Victorian Legal Services
COMMISSIONER

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Opinion

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Contingency fees will fail us

The *Financial Review's* recent article on contingency fees (Legal profession divided on banning success fees, 18 February 2016), analysed the advantages and disadvantages of contingency fees for lawyers. As the regulator of Victoria's legal profession I am concerned that the vice of contingency fees is being disguised behind the camouflage of access to justice.

In Australia, we have generally good opportunities for access to justice and we have fair and proportionate fees. We should not adopt a flawed and cynical device for over-charging as an excuse for giving people access to the courts. Contingency fees are not good for any of us.

Contingency fees, as used in the USA, allow the lawyer to take on claims for no fee. The winnings are split between the lawyer and the client. In America the loser does not pay the winner's costs. Most litigants, no matter how doubtful the claim, have a good chance of being offered money to settle. This is because the person sued is at risk of paying out more money in defending the claim, than they pay to settle.

That is not the law in Australia. Our courts invariably order that the winner gets their costs paid. This has consequences for people who sue and lose. Even if the plaintiff has an agreement from the lawyer that without a win there is no fee, the losing plaintiff can be ordered to pay most of the other side's legal costs. This system discourages lawyers from bringing hopeless causes. It also reduces the pressure on a defendant to offer money in meritless cases, because the plaintiff still faces an adverse costs order if they lose.

This costs indemnity rule makes the access to justice argument in support of contingency fees fall away. A plaintiff still takes a major financial risk in suing where the case, as deserving as it might be, has little prospect of success on the evidence. So just because the plaintiff has their own lawyer with "skin in the game", the contingency promise does not absolve a person from losing their house if the case fails.

The argument in favour of contingency fees that suggests legal aid does not fund enough cases is flawed. Only certain kinds of case lend themselves to fitting the contingency model: those which produce a flow of money to the plaintiff. Family law and criminal matters, which proponents suggested should be protected from contingency fees, would not deliver the returns sought by the law firm anyway.

Another major claim is that small businesses being sued by others can't afford the legal fees without a contingent arrangement. The small business defendant is defending a suit - not initiating a claim. In a successful defence, the only outcome likely is that part of their costs will be payable by the losing plaintiff. In this example there is no point in offering a contingency arrangement to defend a civil suit if their client is not going to recover money. The same applies for many areas of law like migration, real estate, contracts, and business law.

The big push for lifting the ban on contingency fees comes from those who believe individuals who suffer losses by injury or financial damage can't get lawyers to take on their case. The belief is that they are denied access to justice and that contingency fees are needed to fill this gap. This is largely untrue in a country where the lawful and well regulated "no win, no fee" arrangements are available in every state and territory and fees charged by class action lawyers are supervised and approved by the court. The truth is that lawyers are willing and available to take on good cases for people who can't afford a lawyer if the lawyer thinks they can win.

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As the regulator of the legal profession in Victoria for the past seven years and with a background as a plaintiff personal injuries lawyer for 23 years, the only gap that I can see likely to be filled is for more hopeless, high-priced causes to be taken on without any reduction in the risk of an adverse costs order against the individual plaintiff when the case fails.

Claims that the Productivity Commission has endorsed contingency fees to improve access to justice are ironic because it was the Productivity Commission who pushed for a national scheme for regulating the legal profession. The uniform scheme for regulating Victorian and New South Wales lawyers arises out of that national ambition. A key ingredient of the uniform scheme is that the interests of consumers of legal services are prominent. A significant focus of the regulatory regime is on the importance of legal costs being reasonable and based on legal services that are proportionate to the client's legal needs. Contingency fees would annihilate that principle.

Let's say a lawyer's fee charged upon successful completion of a claim for money is 30% of the compensation or damages recovered. For $20,000 of work done to recover $45,000 of damages, this could look like a good deal because the lawyer's fee will be fixed at 30%, being $15,000. The client saves $5000.

That is not the real world of contingency fees. The real world looks more like this: the damages payout for a badly injured mid-career worker with no chance of returning to work might be $600,000. Even if $120,000 worth of legal work has been done, a 30% contingency deal allows the lawyer to take $200,000. That might look tolerable even if somewhat unbalanced. But what if the case settled at mediation or at an early stage, which is encouraged, where only $50,000 worth of legal work was performed? The contingency deal requires the client to pay $200,000. Is it reasonable and proportionate that the lawyer gets fees at 400% of the conventional value of that work? No.

The other feature of this dangerous fee structure is that it adds an almost irresistible incentive to an otherwise ethical lawyer to settle a deserving but difficult case cheap and early so the actual work of the lawyer does not exceed the contingency fee. And how do the profession and the community regulate that when the consumer will never know whether they have been sold short on taking too little in damages, or ripped off by paying too much in costs?

If contingency fees arrive on these shores the doctrine of reasonableness and proportionality will be dissolved into an unregulated soup where very few, if any clients, will gain better access to a lawyer. Instead many will pay handsomely, and many lawyers will wrongly believe their entitlement to large chunks of their clients' damages payouts is a just reward for their own risk-taking.

Our community shuns rampant litigation of the Californian style. Contingency fees add to the risk of rampant litigation with little prospect of being regulated in consumers' interests. I would urge the legal profession to think again about lifting the ban on contingency fees.

Michael McGarvie is the Victorian Legal Services Commissioner and CEO of the Victorian Legal Services Board.