Proposals for Reform of Civil Litigation Funding and Costs in England and Wales

Consultation Paper

Response of JUSTICE

February 2011

Q 1 – Do you agree that CFA success fees should no longer be recoverable from the losing party in any case?

Yes

Q 2 – If your answer to Q 1 is no, do you consider that success fees should remain recoverable from the losing party in those categories of case (road traffic accident and employer's liability) where the recoverable success fee has been fixed?

NA

Q 3 – Do you consider that success fees should remain recoverable from the losing party in cases where damages are not sought e.g. judicial review, housing disrepair (where the primary remedy is specific performance rather than damages)?

No

Q 4 – Do you consider that if success fees remain recoverable from the losing party in cases where damages are not sought, a maximum recoverable success fee of 25% (with any success fee above 25% being paid by the client) would provide a workable model?

There should be a maximum of 25 per cent with no excess liability for the client.

Q 5 – Do you consider that success fees should remain recoverable from the losing party in certain categories of case where damages are sought e.g. complex clinical negligence cases? Please explain how the categories of case should be defined.

Our view is that clinical negligence cases should remain covered by legal aid. If full coverage is not possible then partial coverage should be maintained up until the stage of informed advice on the chances of success. Lord Justice Jackson recommended give consideration to 'retaining legal aid for reasonable pre-litigation disbursements in clinical negligence cases.[1] If it is then felt necessary that CFAs apply this should be on the usual basis. The legal aid cost should be recoverable from a successful case.

Q 6 – If success fees remain recoverable from the losing party in certain categories of case where damages are sought, (i) what should the maximum recoverable success fee be and (ii) should it be different in different categories of case?

The maximum should be 25 per cent of the costs otherwise applicable over all cases.

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[1] Lord Justice Jackson *Response to Legal Aid Consultation* 14 January 2011 , para 3.7

Q 7 – Do you agree that the maximum success fee that lawyers can charge a claimant should remain at 100%?

No.

Q 8 – Do you agree that there should be a cap on the amount of damages which may be charged as a success fee in personal injury claims, excluding any damages relating to future care or future losses?

Yes

Q 9 – If your answer to Q 8 is yes, should the cap be (i) 25% or (ii) some other figure (please state with reasons)?

25 per cent

Q 10 – If your answer to Q 8 is yes then should such a cap be binding in all personal injury cases or should there be exceptions, and if so what and how should they operate?

All

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Section 2.2 – After the event insurance premiums
The proposal: that the ATE insurance premium should no longer be recoverable from the losing party
Q 11 – Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?

Yes

Q 12 – If your answer to Q 11 is no, please state in which categories of case ATE insurance premiums should remain recoverable and why.

NA

Q 13 – If your answer to Q 11 is no, should recoverability of ATE insurance premiums be limited to circumstances where the successful party can show that no other form of funding is available?

NA

Q 14 - Do you consider that ATE insurance premiums relating to disbursements only should remain recoverable in any categories of civil litigation? If so, which?

Yes. All disbursements other than to lawyers necessary reasonably to pursue the claim.

Q 15 – If your answer to Q 14 is yes, should recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?

Yes

Q 16 – If your answer to Q 14 or Q 15 is yes, should recoverability of ATE insurance premiums relating to disbursements be limited to circumstances where the successful party can show that no other form of funding is available?

No. It is better to have a general rule.

Q 17 – How could disbursements be funded if the recoverability of ATE insurance premiums is abolished?

That is why ATE insurance should be retained for disbursements in most cases and legal aid for clinical negligence.

Q 18 – Do you agree that, if recoverability of ATE insurance premiums is abolished, the recoverability of the self-insurance element by membership organisations provided for under section 30 of the Access to Justice Act 1999 should similarly be abolished?

We have no view.

Section 2.3 - 10% increase in general damages
The proposal: that there should be an increase in general damages of 10%

Q 19 – Do you agree that, in principle, successful claimants should secure an increase in general damages for civil wrongs of 10%?

Not because of any issue relating to the funding of cases. The issue of damages should be separate from costs. There is a case, acknowledged by Lord Justice Jackson, for asking the courts to reconsider the general level of damages because they are currently too low.

Q 20 – Do you consider that any increase in general damages should be limited to CFA claimants and legal aid claimants subject to a SLAS?

No. We oppose the SLAS (see our response to the legal aid consultation).

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Section 2.4 Part 36 Offers

The proposal: that Part 36 of the Civil Procedure Rules (offers to settle) should be reformed

Q 21 – Do you agree with the proposal to introduce an additional payment, equivalent to a 10% increase in damages, where a claimant obtains judgment at least as advantageous as his own Part 36 offer?

Not as such. Damages should be separate from costs. The other party should pay an additional contribution to costs. This could be up to 10 per cent of the damages.

Q 22 – Do you agree that this proposal should apply to all claimant Part 36 offers (including cases for example where no financial remedy is claimed or where the offer relates to liability only)? Please give reasons and indicate the types of claim to which the proposal should not apply.

Yes

Q 23 – Do you agree that the proposal should apply to incentivise early offers? Please explain how this should operate.

There would be cost penalties.

Q 24 – Do you consider that the increase should be less than 10% where the amount of the award exceeds a certain level? If so, please explain how you think this should operate.

No. A simple rule is required. The funding system is becoming massively over-complex.

Q 25 – Do you consider that there should be a staged reduction in the percentage uplift as damages increase?

No.

Q 26 – Do you agree that the effect of *Carver* should be reversed?

No. Its effect may be harsh but its effect is clear: beat the offer and you get costs.

Q 27 – Do you agree that there is merit in the alternative scheme based on a margin for negotiation as proposed by FOIL? How do you think such a scheme should operate?

No.

Section 2.5 – Qualified one way costs shifting
The proposal: that there should be a regime of qualified one way costs shifting in certain cases
Q 28 - Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135 – 137)? If not, please give reasons.

Sir Rupert Jackson argues for the following test:

> *Costs ordered against the claimant in any claim [covered by QOCS] shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:*
>
> *(a) the financial resources of all the parties to the proceedings, and*

(b) their conduct in connection with the dispute to which the proceedings relate.

The difficulty is that no applicant would know in advance whether they might face an order for costs. This is a problem under existing legal aid legislation but the position is mitigated by the fact that, in practice, few orders are made. The better formulation would be:

> *Costs shall not be ordered against the claimant in any claim save where reasonable in all the circumstances and having regard in particular to:*
>
> *(a) their conduct in connection with the dispute to which the proceedings relate; and*
>
> *(b) the financial resources of all the parties to the proceedings.*

Q 29 – Do you agree that QOCS would significantly reduce the claimant's need for ATE insurance?

It would on the terms above.

Q 30 – Do you agree that QOCS should be extended beyond personal injury? Please list the categories of case to which it should apply, with reasons.

A rule as above would go some way to protecting clients from the withdrawal of legal aid. It should certainly apply in all personal injury, clinical negligence and actions against public authorities.

Q 31 – What are the underlying principles which should determine whether QOCS should apply to a particular type of case?

Equality of arms.

Q 32 – Do you consider that QOCS should apply to (i) claimants on CFAs only or (ii) all claimants however funded?

All

Q 33 – Do you agree that QOCS should cover only claimants who are individuals? If not, to which other types of claimant should QOCS apply? Please explain your reasons.

We would be content for it to cover individuals.

Q 34 – Do you agree that, if QOCS is adopted, there should be more certainty as to the financial circumstances of the parties in which QOCS should not apply?

This is not necessary under our version.

Q 35 – If you agree with Q 34, do you agree with the proposals for a fixed amount of recoverable costs (paragraphs 143 - 146)? How else should this be done?
NA

Section 2.7 – Alternative recommendations on recoverability

Q 36 – Do you agree that, if the primary recommendations on the abolition of recoverability etc are not implemented, (i) Alternative Package 1 or (ii) Alternative Package 2 should be implemented?

We express no view on the questions in this section.

Q 37 – To what categories of case should fixed recoverable success fees be extended? Please explain your reasons.

Q 38 – Do you agree that, if recoverability of ATE insurance remains, the Alternative Packages of measures proposed by Sir Rupert should also apply to the recovery of the self-insurance element by membership organisations?
Q 39 – Are there any elements of the alternative packages that you consider should not be implemented? If so, which and why?
Section 2.8 – Proportionality

The proposal: that there should be a new test of proportionality of costs

Q 40 – Do you agree that, if Sir Rupert's primary recommendations for CFAs are implemented, a new test of proportionality along the lines suggested by Sir Rupert should be introduced?

We express no view on this section.

Q 41 – If your answer to Q40 is no, please explain why not and what alternatives would you propose to achieve the objective of ensuring that costs are proportionate?

Q 42 – How would your answer to Q40 change if (i) Sir Rupert's alternative recommendations were introduced instead, or (ii) no change is made to the present CFA regime? Please give reasons.

Q 43 – Do you agree that revisions to the Costs Practice Direction, along the lines suggested (at paragraph 219), would be helpful?

Q 44 - What examples might be given of circumstances where it would be inappropriate to challenge costs assessed as reasonable on the basis of the proportionality principle?

Section 2.9 – Damages-Based Agreements

The proposal: that Damages-Based Agreements ('contingency fees') should be allowed in litigation

Q 45 – Do you agree that lawyers should be permitted to enter into damages- based agreements (DBAs) with their clients in civil litigation?

No. Damages should be separated from costs. To merge the two will lead to damages inflation as judges seek to protect defendants and leads to the law coming into disrepute as any rational calculation of damages is challenged by a percentage deduction.

Q 46 – Do you consider that DBAs should not be valid unless the claimant has received independent advice?

Certainly.

Q 47 – Do you consider that DBAs need specific regulation? If so, what should such regulation cover?

NA

Q 48 – Do you agree that, if DBAs are allowed in litigation, costs recovery for DBA cases should be on the conventional basis (that is the opponent's costs liability should not be by reference to the DBA)?

NA

Q 49 - Do you consider that where QOCS is introduced for claims under CFAs, it should apply to claims funded under DBAs?

Clearly.

Q 50 – Do you consider that the maximum fee lawyers can recover from damages awarded under a DBA in personal injury cases should be limited to (i) 25% of damages excluding any damages referable to future care or losses as proposed, or (ii) some other figure? Please give reasons for your answer.

NA

Q 51 – Do you consider that in personal injury claims where the solicitor accepts liability for paying the claimant's disbursements if the claim fails, the maximum fee should remain at 25%? If not, what should the maximum fee be? Should the limit be different in different categories of case?

NA

Q 52 – Do you consider that there should be a maximum fee that lawyers can recover from damages in non-personal injury claims? If so, what should that maximum fee be, and should the maximum fee be different in different categories of case?

NA

Q 53 – How should disbursements be financed by claimants operating under DBAs?

NA

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Section 2.10 – Litigants in Person

The proposal: that the prescribed rate of £9.25 an hour recoverable by litigants in person who cannot prove financial loss should be increased to £20 an hour

Q 54 – Do you agree that the prescribed rate of £9.25 per hour recoverable by litigants in person should be increased? If not why not?

Yes

Q 55 – Do you agree that the rate should be increased to (i) £16.50 per hour, (ii) £20 per hour or (iii) some other rate (please specify)?

£16.50 would represent a reasonable uplift from the current amount.

Q 56 – Do you agree that the prescribed rate of £50 per day for small claims be increased? If so, to what figure?

Yes. £100.

Questions relating to Impact Assessments

Q 57 – Do you agree with our assessment of the competition impact of these proposals?

We make no response to this section.

Q 58 – Do you agree with our assessment of the impact of these proposals on small businesses?

Q 59 – Do you have any evidence that any of these proposals will impact disproportionately on people depending on the following protected characteristics?

Disability

Sex

Gender Reassignment

Race

Religion or belief

Sexual Orientation

Pregnancy & Maternity

Age

Q 60 - Do you have any other comments on the preliminary impact assessments published alongside this consultation?

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