such a fee does not automatically entitle the party incurring such a fee to recover the full value on a judicial basis. The fact that fees payable to Counsel are rendered on a Solicitor and Client basis, without the constraints placed upon any inflationary responsive judicial table, has tended to result in these fees climbing at a higher rate than the judicial norm. The absence of any robust information on the rate of fees charged and the rate recovered in relation to services supplied by Counsel is a hindrance to identifying the extent to which this phenomenon has impacted upon the accelerating cost of litigation. However, the statistics published by the Scottish Legal Aid Board in relation to the overall cost of Agents, Counsel and other Outlays in litigation do point to this aspect and make interesting reading.

(c) The reduction in the availability and use of the civil legal aid system caused by a virtual freezing of fee rates in the period from 1992 to 2003

It is not in dispute that the fee value of work undertaken under the civil legal aid system in the above period did not keep pace with inflation. The original 1949 Legal Aid (Scotland) Act introduced a concept whereby practitioners undertaking civil legal aid work were remunerated at the market rate less 15%. (later reduced to 10%). The concept behind the 15% deduction was not an acceptance of the fact that state-funded work should be remunerated at a lower rate. However, given the guaranteed source of funding and the relative ease of payment it was felt that some kind of discount should apply. This position prevailed for a period of in excess of thirty years and although the civil legal aid payment structures were amended on several occasions the statutory reduction principal remained until the mid 1980's. At that time specific "legal aid" Tables of Fees appeared for the first time and the link between private client funding patterns and state funding rates was severed. During the subsequent period and particularly after the inception of the Scottish Legal Aid Board in 1987 the differential became more marked. The virtual freezing of rates during the eleven year period commencing in 1992 has to be examined in contrast with the parallel lifting of the constraints upon private client rates which also took effect in 1992 and caused a movement in the opposite direction. This, in conjunction with the refreshing of judicial rates with effect from 1st December 1998 has caused an insidious reduction in the attraction of utilising civil legal aid, particularly in larger actions and actions where there is a potential for recovery for expenses. Although no exact measurement is possible due to the way in which the respective Tables of Fees have diverged since 1985 it would be fair to say that the civil legal aid Table has approximately 40% of the value of the standard judicial Table and possibly no more than 30% of the value of typical private client rates. During this period and certainly until 2003 financial qualification rates, both income and capital, did not keep pace with inflation thereby further reducing the availability of civil legal aid to the population generally. A number of measures have been introduced during the last five years seeking to address the availability issues although the fee differential remains wide and continues to grow.

The net impact of the shifting position of civil legal aid has been to reduce the number of applications under the civil scheme and some of this work has simply shifted into the private sector. Particularly in situations in which the service provider is confident that a successful outcome can be achieved, at least in the area of expenses, there is no perceived benefit in applying for civil legal aid. As a consequence of this a greater number of litigations are undertaken at the higher private rate and a reducing number of litigations are performed at the much lower civil rate. In addition, where private funding is involved the need for a "safety net" of civil legal aid is removed. The matter then proceeds with an increased pressure to resolve on a basis involving recovery of expenses thereby increasing overall cost to both parties.

(d) The removal of controls on the Solicitor and Client Accounting rates introduced in 1992

Until 1992 the fees charged by Agents providing legal services in civil litigation, special bargains excepted, were subject to the constraints imposed by the regulated judicial Table of Fees. The change introduced in 1992 effectively swept away all such controls except insofar as they related to party and party awards of expense. An obvious product of this change and one which has been referred to in the Consultation Paper is that whilst Solicitor and Client Fees rose at an accelerating rate (effectively applying market forces) the sums recoverable were restricted in terms of the regulated judicial Tables of Fees. The disparity grew throughout the 1990's attracting increasing criticism from successful litigants and the pressure exerted resulted in the 1998 review. Although the 1998 review to the Civil Table of Fees introduced a partial correction into the system it did not fully restore the situation to the pre 1992 position. Effectively, the relationship between Solicitor and Client and Party and Party expenses was severed by the 1992 change. Whereas previously the difference between the two scales could be defined by identifying items of work deemed to be solely payable by the client, the position from 1992 onwards has been that the difference between the two rates requires to be measured both in terms of rate and work performed. The product of all of this is that the different Tables have been developing at different speeds with pressures on overall cost.

(e) A tendency to increase the use of third party involvement (Expert Witnesses, Professional Witnesses, Background Reports) in various types in litigation and particularly in Professional Injury Matters

The growing cost of litigation is often perceived as being linked to a growing cost in the provision of the services of a solicitor. However, particularly in the case of proceedings in the Court of Session, the majority of the increased cost is attributable to increased outlays rather than increased fee rates. In relation to the employment of Expert Witnesses the dynamics are particularly interesting. Four main reasons can be identified for the increased cost:-

- (i) A greater number of experts are now involved with a much increased use of experts in the area of services, employment and accident reconstruction. As the medical profession has become increasingly specialised, practitioners have also tended to employ an increasing number of experts in circumstances in which a general consultant may have been employed in the past**
- (ii) The number of reports instructed has now increased with a much greater possibility of recovery of expense for “intermediate” reports particularly in circumstances in which the instruction coincides with a judicial Tender or even an extra-judicial offer. The test of economy that prevailed until 30 years ago tended to deem such Reports, Consultations and contacts generally to be non-recoverable expenses. In addition the Legal Aid Authorities would not grant sanction for such work. These expenses are now being added to ‘both sides of the Account’ and increasing overall expense. However, from the perspective of successful litigants they will argue, with justification, that such work is necessary.**
- (iii) The length of Reports has increased enormously. Medical Reports tend to provide much more information on the background circumstances and “scene setting”. Care Reports and Employment Reports are particularly long and attract very large fees for revisal. It is not uncommon to encounter individual Care Reports of over 50 sheets in length or a situation in which the Care Reports in the case extend to a total of more than 100 sheets. In such circumstances the recoverable judicial fees for this aspect alone can be the equivalent of all of the main ‘procedural’ fees in the Account of Expenses and can considerably increase the unsuccessful party’s exposure to expense.**
- (iv) The sums paid to Expert Witnesses have also increased at a faster rate than any of the inflationary indices. A number of businesses have emerged trading specifically within the area of the provision of expert witnesses and support services. These operations are much more ‘fee aware’ than some of their predecessors and will often charge fees at the maximum rate provided for within the fee structures.**

It must be recognised that the four factors listed above do not necessarily increase the cost of litigation to a successful party. Provided the experts utilised are properly certified and the work undertaken satisfies the Auditor of Court at any subsequent diet of taxation then no additional cost accrues to a successful party. However, the increased cost burden does add to overall expenditure in the form of the judicial expense payable by an unsuccessful opponent. Furthermore, the ‘threat’ of an ever increasing financial penalty in this area can change the dynamics of an action. An unsuccessful opponent may feel under more pressure to settle at an earlier stage of an action if they are aware that a large number of experts have been ‘lined up’ for the Pursuer. Particularly in lower value action they will be aware that the additional cost involved may be disproportionate to the Principal Sum at stake. Equally, a successful Pursuer may feel under more pressure to accept an offer made at an intermediate stage, particularly if that offer is formulated as a Tender. The financial penalty of not accepting may outweigh any judicial award made when the added burden of meeting post-tender third party provider expenses is taken into account. This aspect can be particularly relevant in Speculative Cases or cases supported by BTE Insurance where the support may be conditional upon offers of a particular nature being accepted.

(f) An increase in the number of lapsed days per cause

Although the expense of running litigation varies enormously from provider to provider there is an identifiable correlation between the time taken to provide a service and the cost to the client and to the paying party. To a certain extent 'Block Fees' reduce the impact of these variations. The Scottish Legal Aid Board introduced Block Fees as the sole method of accounting certain types of proceedings within the Sheriff Court arena in 2003. Their thinking was that this introduced a system of 'soft-capping' of fee structures and therefore incentivised efficient case management by providers. Although Block Fee Accounts are the preferred method of preparation of Accounts of Expenses in both the Court of Session and the Sheriff Court, they are only compulsory in Summary Cause cases and in Sheriff Court Ordinary Causes and Court of Session cases an option to charge for all work on a detailed basis also exists. What this means is that in the longer cases overall cost of litigation increases, particularly in the case of the unsuccessful party. As cases lengthen then the number of Expert Reports instructed and the number of meetings, consultations, letters written, documents considered and the like will tend to increase with a consequent increase in the overall cost. Insurers recognise this phenomenon and will often measure the performance of their own providers by recording the number of days taken to perform a particular task or to achieve a specific goal, whether settlement or some other measurable outcome. The introduction of the New Rules for Personal Injury actions in the Court of Session (Chapter 43) has addressed this to an extent by introducing specific timetables for various parts of the procedure and by improving upon the opportunities for parties to convene at intermediate stages in the cause. However, some of the benefits gained have been eradicated or at least eroded by changing patterns of behaviour in the case of service providers. It is certainly the case that many actions now settle shortly after the Pre-Trial Meeting or that matters discussed at the Pre-Trial Meeting act as a catalyst for subsequent settlement of the matter prior to Proof or Trial. However, in the five years since this procedure was introduced the way in which parties prepare for Pre-Trial meetings has changed with an increasing emphasis on ingathering updated Expert Reports and holding Pre-Proof Consultations in the period prior to the PTM taking place. In expenses terms the product of this has been a reducing benefit in terms of expenses 'saved' whether by the paying party or by the successful party in terms of irrecoverable fees and outlays. It is most certainly the case that the introduction of the Chapter 43 Rules has reduced cost and delay overall although it is perhaps the case that the primary benefit has been delivered to the administration of the court in terms of time management rather than in cost savings to the participants.

(g) The introduction of “new” judicial fees into both the Court of Session Table of Fees and the Sheriff Court Table of Fees (Block Judicial) and the revisal of judicial rates introduced with effect from 1st December 1998 resulting in certain fees being increased by sums well in excess of inflation

As is mentioned in the Consultation Paper a new fee regime was introduced into both Court of Session Accounts and Sheriff Court (Ordinary) Accounts on 1st December 1998. This was further reinforced in June 2002 when new rules were introduced for Summary Cause and Small Claims Actions (now further extended in January 2008) followed up by the introduction of a special Personal Injury procedure and scale reflecting the 1998 changes in other courts. The 1998 changes were two-fold in that they increased the actual value of certain fees by sums well in excess of any inflationary index. At the same time ‘new’ fees were introduced designed to reflect procedures introduced to reward networking between the respective agents and their support teams. Taking account of fees introduced around this period but not necessarily on 1st December 1998 Agents were rewarded for the first time for work undertaken “in contemplation of proceedings being raised”, for work undertaken in limiting the scope of a hearing and for participating in settlement discussion undertaken with a view to settlement even if no actual settlement emerged. The concept behind all of these fees was to increase the number of opportunities for parties to convene on settlement and to deliver a consequent saving in terms of raw overall cost and use of court time. However, whether these goals have been achieved is difficult to measure. It is also the case that the way in which this work is measured and rewarded varies enormously. For example, many Sheriff Court Auditors will allow the “Pre-Litigation Fee” in an Account of Expenses in circumstances in which there has been little or no contact between parties in the period prior to proceedings being raised. When this occurs the product of this approach is a straightforward increase in the cost to the paying party when compared to the situation that prevailed previously without any corresponding benefit elsewhere within the process accruing to either opposing parties or to court administration.

(h) The introduction and increasing use of Speculative Fee Agreements enabling agents to charge a premium on recoverable fees of up to 100%

It is important when examining the use of Speculative Fee Agreements to differentiate between such agreements and the ability of agents acting on behalf of successful parties to charge a rate from the outset that is higher than the judicially recoverable equivalent. Whereas the higher rate is recoverable irrespective of whether a successful outcome is achieved, speculative fees are only payable in circumstances in which the outcome is successful from the perspective of the instructing party. The new Table of Fees was introduced into the fee rates enables solicitors to engage on the basis of an uplift of up to 100% on judicially recoverable items only. Demonstrably, the introduction of such a system increases the pressure upon the service provider to produce a successful outcome given the fee charging relationship. Whether this then impacts upon the way in which the service is delivered or the extent to which the provider sources third party support is an unknown factor. I am not aware of any comparative research in this field. However, in addition to adding to overall cost to the successful party in the form of a fee premium it may be the case that the provider also feels disposed to make a greater use of support services in the form of an increasing reliance on Counsel and Experts. These services do not form part of the uplifted portion. Equally the availability of this service does address a previously unmet need insofar as it enables some 'middle income' litigants, without the necessary resources, to access the court system to obtain access to the justice system in circumstances in which they would previously have been denied any such outcome. The net effect of this is to increase the total judicial market and also to increase the individual cost of cases using this facility.

(i) The failure to move the privative limit for proceedings in the Court of Session in line with any of the inflationary indices

The preceding paragraphs address a number of issues and developments impacting upon the cost of litigation to both clients and paying parties alike during the period from around 1985 through to the present day. In January 2008 the first revisal to the privative limit for some 20 years was introduced with the limit for proceedings in the Court of Session being increased by 233% and an increase of 300% being introduced in relation to Small Claims procedure. Whether such a drastic increase in the limits was appropriate is a matter for others to address elsewhere within the Consultation Paper. In terms of issues of cost and expense what can be said is that the failure to increase those limits during the proceeding twenty years most certainly increased the attractiveness of litigation as a conduit for achieving an outcome. Equally given that inflationary pressures during the first half of the period in particular increased the value of claims by figures of well over 100% the impact of this was to cause a shift in the balance of litigation from the lower courts to the higher courts. In cost terms the difference is then accentuated by the choice of forum as there is an undeniable increase in overall cost when litigation moves through the various stages from Small Claims through to the Court of Session¹.

¹ See Scottish Legal Aid Board Annual Report 2006-2007 3.21

(j) An increasing use of Additional Fee applications and awards on fee uplift at substantially higher figures than the previous norm.

Additional Fees are not a recently introduced feature of the fee scales. However, a number of revisals have taken place over the last twenty years or so and taken collectively they have further increased the overall cost of litigation. During this period the two main changes that have been introduced are:-

- (1) The removal of a statutory maximum of 50% in Sheriff Court Summary Cases**
- (2) The widening of Rule 42 in the Court of Session to allow the Auditor of Court to determine whether an Additional Fee should be granted**

In addition to these changes it is also the case that Additional Fees have tended to increase in size over the period, both in percentage terms and also in terms of overall sums awarded. Although each application for fee uplift is treated on its merits it is certainly the case that a number of fee uplifts of 150% or more have been granted during the last twenty years whereas previously uplifts of this magnitude were rare. It is also the case that Agents are showing an increasing propensity to seek fee uplifts, on many occasions following upon suggestion by their Law Accountants. Whereas previously it was held that an application for fee uplift required to be made during the currency of proceedings, it is now competent in Court of Session proceedings to seek to uplift fees at any time prior to the commencement of a Diet of Taxation. What this means is that previously the realisation that the overall cost of running an action justified a fee uplift may have come too late in the day. It is now possible to apply for such an uplift armed with information from Law Accountants on the overall cost to the client.

As regards the reason for fee uplifts being granted at an increasingly large amount this may be due to the removal of the Solicitor and Client scale from the judicial Tables of Fees in 1992. As part of the overall assessment of what is reasonable by way of fee uplift the court or the auditor will normally require the party making the application to supply information on the Solicitor and Client charge out rate. This is undertaken with a view to ensuring that the overall sum awarded does not exceed the Solicitor and Client cost thereby resulting in a windfall to the receiving party. The fact that since 1992 Solicitor and Client rates have risen more steeply than court rates and that constraints on client paying agreements have been removed has tended to increase the potential for awarding higher sums by way of recompense.

(k) A greater awareness throughout the legal profession regarding fee recoverability and how to operate the judicial structures in a more advantageous basis

A by-product of the reduced importance of the civil legal aid system has been a need to be more “fee aware” when acting in civil court proceedings. Particularly in “No win – No Fee” arrangements it is very important to ensure that fee recovery streams are secured and Agents are now much more knowledgeable in this area than previously. At the time when it was common practice to secure a grant of legal aid prior to litigating any adverse outcome was protected in that the agent acting would then be paid at legal aid rates (market less 10%) for all work undertaken. Furthermore payment was made at a rate only slightly below the private market equivalent. However, the demise of civil legal aid and the erosion of civil legal aid rates have resulted in the profession becoming much more aware of which fees are judicially recoverable and also aware that, as part of a settlement process, concessions may be achieved in the area of expenses. With civil legal aid rates representing only 40% or so of the equivalent judicial rate Agents will normally regard civil legal aid cover as a version of ATE insurance in so far as it affords partial cover for fees and will also cover some but possibly not all outlays. Against this background it is essential that Agents undertake their work in such a way that it will be judicially recoverable thereby increasing overall judicial expenses. It is interesting to note that sums paid out by the Scottish Legal Aid Board in the period from 1995 onwards indicate a substantially higher average cost in Reparation cases, particularly in payments to Counsel and to Third Party providers. A great deal of this increase can be attributed to the fact that a much larger percentage of cases are now remunerated through recovered expenses and/or principal sums. The recovered amounts fund the payment and also result in the apparent payment by SLAB being funded at a much increased rate. This is one of the reasons for the increased average account size in legal aid cases in the period between 1992 – 2003 when fee rates were frozen. The Scottish Legal Aid Board and the Executive continually argued that there was no need to increase fee rates as average account values were moving upwards. However, the bulk of the increase could be attributed to a fairly narrow area of work. In traditional areas of work such as Family Law the freezing of fees was very real and impacted upon many providers.

(l) An increasingly liberal interpretation of the terms of Rule 42.10.1 in the Court of Session on the definition of “reasonable”

For the last 30 years we have had a changing interpretation of the judicial test on recoverable expenses. Until then expenses were recovered on a test of economy and a fairly severe approach was adopted on the type of work that could be regarded as judicially recoverable, both in terms of nature and rate. Over the last 30 years recoverability has been judged against a test of reasonableness and gradually over this period the test has been interpreted in a less demanding way. In addition to introducing new fees to cover aspects previously regarded as bad charges such as extra-judicial offers and work undertaken prior to any proceedings being raised, some of the existing attitudes such as the “2 consultation rule” have been removed. The net result of this is to provide for a greater percentage of recoverable work per cause. However, agents will also undertake more work generally in the knowledge that these services will be recoverable provided a successful outcome can be achieved. This may be one explanation of the increasing length of Proofs (where they do occur) caused by a much higher level of preparation and third party involvement.

Question – To what extent does the cost of litigating deter people from pursuing or defending cases in court?

As with most of the questions posed within the Consultation Paper little evidence exists to show whether the client group generally are being deterred from involving themselves in court cases due to cost factors. There can be no doubt that costs have increased disproportionately over the last 15 years or so although the dynamics may be changing and some of the processes involved have now reached maturity. What is interesting to note is the extent to which applications for legal aid fall away to a disproportionate level in situations in which a contribution is required from the Assisted Person. Although the official SLAB figures on the percentage of the population entitled to legal aid (both free and by way of a contribution) are at a variance with figures sourced elsewhere what is clear is that as the potential cost of proceedings increase there is a reduced take up and it would be reasonable to assume this factor also occurs, probably to an increasing extent, within the constituency who do not qualify for civil legal aid due to excess means or capital.

Access to the court system can be funded in a number of ways:-

- **Obtaining free legal aid**
- **Obtaining legal aid on a contributory basis**
- **Through BTE insurance**
- **Through ATE insurance**
- **Through “No win – No Fee arrangements”**
- **Using a Speculative Fee Arrangement**
- **Through Other 3rd Party Funding such as Trade Union Cover**
- **Using Private Funding (own means)**
- **Using “Claims Support”**

With the exception of using personal means the remainder of the options all involve some kind of Third Party involvement and most will involve some kind of diminution of the sum ultimately recovered whether by advance premium or subsequent set-off from Capital/Principal Sums. It is reasonable to assume that most potential litigants adopt a commercial view when determining whether to become involved in court proceedings. Demonstrably those with full funding support find the prospect of court proceedings less financially threatening than those without such cover. Some of the funding options are only available in situations in which the potential Third Party funder can be reasonably assured of a successful outcome. For example BTE insurers will often insist upon providers indicating that there is a probability of success before agreeing to fund litigation on behalf of a potential Pursuer. On occasions BTE insurers will enter into “bagatelle” arrangements whereby they will fund a settlement or part of a settlement on the basis that there is no “business case” for allowing the litigation to proceed. It would be reasonable to assume that someone conducting litigation on a privately funded basis may discontinue litigation when faced with a similar set of circumstances. This also raises interesting questions as to the commercial pressures applying to Agents and to Third Party funders undertaking work on a speculative basis when similar circumstances occur.

It should also be noted that some of the funding options are only available in certain circumstances. Agents will not accept instructions on a “No Win-No Fee Basis” or on a “Spec. Fee Basis” in circumstances in which there is no or little prospect of a pecuniary recovery whether through Principal Sum or Capital Sum. What this means is that someone wishing to pursue an action with good prospects or recovery will have a greater number of funding options open to them than someone proposing to defend the same action! In the case of many personal injury cases and most motor claims insurance cover will be available to potential defenders. However, if the civil legal aid system is to continue to have a decreasing importance in supporting potential litigants then any replacement must not discriminate unfairly against any particular group.

Question – Does the current system of levying court fees affect access to justice. If so, how and in what kind of cases?

The issue of court dues has become much more contentious in recent years, particularly since the introduction of Fee Exemption criteria in 2002. In the case of legally aided litigants the answer to this question is clearly in the negative as the new rules relieve them of all liability for same. The group who are most critical of court dues are firms and support organisations funding work on a speculative basis as the funding to meet court dues requires to be found from other resources. Undoubtedly the need to advance such sums causes difficulty and results in a real cost to such providers. Where this requirement causes particular difficulty is in personal injury cases running for a substantial period of time. In situations in which the matter calls in court on procedural matters and runs to full Proof it can be necessary for such providers to find several hundred pounds or more by way of funding for court dues.

Whether this requirement impacts upon access to justice is another matter. The cost of court dues is not the only cost impacting on such providers and given that the rules now provide for Speculative agreements allowing for uplift in fees in successful proceedings then it could be argued that recompense is available elsewhere to cover the cost of carrying such outlays and to cross-subsidize.

Given that this question has been asked within the Consultation Paper it is appropriate to consider the whole question of Fee Exemption criteria and application of benefit. In general terms Fee Exemption is enjoyed by those of limited means, not exclusively legally aided and by government. In both cases, given that court dues are payable thereby supplying a source of funding to the courts (something over 50% of total cost) then it makes little sense to fund one part of the justice budget, whether legal aid or internal service provision, to offset the cost of another department working from the same core budget (Justice). However, in situations in which there is a successful outcome it is often the case that the ultimate beneficiary of Fee Exemption is a Third Party well able to meet the expenses involved. For example in a Personal Injury action involving Assisted Person A litigating against Privately Funded B plc it is the case that A will not incur fee fund dues. If Privately Funded B plc are ultimately found liable and incur a further liability for expenses then the benefit in not incurring court dues is transferred to and enjoyed by B plc or possibly by their Insurers C.

One way of addressing the concerns of those firms directly funding court dues and dealing with the inconsistencies of the Fee Exemption system would be to allow for a system of Fee Deferment rather than Fee Exemption. In cases in which there was no ultimate financial recovery then the Fee Deferment would convert into an exemption. However, in the event of a financial recovery, whether Principal Sum, Capital Sum or Expenses the Fee Deferment would be lifted upon funds being received by the successful party.

Question - Are the current rules for recovery of judicial expenses satisfactory?

To a great extent the rules on recovery of expenses mirror those that exist in neighbouring jurisdictions such as England and Ireland. As a general principle expenses follow success and ultimately the court has a wide discretion on the extent to which an award of expenses can be made ranging from awarding no expenses or awarding expenses on a reduced scale through to awarding expenses on a Solicitor and Client/Client Paying basis and, in terms of some very recent decisions, granting an uplift on the Client paying scale.

As a general principle the ethos of expenses following success is sound. However, the vast disparity in expenses and also the imbalance between party and party expenses and solicitor and client expenses is a source for concern.

Essentially there are two competing goals in the area of expenses being the desire to ensure that a successful litigant should be entitled to recover their reasonable expenses thereby avoiding the spectacle of pyrrhic victories and, secondly, the desire to ensure that there is some kind of proportionality between the value of proceedings and the cost to participants

Trying to create a better expense recovery system is difficult. The new Summary Cause Table introduces a scale based on value of settlement and this certainly introduces a concept of proportionality in relation to value of sum sued for and settlement terms. The *ad valorem* principal also applies to the recently introduced Pre-Action Protocol (PAP) fees in relation to the agreement between the Law Society of Scotland and the Insurance Industry (Scottish Claims Managers Forum) covering pre-litigation settlements. The difficulty about introducing such a system into the judicial scale is that sometimes it achieves the opposite of the intended result. Although, on the face of it, an expenses recovery proportionate to the sum sued for may appear to introduce an element of fairness into the whole process, such a system creates a very uneven 'playing-field' in so far as it relates to the ability of either party to continue to fund proceedings. It is undeniable that in many lower value cases and some mid value cases (say up to c£50000) it is often the case that net expenses will exceed the net award. This is a factor that troubles insurers and other funders who identify the apparent unfairness of the system. However, if some kind of proportionate award system is introduced then this introduces a 'sea-change' into the dynamics and tends to favour those with "deep pockets" In the same way that an award of expenses or a total expenses bill in excess of the principal sum may be perceived as being a waste of resources, if the potential loss on recovered expenses exceeds any potential Principal Sum then an equally unfair principle is imposed with poorly resourced litigants being outlasted by well funded Opponents. Although the principle introduced into Small Claims expense awards in January 2008 may be sound for very small value claims where it is in the interests of the courts to discourage use of the court system generally, imperatives change quickly and it would be considered unreasonable by many to deny potential access to the justice system to those seeking modest four-figure sums if a well financed Defender could effectively see them off in a 'war of attrition' relating to legal costs and availability of funding. The notion of fixing expenses at a proportion of the sums awarded has its attractions. However, although this may increase the

correlation between awards and expenses (a concept unique to the new Small Claims Rules at present) it also reduces the correlation between the amount of work done and procedure generally and the ultimate liability of the paying party. At the same time the opportunity for reasonable recovery of properly incurred expenses is diminished which changes the dynamics of court proceedings and favours the well funded litigator to the detriment of the less well funded.

Question - Are the current rule arrangements for the taxation of judicial accounts of expenses satisfactory?

The simple answer to this question is no! However, it is important to ensure that any changes proposed preserve some of the excellent qualities of the taxation system currently available

There are various problems with the way in which the judicial recovery rules operate and both recovering and paying parties have good grounds to be dissatisfied with the way in which the system operates. However, there are many aspects of the current rules and tests applied that are positive processes in ensuring that matters of expenses are dealt with having regard to fairness and equity and any major changes in the approach to expense recovery must ensure that these positive qualities are not lost as part of the reforming process.

Looking at the position and identifying both positive and negative aspects the following points occur:-

Negative:-

- In can be disproportionately expensive
- It is lengthy
- The guidelines are vague and ill defined
- A paying party has insufficient information on the potential expenses payable at intermediate stages of the proceedings
- It is inconsistent within the Sheriff Court arena
- There is a lack of transparency
- It can be abused

Positive

- It is independent
- It produces an outcome
- It is proportionate to the work undertaken in cost
- It provides a platform to both parties
- It is understood by those involved within the system
- It provides an opportunity to recover proper expenses

As regards the cost of taxation again the question of proportionality is relevant. Typically a Law Accountant will charge between 2 and 3% of the raw value of the judicial claim for expenses as the fee for preparing a full judicial Account of Expenses. The cost of having judicial Accounts of Expenses taxed was increased from 4% to 5% of the value of the Account as lodged in 2007. In addition, parties proceeding through a negotiation stage to a full Diet of Taxation may well be confronted with a further charge of between say 7% and 10%+ of the gross fee value in meeting the cost of negotiation and representation at the diet. Taken collectively the cost of proceeding to a full taxation of expenses will incur a further 15 – 20% in expenses although much of this cost will fall upon the paying party and on many occasions the successful party is able to recover all of the expenses of the various stages of taxation procedures. Although even 15% of the gross value of the Account of Expenses is undoubtedly a lot of money it must be

borne in mind that many of the claims worth up to £15,000 or even more are settled on the basis that the recoverable expenses will exceed the Principal Sum. Therefore, given the relative importance to the Pursuer/Client it may be regarded as essential that a mechanism exists for recovery of all expenses (Agent's Fees, Counsel's Fees and Third Party Provider charges). The fact that these expenses (costs) may exceed the sum awarded or agreed should not, in itself be regarded as a reason for discontinuing a system of expense appraisal and taxing. After all, if the expenses award has the potential to exceed the award of Principal Sum then it is unsurprising that Agents would wish to devote adequate resources into the taxation/recovery process. Undoubtedly, there are strategies available to reduce the cost of the procedure or to change the way in which liability for the cost of taxation process is apportioned with a view to incentivising settlement proposals and reducing the use of taxation procedures.

On the issue of length it is often the case that Accounts of Expenses can be 50 or more sheets long in bigger cases. Indeed in some of the larger Court of Session cases recently Accounts of more than 150 sheets have been encountered with Points of Objection of similar length. This results in a lengthy and cost consuming procedure, often without a particularly satisfactory outcome from the perspective of either party.

The ways in which taxations are conducted vary enormously from court to court and, in the Sheriff Court, procedures vary widely with some Auditors allowing work that is disallowed by colleagues elsewhere. This can cause confusion and also leads to geographic differences in accounting practices and, as a consequence, the cost of litigation.

The fact that a losing party in a litigation may be confronted with claims for expenses for items of work which they had no prior knowledge of is also a source of difficulty. When settling proceedings both parties should have the fullest possible knowledge of potential exposure to expenses, particularly in cases in which the expenses concerned may well exceed the principal sum. Often actions will be settled at particular amounts through expediency or simply to bring closure to proceedings. Although on occasion Agents for the losing party will ask for ball-park information on the anticipated expenses figure it is not always possible to obtain this information in advance. Third Party providers often make up a substantial proportion of the value of Accounts and it can be difficult to persuade them to provide advance information on intended fees. In addition, fees are sometimes varied according to outcome and this is another 'unknown' factor. In relation to Counsel's Fees an opposing party has no specific right to see the fee notes issued and many lodging parties specifically decline to produce fee notes for Counsel when intimating Accounts of Expenses. Although the Auditor of Court is entitled to view the Fee Notes as issued by Counsel this is not a satisfactory position given that the majority of Accounts are settled by negotiation rather than at taxation. As Counsel's fees are often the highest single element in larger value Accounts the lack of transparency in the process is wholly unacceptable. As Accounts of Expenses are effectively précis of the work undertaken individual entries lack clarity and this is open to abuse in cases that are settled without being formally scrutinised by the Auditor of Court.

Question - To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

It must be accepted that the existence of the A&A Scheme and Civil Legal Aid enables many lower earners or unwaged individuals to access the justice system. Without it such individuals would require to rely on service being provided by the “not for profit” sector or represent themselves which would not be in the interests of the delivery of justice. However, the current legal aid system has a number of serious deficiencies that impinge upon the even distribution of access to justice. Furthermore the extent to which civil legal aid is available is becoming a real issue with a large volume of low to middle earners finding themselves outside the legal aid safety net.

It is also interesting to see the way in which legal advice and assistance and full legal aid is delivered by providers to the client group. When civil legal aid was first made available in Scotland in 1950 the nature of the service and the way in which the service was provided to the client meant that essentially an Assisted Person received exactly the same type of service as that given to a private client. However, over the last 20 years since the inception of the Scottish Legal Aid Board and particularly in the last 5 years since the changes introduced in October 2003 have come into effect, the nature of the service provided to Assisted Persons is fundamentally different from that delivered to a typical private client. The introduction of ‘peer review’ and quality control procedures by the Board is the latest in a number of measures introduced by the legal aid authorities in which they seek to define the service and the way in which that service should be delivered. In feeing terms the October 2003 changes to the Sheriff Court Table introduce a version of ‘soft-capping’ into the fee structures by applying block fees which are subject to maximum levels. Ignoring the question of whether the new fees introduced any increase in rates of remuneration what can be said is that they are designed to influence the way in which providers deliver the service to Assisted Persons. Indeed it is a stated aim of the new fee structure that providers are encouraged to progress cases swiftly and are rewarded in terms of the front-loading of some of the fees covering earlier parts of the procedure.

Taken from the perspective of “access to justice” it should be recognised that civil legal aid is no longer providing “an even playing field” given the way in which the governing body wishes it to be delivered and paid for. The system is micro-managed from the centre with a much more prescriptive delivery of service. The principle of a “demand led” provision has largely been abandoned in favour of a much more rigid service. One of the main problems with the legal aid system is the lack of “ownership” from the perspective of the client and as the system becomes increasingly controlled this problem is becoming exacerbated.

Question - Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

Although initiatives such as the introduction of Speculative Fee Agreements and No Win – No Fee Arrangements have lessened the gap caused by the reduction in the civil legal aid sector it should be borne in mind that not all actions involve substantial pecuniary outcomes. In proceedings of low or nil value it is not possible to obtain funds from this source. It is also the case that many potential litigants are Defenders and although most Defenders in Personal Injury or Motor cases will have insurance cover this is not always the case.

It is also noticeable that in lower value actions the “Not for Profit” sector are involved in a disproportionately large number of actions. Although Personal Injury case are exempt from the increase in value in Small Claims proceedings it can be anticipated that the Third Sector will become increasingly involved in lower value cases generally as the economics of private firms becoming involved in Small Claims proceedings or even Summary Cause proceedings are extremely challenging. This raises a number of issues including the lack of geographical spread of bodies such as Law Centres or Specialist Charities and also the fact that they often involve themselves in a fairly narrow area of law such as housing or dampness claims. Significantly, a large number of Law Centres will not involve themselves in PI matters and they are normally located in urban areas.

The question of the lack of access to the courts by ‘middle income’ earners is also a major issue. Closer examination of the Scottish Legal Aid Board figures for the period from 1995 – 2006 suggests that a significant number of individuals obtained offers of legal aid subject to a fairly hefty contribution but felt unable to take up these offers, presumably for cash based reasons. In 1992 the Scottish Legal Aid Board revised the basis upon which contributions were calculated and introduced a much steeper gradient into the calculation process. Steps announced by the then Justice Secretary in March 2003 partially addressed this problem with lengthened contribution periods and a higher entry point for contribution purposes. However, the amount of the contribution demanded from potential litigants can be a very large part of their disposable income and there is clear evidence that this acts as a disincentive on many occasions.

There is also the question of those who narrowly miss the legal aid qualification threshold. I regard the figures appearing in the Consultation Paper on the size of the potential legal aid constituency with some scepticism². There is evidence elsewhere to suggest that a somewhat lower proportion of the population generally qualify for civil legal aid, whether free or on a contribution. The SLAB figures also ignore the very real problem of geographical spread of provision. However, beyond the legal aid threshold a large group can be found who most certainly do not have the resources to fund a major litigation, whether in the Sheriff Court or in the Court of Session. It may well be the case that this group will have a higher proportion of BTE insurance as this type of insurance is often sold as an add on to items such as comprehensive car insurance or property owners insurance where the middle income group will have a greater

² SLAB (2001) Legal Aid in a Changing World

representation. Nonetheless, BTE insurance is still not widespread and it is difficult to see how, in a Scottish context, those who may not qualify for civil legal aid could be compelled to obtain such cover.

Question - What impact have Speculative Fee arrangements had on access to justice?

Somewhat surprisingly Speculative Fee Arrangements are not commonly used and many of the firms who operate specialist Personal Injury practices prefer to work on a No Win – No Fee arrangement or to reach agreement with their client that any shortfall in Solicitor and Client liabilities will be funded from the Principal Sum. There are a number of factors suppressing the use of Speculative Fee Agreements and the main reasons can be summarised as follows:-

- It is a breach of the (Legal Aid) Act to enter into a Speculative Agreement when acting for an Assisted Person
- Many cases are backed by Trade Unions or other Third Party funders who are not willing to pay a premium or to see their members exposed to one
- The Judicial Table has increased in value over the last 10 years in particular thereby reducing the pressure to seek additional recompense elsewhere
- The type of information required to enable a Speculative Fee Arrangement to be calculated properly is not always readily available at the conclusion of the cause as many “expenses agreements” do not break down the component parts of the calculation
- The Speculative Arrangement for Solicitors operates separately from the Speculative arrangement for Counsel.
- A Speculative Agreement has little attraction to the client when instructing in lower value cases or as a Defender where a successful outcome may still result in a loss overall

Where Speculative Fee arrangements have been employed and are triggered there is often some confusion as to exactly what constitutes the basis of the fee uplift calculation. Although Rule 42.17 is very clear in its terms providers often calculate fees on a somewhat different basis and seem to have difficulty in determining the fees upon which the uplift should apply. In theory Speculative Agreements assist firms in taking instructions in more difficult cases and allow for risk to be factored into the feeing mechanism. However, when Speculative Agreements are encountered it is often the case that the litigation on the face of it, appears to be relatively low risk (e.g. liability and/or causation conceded) and this may not be the best use of the Scheme from the perspective of the consumer of legal services. In making this observation it must be conceded that Law Accountants generally access papers at the end of the proceedings only and are able to consider the historical development of the process with the benefit of hindsight. Looked at from the position of the client then Speculative Agreements add to overall cost and, where they are employed, the percentage of the overall payment finding its way to the successful litigant is reduced. However, given that the Speculative Fee Arrangement will normally be funded from “winnings” the net cost to both parties in the litigation is unaffected.

Question - Should legal expenses insurance, including “before the event” and “after the event” insurance have a greater role to play in the funding of litigation in Scotland?

BTE insurance is playing an increasing role in the funding of litigation in Scotland already. That said, taken as a percentage of litigation overall BTE cover still forms a very small part of the overall provision. The advantage of BTE cover as opposed to ATE cover is that it does not add to the cost of each individual action and, like most insurance, is a spread of risk. Even if the cost of annual cover were to be factored into the overall litigation cost it would be a very small portion of the full sum involved. However, BTE insurance does have some drawbacks such as policy exclusions. One leading supermarket chain used to provide a policy which specifically precluded any proceedings against their own organisation as one of the policy conditions. In general terms cover is subject to the covering insurer being satisfied that a positive outcome can be achieved at all times. Cover can be withdrawn in circumstances in which the Agents or Insurers are of the view that the matter should not be proceeded with subject to varying criteria. In the normal course of events policyholders will be directed to specific preferred agents or panel agents and, subject to the Rules of The Law Society of Scotland regarding agency payments, the commercial arrangements which may exist between panel agents and the insurers are not something within the knowledge or domain of the insured/client.

Another factor to be considered in relation to the role that BTE Insurance may play in any future funding menu is the fact that most BTE policies are organised on a U.K. wide basis. Initially Legal Expense Insurance was organised as an adjunct to the services of some of the major insurers. However, in recent years a number of specialist insurers have emerged working specifically in this area. They have a much greater insight into the market generally and are much more ‘hands on’ in relation to the conduct of the cause and the performance of the provider. Undoubtedly this has led to a great improvement in the quality of the service delivered, particularly that provided by Panel Agents. The difficulty is that the template used by Legal Expenses Insurers tends to be much more Anglo-centric which is unsurprising given that the focus of work occurs with England and Wales jurisdiction. Some of the assumptions applicable to conduct ‘south of the border’ do not readily convert in a Scottish context. Perhaps the most obvious is the notion that judicial expenses can be substantially below that payable on a Third Party paying basis. BTE insurance is predicated on the basis that cover will normally be given in circumstances in which the probable outcome is success and that with success comes a full return of expenses. Thus the overall cost is relatively small being the cost of those cases in which success, although anticipated is not achieved, and the cost of paying for a small number of non-recoverable items in successful cases. In a Scottish context this model breaks down as expense recoveries fall well below 100% overall and proceedings, particularly those in the Sheriff Court, move at varying rates of progress. Therefore, if a conclusion were to be reached that BTE Insurance should play an increasing role in providing a conduit to justice in the future it would first of all be necessary to engage with some of the high profile providers to ascertain whether this could be achieved and, if so, how it could be delivered.

After the event insurance falls into a somewhat different category and it is also necessary to define exactly what is meant by ATE cover. Once again there are a number of positive and negative elements impacting upon the way in which it can be provided and utilised by the potential client group. Unlike BTE insurance ATE Insurance does impact directly on the aggregate cost of the proceedings and, in relation to an Inquiry focussed upon ways of reducing cost overall it is, at first blush, a less appealing product. However, in circumstances in which no other funding opportunities are available it can most certainly contribute towards the availability of legal representation

ATE insurance can be provided by specialist companies on a 'one-off' basis. Alternatively, there are a few larger providers of legal service who are in a position to arrange for a more standardised form of cover provided across a broad base of their work. These policies tend to operate on a 'broad axe' basis covering, on occasion basic outlays and providing for cover against liability for expenses in certain circumstances. At this level the system can only work if a high success rate is achieved as the impact of a relatively small number of 'contra awards' can seriously undermine the business case for such a provision. For example, if the average cost of cover is say 5% of the cost of the service provided and 1 in 20 of cases are lost with full liability for expenses then such a system will quickly lose its attraction from the perspective of the underwriters. If the response is to increase the cost to say 10% of the cost of the service than that may reach an unacceptably high leverage point when compared to the potential benefits derived. Given that, in lower value cases, Principal Sums can be appreciably lower than expenses then 10% or more of the anticipated expenses may be 20% or more of the anticipated Principal Sum. To put this another way, ATE Insurance is unlikely to provide a solution to the problem of funding low value matters or diverting away from the court system as the economics militate against this. A fine balance always requires to be achieved between the cost of the service and the percentage of successful outcomes. It is necessary that the providers of the cover have full confidence in their law agents and this may well be the reason why previous attempts to provide this type of cover on a universal basis have foundered.

Claims companies also provide a version of ATE cover. Although arrangements vary enormously it is fairly typical for potential litigants to be provided with support in return for payment of a pre-agreed proportion of the Principal Sum as paid out. No advance premiums are sought under such circumstances and the arrangements between provider and client are undertaken at a level prior to the involvement of any legal provision. However, on occasion organisations supporting claimants undertaking work on this basis are involved in 'losing actions' and they must ensure that the sum claimed as a percentage in damages overall exceeds any contra exposures to ensure that a profitable service can be provided. On a cost basis this type of service adds nothing to the overall cost of the proceedings. However, what it does do is diminish the value of the Principal Sum achieved when paid to the successful litigant. On the issue of access to the justice system such arrangements score highly. However, in relation to the outcome achieved they fall below some of the alternatives currently available.

What must be conceded in relation to all of the BTE and ATE arrangements is that they allow certain potential litigants to access the justice system where no other means of achieving representation would be available.

Question - What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?

We have the benefit of the English experience and when considering the commercial impact of ATE Insurance and fee recoverability it is also necessary to consider this in conjunction with Conditional Fee Agreements and Success Fees.³

Once again looking at the overall cost of litigation the ability to recover ATE premiums and any Success Fees that may attach adds to the overall cost of the litigation. Essentially such initiatives introduce new funding into the industry but also add to the overall cost of litigation as the funding introduced is new money and is also additional to that normally employed within the legal arena.

If ATE insurance premiums become recoverable then this is an additional cost imposition upon the losing Opposing party. The prospect of incurring an additional cost can impact upon the litigation or potential litigation in a different way. Looking at these issues briefly they are as follows:-

- The ultimate cost of the premium is shifted from Principal Sum to Expenses
- The ultimate payer of the premium is the losing party
- The prospects of a potential litigant receiving representation are increased
- The concept of a losing party meeting only the award and ‘reasonable expenses’ is broken
- The overall cost of the litigation (aggregate) is increased
- In England costs are awarded on a variable basis whereas in Scotland judicial expenses are drawn from the same source Table⁴
- Such a step introduces additional stakeholders into the process including ATE insurers, funders and financiers
- If ATE is introduced pressure will then mount upon the legal aid authorities to withdraw from this area of provision
- ATE would not cover family law work and certain other types of proceedings
- There is little rationale in providing ATE Insurance to Defenders who may be disadvantaged both in areas of accessing justice and them settling at an increased amount
- The ATE industry operates with a profit motive ultimately funded from the litigation source

³ See Consultation Paper CP16/07 published by Ministry of Justice on 9th August 2007

⁴ In relation to Solicitors only

Part II

General Observations, Comments and Suggestions arising from this Response and issues covered within the Consultation Paper

PROPOSALS AND SUGGESTIONS

- (a) The relationship between jurisdiction and cost**
- (b) A different approach to the costing of work**
- (c) The impact of intervention by the administration**
- (d) Streamlining the expenses and taxation process**
- (e) Additional Fees and Fee Variation**
- (f) Modernise the relationship with Counsel/Solicitor Advocates**
- (g) Third Party Expenditure**
- (h) Adding Incentives to encourage efficient Case Management**
- (i) The impact of Legal Aid**
- (j) Replacing Fee Exemption with Fee Deferment**

(a) The relationship between jurisdiction and cost

It is often argued that the cost of litigating in the Sheriff Court and in the Court of Session is similar and that there is no real benefit in financial terms. Looked at purely from the perspective of work inputs by Law Agents there is a certain amount of truth in this ascertain. Certainly there is no great difference between charge out rates applied and many of the 'Block' Fees are broadly similar. However, there are two major factors that lead to a significant difference between average expenses incurred within the Sheriff Court and the Court of Session being number of days elapsing between commencement and conclusion of proceedings and the sums expended on third party services such as support fees paid to Counsel and Expert Witnesses. Although no specific information is available on the relative aggregate cost in either court actions in the Court of Session are typically at least twice as expensive as those in the Sheriff Court and the differential is even greater when support fees are isolated.

One source of information on the relative costs in each area is provided within the Annual Reports published by the Scottish Legal Aid Board where sums disbursed in the period 2006-2007 are broken down between payments to Solicitors, Counsel and Third Parties.⁵ Taking Sheriff Court payments (including payments in Summary cause matters) the Board have transmitted payments totalling £4.51 million over a total of 1026 cases giving an average of £4395 per case of which payments break down 61% Solicitors, 13% Counsel and 26% outlays. In the Court of Session the relative figures are £5.83 million over a total of 307 cases giving an average cost of £18990 per case. When the figures are then broken down between Solicitors, Counsel and Third Party Outlays the figures break down 33% Solicitors, 29% Counsel and 38% outlays to third parties.

When the relative payments made 10 years earlier are examined a clear trend is discerned and, with a few minor blips, the dynamics of this process can be identified during the intervening years. The figures for payment year 1996 – 1997 indicate total payments in the Sheriff Court of £3.62 million over a total of 1369 cases giving an average of £2645 per case. When these figures are broken down payments were 65% Solicitors, 6% Counsel and 29% Outlays. In the Court of Session in the same year a total of £3.45 million was paid over 707 cases at an average of £7979 per case. Breaking down the figures between Solicitors, Counsel and Third Party Outlays the figures break down 53% to Solicitors, 26% to Counsel and 21% Third Party Outlays.

Looking at the changing relationship between Solicitor payments and Counsel payments over this period the average payment per case in the Court of Session over the 10 year period increased as follows:-

Solicitors (£2601 increased to £6263) = % increase 141%
Counsel (£1285 increased to £5489) = % increase 327%
Other (£1623 increased to £7254) = % increase 347%

⁵ See Annual Report 2006/7 Appendix 3.21 Page 58

Great care should be taken when considering these figures as the information published by the Scottish Legal Aid Board does not fully reflect the legal market generally. Policy changes implemented by the Board during this period including a presumption against granting authority to proceed in the Court of Session in lower value cases (now £50,000) impact upon the figures. In addition, the figures cover both payments funded by judicial expenses and payments in unsuccessful cases where the payments are paid directly from the legal aid fund. The latter payments are made in terms of the legal aid Table of Fees where fees were increased on one occasion only during the period in question being a 21% increase introduced in 2003. There is also the question of Solicitor-Advocacy Payments where the way in which the Board record payments tends to result in payments earned on a Solicitor Advocacy basis being charged as Solicitor fees in certain types of Account. However, the figures are stark and show that non-Solicitor payments are growing at well over double the rate of the increase to the Solicitor profession. This is no accident as whereas payments to Solicitors in legal aid cases are regulated (whether judicially or fund paying) payments to Counsel and to Third Party providers are not subject to any specific Table of Fees (The Legal Aid Board's Table of Fees for Counsel in the Court of Session does not apply when expenses are recovered).

A reasonable conclusion in relation to the growth in average case cost would be that measures aimed at controlling payments to Counsel (whether Solicitor/Advocates or Counsel) and Third Party providers will have a much greater impact upon case cost than any measures aimed specifically at the Solicitor part of the profession. It is not the purpose of this Submission to take any view on the relative merits of litigating in the Court of Session or the Sheriff Court. There are important issues relating to expertise and creating areas of skills within specific courts to be considered by others. However, it is most certainly the case that the typical cost regime favours the Sheriff Court over the Court of Session if the remit is to reduce overall cost. Going back briefly to the comparison between the 1996/7 figures and the 2006/7 figures it is particularly interesting to note that payments to Solicitors in Sheriff Court cases increased by as little as 16% over a 10 year period. Again this figure is distorted by a number of SLAB funded payments at legal aid rates but it is quite startling and makes it quite clear that, in this area of work, rates have remuneration have not moved significantly and do not appear to have kept up with either wage or price inflation.

(b) A different approach to the costing of work

One of the problems in addressing issues of cost in relation to litigation is that traditional ways of measuring legal work tend to penalise efficient work practices and an interventionist approach. In the past legal work was quantified in value terms applying time and line principles where total cost is determined by applying a multiplier of number of activities whether written or spoken by a chosen value. More recently when charging clients values have been expressed in terms of time expended again applying a chosen multiplier. Neither of these methods rewards efficiency of effort in terms of rate of remuneration and it is often argued that practitioners deliberately extend the number of work outputs to enhance fee recovery and therefore profit. With some justification practitioners respond to this point by pointing out that if they are fully employed on work in any event the marginal effort employed in expending extra outputs actually reduces the profit benefit. Nonetheless the system is open to criticism and although Block Fees offer an alternative many block fees are calculated on the basis of the average number of work outputs per tranche and therefore simply embody any potential excesses within the detailed system. In addition, on a judicial basis Agents are entitled to produce Accounts on either block or judicial basis and this simply further complicates the system.

There are two steps that can be taken to address this issue aimed towards simplifying the costing structures whilst providing incentives for good and efficient case management. First of all the fee structures should be shifted to provide for regressive charging whereby the delivery of services is rewarded at a high starting point with a gradual diminution of reward as provision increases. Secondly, the principle of being able to charge on two different scales could be replaced by a single charging method. However, as part of the reducing fee method of reward the current block fee areas could be very useful in creating areas of demarcation for the purposes of calculating ranges of diminishing fees. Although such a system may appear to be very complicated it would lend itself to modern IT work recording methods and would present no major challenge to any decent database.

(c) The impact of Intervention by the administration

Many of the initiatives introduced over the last 15 years or so have been geared towards getting people together and looking for a less adversarial approach towards dispute resolution.

Looking at this from a financial perspective fees such as the “Pre-Litigation Fee”, the “Hearing Limitation Fee” and the additional element to the “Extra-Judicial Settlement Fee” were all introduced with a view to assisting lines of communication between Opponents in litigation. Most practitioners would argue that these incentives have been successful in bringing parties together prior to any Proof taking place. It is also the case that Pre-Trial Meeting procedures have been a success evidenced by the fact the parties often now arrange them in some of the remaining Ordinary Rules cases as an aid to settlement.

What is less obvious is any evidence of substantial savings in the cost of litigation whether in relation to each party or on an aggregate basis. As an example the cost of a Pre-Trial Meeting adds additional fee elements to the cost of the litigation. Although there is a saving in terms of court time and a larger number of cases are now concluding earlier, the cost of the Pre-Trial Meeting is often as great as the previous cost of full Pre-Proof Procedures. Under the circumstances any benefit is delivered to the court administration system in the form of better notice of impending settlement. There is certainly evidence that Chapter 43 cases cost less than the old Ordinary Rules cases but the difference is fairly small and, in the case of claims for judicial expenses, often imperceptible. Indeed where cases do not settle immediately after the PTM it is often the case that additional expenses will be incurred in revisiting certain areas of evidence that were felt to be vulnerable at the PTM

Although not directly contained within the section of Fees the Consultation Paper does include reference to the Irish PIAB and PRTB. Reports coming from the Irish Republic in relation to the operation and success of this system have been varied. However, it is my view that such a system would be unlikely to deliver real benefits within Scottish jurisdiction and may well have the opposite effect. The PAP arrangements agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers have the effect of bringing parties together over a specified period and contain provisions for achieving consensus in most of the key areas. The protocol includes a specified period in which the required steps can be carried out before further procedures are triggered. As a result of the success of the PAP system it has recently been extended into other areas. Any attempt to impose a further layer of scrutiny into the system may well impact adversely on the current procedures which are still in their infancy. What needs to be recognised and indeed is recognised by many Insurance Funders is that there is a correlation between the number of days instructions are running and total cost. In a system such as the Irish system where typically claims were running for an average of more than three years the imposition of a central body intervening at a preliminary period could well deliver a cost benefit. However, the Scottish system has already been the subject of voluntary reform and these reforms have delivered real savings in terms of the average number of

days from instruction to settlement. There is also evidence that a significantly n greater number of potential claims are being resolved without resort to litigation and the overlaying of a further procedure into the system is unlikely to be helpful. Unless any PAIB equivalent were to be introduced an a statutory basis without right of Appeal then the concern would be that it would simply add to overall expense by creating a further ‘hurdle’ for those matters in which a consensual agreement using PAP procedures could not be achieved. This would increase the total number of days running and would impact adversely on net cost.

(d) Streamlining the expenses and taxation procedure

Any change in the fee calculation system would also require changes to the expenses calculation and taxation processes. As has been highlighted earlier in this Paper the current system has many qualities but is expensive and can be inconsistent.

The introduction of a single fee recovery structure (the same basic formula could be applied throughout the court system) would simplify the procedures for presentation and taxation of judicial expenses claims. It would also give all stakeholders the opportunity of involving themselves in new technology with a view to producing electronic platforms throughout the expense adjustment process. It is suggested that a variation of the Account Model used in the House of Lords could provide a suitable template for preparation and adjustment of expenses. A recent examination and evaluation of the operation of the Chapter 43 proceedings in the Court of Session identified certain problems in relation to taxation of Accounts of Expenses in the Sheriff Court and a streamlined system would enable some of the issues identified to be addressed.

At the moment diets of taxation within certain Sheriff Court areas create real challenges for the local organisational structures in terms of allocation of time and resources. In locations at which the Sheriff Clerk also fulfils the role of Auditor the requirements of a lengthy and time consuming taxation process require a diversion of resources to the detriment of other court services. There are also difficulties in delivering an even service throughout the numerous locations delivered by a mixture of full time and part time officials. A uniform system would allow for the creation of a single body or a body operating from a small number of specialised locations with all Auditors working within the system being employed on a full time basis and contributing to the ongoing development of the various Tables of Fees. The nucleus of this operation already exists with full time operations in the Court of Session and Glasgow Sheriff Court arguably already accounting for around half of all, current cases. Developing individual centres of excellence would improve the process and the delivery of the service.

The introduction of electronic systems of information transfer would also enable parties to be represented at taxation without requiring formal attendance at the specific location. The model currently applied for Case Management Conferences at Glasgow Sheriff Court could be adapted for use in a taxation setting thereby further reducing cost and length of procedures. If such a system were adopted it is important that some of the qualities of the taxation procedure are not lost and it should be possible to improve upon the examination of the claim for expenses and scrutiny procedures. It is suggested that a process whereby specific parts of the Account of Expenses are examined in detail as part of a sampling exercise would produce a more robust examination and a greater test.

(e) Additional Fees and Fee Variation

In any wholesale review of the fee calculation process it would be necessary to consider the application of fee uplifts and the way in which the Court currently seek to impact upon issues of fee recovery such as awarding reduced expenses or by awarding on scales other than the conventional party and party scale.

Although the system operates differently in the Sheriff Court (where power lies with the Sheriff) and in the Court of Session where power lies with the Auditor after a remit from the Court, the actual fixing of the fee uplift is undertaken on a rather unsatisfactory basis in that the evidence base provided by parties applying for uplift is often scant and relates in the main to the circumstances of the action rather than the actual additional cost of delivering service. In addition uplifts are granted without recourse to the nature of the accounting method employed which means that a court may grant a substantial increase to reflect a particular aspect of the cause in circumstances in which the use of a detailed Account rather than a block fee account may also reflect those same circumstances. In England expenses are not determined on a fixed Table of Fees but derive from a number of factors including the charge out rate and geographic location of the service provider, the nature of the proceedings, the level of seniority of the service provider and guidelines relating to standard cost patterns. Many of the factors are known in advance to both parties during the currency of the proceedings and the match between expenses expended and costs recovered is much more accurate and predictable than in Scotland. This factor was no doubt of assistance when the ‘Predictable Cost’ outlines were formulated as part of the Woolf reforms.

Some of the principles outlined above are specifically English and do not sit well with established guidelines in Scotland. Although the Auditor of the Court of Session does have a discretion to vary fee rates in either direction this is rarely applied and it is a basic tenet of Scottish expense matter that expenses are calculated on a common scale irrespective of location or other aspects attaching to the provider. However, in the last two decades a number of factors have resulted in the final assessment of fee rates being distorted by very significant levels often without any real notice being given to the Opposing party. In the Court of Session fee uplifts can be granted any time up to the commencement of the Diet of Taxation and many months after the conclusion of proceedings. Uplifts have been granted increasing fee rates by over 200% (although they are relatively rare) and this type of increase can impact greatly upon the liabilities placed upon the paying party who may face a total liability well in excess of that envisaged at the time of settlement. Equally, a successful party may anticipate an uplift as part of the calculation of the viability of funding the case only to discover that such a variation is not forthcoming or is granted at a level well below the anticipated level. Given that the fixing of basic fee rates is undertaken after an extremely rigorous exercise it is less than satisfactory that the fee uplift process is subject to such vagaries. The position of Auditors has also been the subject of some concern in certain cases⁶ and this is a situation that should be avoided in any fee assessment structure. It is essential that the Auditor should be

⁶ see Honer and Honer –v- Wilson, Lord Glennie 19th October 2006

able to carry out his or her duties without being open to such criticism, however unfounded.

In relation to the ability of the court to vary the scale of the award any new system should be much more transparent and should align itself much more closely to real cost. There seems little point in fixing Solicitor fee recovery rates at figures which are scrutinised annually to 0.1% of the rate when the system then provides for fee uplifts being granted at figures of several hundred per cent in individual cases. This is no equity in this approach, either from the perspective of the paying party or from the perspective of Solicitors generally as the vast majority of awards are made at standard rates. I favour a system whereby the judicial rate is fixed at a median position and all cases go through a sifting process at a very early stage in the procedure. This process of 'gate-keeping' would have the power to remit the matter to a higher or a lower court and would also categorise the action against the median point in terms of fee scale and right of recovery. The presumption would be that actions proceed at the median rate but would provide for higher and lower rates applying to certain types of action. Statistically the median point would always be maintained and, once again, the use of an electronic platform for expenses accounting could be used to monitor this process. The court would require to retain a power to move proceedings in an upward or downwards direction, either by application or its own instigation. However, this power would be exercised sparingly and would be subject to some kind of 'cut-off' point. In fairness to parties and to practitioners the last cut-off point would be considerably prior to Proof and certainly not on the cusp of a Diet of Taxation. The fee variation procedure would replace Additional Fee applications entirely. However, the principles that apply at present regarding leaving ultimate authority with the court would remain. In addition, the Auditor's independence would be improved as any taxation procedure would conflate the roles currently undertaken in fixing and thereafter taxing fees at an uplift or modified amount.

Another aspect to be considered at this juncture relates to the increasing use by the court of awards of expenses on scales other than the party and party scale. In recent years a number of high profile cases have been dealt with on the basis of the court awarding expenses against the paying party and in favour of the lodging party on a third party paying basis or even on a Solicitor and Client/Client paying basis. With effect from 20th July 1992 courts no longer had direct control over Solicitor and Client rates whether relative to Law Agents or Third Party providers such as Counsel or Experts. Although Accounts of Expenses may still be taxed when such awards are made they are no longer subject to the party and party test of reasonableness. In effect the paying party becomes responsible for "unreasonable" expenses and on a scale over which neither the court nor the paying party has any direct control. Recently courts have moved a stage further by determining that such an award could be the subject of uplift. The court does so on the basis that, in Court of Session cases, a right of taxation between Solicitor and Client/Client paying remains in terms of Rule 42.7.⁷ Again issues of transparency occur when such awards are made. For instance the feeing arrangements between Client and Solicitor may be the

⁷ See *Trinature Ltd –v- Scotnet (1974) Ltd.* 19th February 2008, Lord Glennie

subject of a number of restraining factors such as waiver of uplift, fixed charging protocols, fee caps, ‘collar and cuff’ arrangements and other methods of fee alignment. A system that allows for such a high level of variation provides for less fiscal control overall. I am in no doubt that the changes introduced in 1992 coupled with the increasing use of Solicitor and Client/Client paying awards is an inflationary factor when looking at the increase in costs overall. The court must always have control over expenses and the ability to award expenses on the Solicitor and Client scale is one of the steps open to the court to show displeasure in relation to the actings of a particular party. However, if the system is to retain real control over the issue of expenses then requiring all such Accounts to be drawn up “at judicial rates” would be more appropriate. There is also a potential conflict in the position of parties who are Assisted Persons” in relation to the way in which this type of case currently operates. In terms of the Legal Aid (Scotland) Act 1986 only the Legal Aid Board can grant a discharge in relation to expenses and all Business Accounts are rendered in terms of the legal aid Tables of Fees. As such when the court make awards on behalf of Assisted Persons on a “Client Paying” basis they are creating a situation which could not occur in reality. This then leads to a tension at any subsequent Taxation where the Account of Expenses is taxed on a ‘notional’ basis and uplifts are granted on the same basis. However, the Legal Aid Account would have been taxed on a Solicitor and Client/Fund paying basis subject to a maximum increase of 50% and subject to criteria laid down by the various Legal Aid tables of Fees.⁸

It is not for me to take a view on whether the increasing use of Solicitor and Client/Client paying awards in conjunction with fee uplifts is reasonable or otherwise. However, where they do occur it is now virtually impossible for the paying party to have any real knowledge of the extent of their exposure to expenses until an Account is intimated at a later stage. This is particularly true now that the Law Society of Scotland no longer feel able to publish a recommended Table with the result that fee rates vary enormously. It would be my suggestion that where such an application is envisaged it should be a requirement that the “Terms of Business” documentation required by the Law Society of Scotland and the terms of any third party engagements be lodged in advance in order that the process is more transparent and the court would be fully aware of the impact of the award and any uplift granted.

Since the Consultation Paper was published we have now been made aware of the proposed abolition of Rule 42.9 which relates to the requirement to present Accounts of Expenses “as if the whole work in the cause had been carried out by one Solicitor”. At this juncture it is not clear how this change will impact upon Account presentation and rights of recovery. Rule 42.10 (1) remains which means that, on a party and party basis all work is still permitted subject to a test of reasonableness. However, given that the expense of litigation is one of the concerns of the Inquiry it is important that any impact of this change is considered. It can be anticipated that the change will result in more “time and line” Accounts of Expenses being submitted and may will increase the pressure to modernise the whole approach to the preparation of judicial Accounts of Expenses.

⁸ See S.S.I. No 178 2003 (and later amendments)

(f) Modernise the relationship with Counsel / Solicitor-Advocates

Over the last 30 years the level of remuneration enjoyed by Counsel in judicial work has grown at a much faster rate than any of the inflationary indices or the comparable rates obtained by Solicitors. On one view this is not directly relevant when considering the cost of litigation generally or the impact of Counsel's Fees on the cost overall. Counsel's fees are rendered on a Solicitor and Client basis and it is important to recognise their independence and the values delivered to the system as a result. However, for several years now we have had a third force in the form of Solicitor/Advocates and the time has now arrived to re-appraise the entire procedure and to modernise the entire relationship between the various providers and to introduce some transparency into the whole process. The situation revealed within the Scottish Legal Aid Board's statistics indicates that in the Court of Session fees recoverable on behalf of Counsel are growing at an unacceptably high figure and that growth in fee rates is a considerable factor in the growth of litigation costs overall. The SLAB information suggests that total payments to Counsel in Court of Session matters was approaching the level paid to Solicitors within the accounts handled. Given that the existence of a legal aid certificate imposes some constraint upon Counsel's fees not applicable within the non-legal aid market, it is my view that payments to Counsel collectively may well now exceed those to Solicitors for work in the Court of Session. Although it would be unreasonable to draw the conclusion that this growth is solely attributable to increase fee rates it would be just as unreasonable to suggest that the growth in fee rates applied by Counsel reflects rate increases elsewhere within the provision of legal service or generally within the market. Although the last two years have coincided with a limited fracturing of the dominant position of Faculty Services Ltd. as a single billing entity, Counsel's Fees are not subjected to the same rigours as fees generally and the time has now arrived to address this both in the interests of the consumer and indeed Counsel.

I suggest the following as measures to improve the quality of information and the degree of transparency in the process:-

- Counsel's Fees be the subject of a Judicial Table
- Solicitor-Advocacy charges be the subject of the same Table (less 10%)
- All instructions to Counsel be recorded in the Minute of Proceedings
- The rule preventing Opposing Parties from having access to Counsel's Fee Notes as presented for taxation be scrapped
- Counsel's Fees as lodged for taxation be rendered on the same basis as the award of the court whether party and party or solicitor and client
- The incentives and tapers proposed for Agents Fees be extended to cover Counsel's Judicial Fees
- Counsel be given increased powers to obtain recovery of fees either from disclosed principals or paying parties
- Counsel be liable (in the first instance) for the element of court dues applicable to their charges and a *pro rata* share of all expenses attaching to the expenses recovery procedure

(g) Third Party Expenditure

The examination of the data available from the Scottish Legal Aid Board highlighted the rapid increase in sums being paid out to Third Party Providers in court costs and other fees. It is to be anticipated that taking the market overall the true increase is even greater. This is due to the fact that any Solicitor working under civil legal aid cover is subject to a test of economy in relation to the Solicitor and Client liability in addition to a test of reasonableness applying the judicial approach. Virtually all experts need to be sanctioned by SLAB in advance of instruction and the Board will decline to grant such sanction if they feel that 'best value' principles are not being adhered to. This has the effect of acting as a restraint to growth in outlays incurred. Furthermore for the last 6 years Fee Exemption has applied to court dues, again having the effect of constraining increased outlays. The fact that outlay payments have increased so markedly in certain categories of work indicates a real growth in these areas with obvious implications for cost of litigation overall.

I would suggest that the Committee give consideration to ways in which the need to employ Third Party stakeholders can be reduced and ways of sharing expenditure between parties. This can be done by a mixture of incentives and sanctions, both aimed at decreasing overall liabilities to the benefit of parties and funders. Obviously the introduction of new fees such as the Hearing Limitation Fee and the Extra-Judicial Negotiation Fee had the intention of producing this outcome. My own view is that their success has been limited and that these fees are often charged and allowed in circumstances in which there is no discernable benefit to the process of achieving finality. Again I believe that a more penal approach such as fee tapering with real incentives for efficient working would be more effective and would deliver clarity to all participants. It also has the benefit of being a self-regulating procedure provided it is properly formulated at the outset.

In relation to the different courts and procedures there is no exact correlation between the length or value of an action and the need for Third Party input. Issues that do impact upon the need for Third Party involvement relate to matters such as liability, causation and quantum and do not necessarily align on a value basis. The increasing reliance on Third Party practitioners to justify services-related aspects of claims adds considerable to overall cost and to growth in costs. As is revealed within the SLAB figures there is a real irony in blaming Law Agents for the increasing cost of litigation when ,as a group, they are arguably worse off than in the past.

(h) Adding Incentives to encourage efficient Case Management

The approach adopted by the Scottish Legal Aid Board when confronted with an increasing bill for legal aid funding during the 1990's was to introduce a system of fee capping. The introduction of a standard block fee for summary criminal work and a series of block charges to cover most types of Sheriff Court civil work were geared towards exercising control over the market and changing behaviour. Although I was and remain a real critic of the approach and, more particularly, the way in which it was implemented and applied, it must be accepted that it was successful in maintaining and even reducing cost and allowing some kind of control to be exercised over the budget.

If real control is to be exercised over the cost of litigation it will be necessary to introduce similar measures into the equation. Any attempt to cap fees or third party expenditure unfairly may well fail to pass the test applicable in other areas. However, it should be possible to apply a number of direct and indirect fiscal changes geared towards producing quicker cheaper and more efficient outcomes. I would suggest that the following areas merit consideration:-

- Front loading fees, particularly during the early part of proceedings
- Tapering fees generally to encourage brevity
- Align fee rates automatically with importance/value of proceedings
- Apply forms of soft-capping to 3rd party involvement in lower value proceedings
- Require earlier disclosure of the involvement of 3rd parties as a condition of right of recovery
- Amend the current arrangements for Counsel 's Fees from their current honorium basis onto a more appropriate feeing arrangement and subject to a published judicial Table of Fees
- Conjoin the current Pre-Action Protocol (PAP) procedure brokered between the Law Society of Scotland and the Forum of Scottish Claims Managers with the Pre-Litigation Procedure
- Give the PAP procedure judicial impact by allowing for a tendering procedure within the required timeframe
- Simplify the Account adjustment and taxation procedure and provide for remote taxation using new technology
- Provide for a system of foundable offers to be made as part of the expenses adjustment process with real penalties similar to those applying in the case of a judicial Tender
- Restrict Solicitor and Client awards to calculation on the judicial Table of Fees
- Make the entire procedure much more transparent including immediate disclosure of the instruction of experts and fees rendered, disclosure of Counsel's Fees incurred and make Counsel's dairies electronically accessible by authorised individual on an historical basis
- Apply more fiscal penalties for late procedure similar to that currently contained within Rule 24.4 in the Court of Session

(i) The impact of Legal Aid

Although there are many differences in the way in which legal aid is delivered in Scotland when compared to England one of the major differences at present is the availability of legal aid to undertake Personal Injury work across the spectrum of courts and procedures in Scotland. The way in which legal aid is managed does impose certain constraints upon which court can be used with the Board often directing actions destined for Sheriff Court Ordinary Procedure into the Summary Cause court and applying a much higher threshold for Court of Session procedure than that applied in terms of the privative limits.

In my own view legal aid has very little impact upon the way in which work is undertaken within the Personal Injury sphere but a much more profound influence upon proceedings involving family matters and impact upon Family Law practitioners. In many respects the way in which the Scottish Legal Aid Board apply their own procedures is particularly harsh and, where a successful outcome can be anticipated, Law Agents are unlikely to favour applying for a legal aid certificate as a precursor to litigating.

Although the value of the civil legal aid Tables of fees vary between Sheriff Court and the Court of Session the Tables of Fees are worth something between £55 and £75 an hour across the Board. However, all administrative work (around 10% of total workload) must be undertaken free of charge and there is also a possibility of Accounts being taxed down and/or outlays being disallowed. Conservatively these factors reduce the value of the work by at least a further 5% giving legal aid a true value of between £47 and £64 per hour. Given that the judicial Tables of Fees are worth approximately £135 per hour and that this is a figure very close to what the Law Society of Scotland General Business Table of Fees would have recommended had it still existed then it is not difficult to see that operating at legal aid rates when alternatives exist is an unattractive proposition. In reality civil legal aid is often applied for to act as a safety net providing for payment at a much lower rate that can be anticipated in the event of a successful outcome. An unintended consequence of this feature is the apparent increased success of the Board in recovering Principal Sums and Expenses as a proportion to payments made. In percentage terms recovery levels have increased enormously since the Board assumed responsibility from the Law Society of Scotland in 1987. In reality the circumstances in which an Agent involved in a successful litigation involving recovery of expenses finds it necessary to obtain direct payment are becoming increasingly rare. Normally legal aid accounts are only required in litigations that are only partially successful or are wholly unsuccessful. There is no business case for billing the Board at a rate of around one-third of the judicial rate on a test of economy rather than a test of reasonableness. In truth in such matters civil legal aid has become a form of ATE Insurance in which the client, in return for a contribution of anything between Nil and several thousand pounds can obtain some kind of protection against exposure for greater expenditure both in relation to liability for their own client's expenses and also any awards of expenses that may be made against them. Although no absolute guarantee exists on modification it is normally granted, often involving the loss of substantial sums to otherwise successful opponents.

It is not appropriate to argue that civil legal aid should be removed from certain parts of the litigation spectrum. Without it the family law sector would be in real difficulty and I suspect that the whole system would quickly disintegrate. However, although the purpose of this Inquiry is not to look at the general function of the legal aid system it must be accepted that it is becoming much less relevant to proceedings involving recovery of substantial sums and judicial expenses. Furthermore, the data being published regarding the way in which legal aid interacts in such proceedings is often misleading and wrongly interpreted and the apparent success in recovering expenses is one such example.

The spend in Scotland on civil legal aid (£31.42 million) and civil advice and assistance (£19.22 million) amounts to over £50 million for a system in which only around 0.25% of the adult population are involved in any payment year. This money should be made to work harder and, in a judicial context it would be worthwhile examining whether the public input could be match-funded with funding from the private sector either to provide for a jointly operate ATE fund as possibly to provide for some kind of comprehensive BTE system. This could operate in a variety of ways but one of the products could be the introduction of a wider range of “assisted person” categories with funding provided on a mixed model and with a payment rate more in keeping with the current private rates. To do so it would be necessary to break through the centralised and micro-managed system currently employed by SLAB and to replace it with a system where the recipient of legal aid was more empowered and bore more responsibility for the management of spend on their behalf. By re-introducing this form of accountability the relationship between provider and client would be strengthened and decisions and spend would become much more relevant to the ultimate client. In such a scenario it is possible to envisage a situation in which the Legal Aid Fund could, in certain cases, be regarded as a fund of last resort, with recipients of legal aid enjoying the same level of representation as is available to private clients in a system in which the solicitor is paid at a fully commercial rate from funds provided by a mixture of private and public origin. In such a scenario certain individuals would receive legal aid on a nominal contribution and the support level would work through to individuals who received legal aid on the basis of a 100% contribution. However, they would all exercise direct control over the spend and the spend on any individual or in any matter would be subject to limits. This simply replicates the position that exists in any private commercial contractual arrangement where purchasers identify the extent to which they can engage in the purchase of a service and work within those limits.

(j) Replacing Fee Exemption with Fee Deferment

Although the introduction of Fee Exemption may have been regarded as a device that would save money and provide for a cheaper justice system it does not always work in this way. Furthermore, many categories of litigant who do not qualify for Fee Exemption (such as those litigating on a no win- no fee basis) regard the system as discriminatory.

It is suggested that Fee Exemption be replaced by a system of fee deferment. Upon incurring the Fee an application for deferment could be submitted thereby postponing any liability to incur same. The system would crystallise at the end of the proceedings at which time fee liabilities would either transfer on to an exemption list in the event of an unsuccessful outcome defined in financial terms. However, if the person applying for deferment achieved a successful outcome then the deferment notice would be cancelled to be replaced by a bill payable by the Paying Party in relation to all deferred court dues. This system would overcome the criticisms of litigants and their solicitors who found difficulty in meeting court dues and securing funds to meet these liabilities over a lengthy period. Even more significantly the Fee Exemption enjoyed by Assisted Persons and other parties deemed not to have the resources to meet such liabilities would not transfer as a benefit to paying parties. At the moment the fee exemption system also applies to judicial awards of expenses meaning that a paying party avoids liability for the expense of court dues if the successful party obtained fee exemption. Given that the court function is already subsidised to something like 40% of the overall cost it is quite inappropriate to pass on such a benefit to those who have been found liable in expenses.

Stewart Mullan
29th March 2008

