

## Law Society briefing on Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill

House of Lords Report Stage – March 2012

*The Law Society ('the Society') is the representative body for 145,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law.*

### Key Points

Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill will:

- **Make Conditional Fee Agreements (CFAs) virtually inaccessible to most people** by reforming the success fee element so as to make such agreements uneconomical in lower value, higher risk, or higher complexity cases.
- **Reduce the compensation received by successful parties** via the same reform. This will cause hardship to thousands of genuine claimants, and many businesses with contractual claims will lose money even when they win the claim.
- **Inhibit access to justice by making 'after-the-event' (ATE) insurance too expensive for the majority of claimants.** Such insurance is currently necessary in many cases for parties to be able to bring their claim by protecting them against financial ruin in the event that they lose.
- **Deny access to justice for middle income families, individuals, businesses, and the victims of clinical negligence** who will find it more difficult to make a claim for any wrong they have suffered.
- **Introduce a flawed ban on referral fees in personal injury claims.** The ban, as currently drafted, will result in unintended consequences that will have a serious impact on the day to day management, conduct and marketing of solicitors' businesses.

The Law Society is therefore very concerned about this Part of the Legal Aid, Sentencing and Punishment of Offenders Bill.

This briefing note provides only a short introduction to the Society's concerns with Part 2 of the Bill in its present form. If you would have any questions or would like to arrange a personal briefing session please do get in touch.

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# Introduction to Part 2 of the Bill

Part 2 of the Bill seeks to introduce selected recommendations from the review in civil litigation funding arrangements undertaken by Lord Justice Jackson in 2008, which proposed changes to the prevailing system of funding civil litigation in the absence of legal aid.

## The current system

The current regime governing CFAs was introduced in the 1990s in order to mitigate for cuts in civil legal aid which were also made at the time, by providing an alternative funding route for those who could not afford to pursue litigation and who were not eligible for legal aid.

Where there is a CFA, the solicitor shares in the risk of losing the case. If the case is won the lawyer's base costs are usually recoverable from the losing party and the lawyer can recover an additional uplift - or 'success fee' - which can be up to 100 per cent of the base costs in those cases which proceed to trial. In many other cases that settle earlier than trial the success fee is in fact considerably less.

Under a CFA, even if a client does not have to pay his or her own lawyer if the case is lost, (s)he may still have to pay the opponent's legal costs and both sides' disbursements. To cover these, clients are often advised to take out 'after the event' (ATE) insurance. The Access to Justice Act 1999 permitted the recovery from the losing party in legal proceedings the extra costs associated with CFAs (ATE insurance and success fees). Until then these had been deducted from the client's damages.

## The Government's proposals in Part 2 of the Bill

In November 2008 Lord Justice Jackson was appointed to conduct a review of civil litigation costs. The review reported in January 2010 and some of the review's recommendations have now been incorporated into the present Bill. The main proposals in the Bill will:

1. **Clause 43 - Abolish recoverability of success fees in CFAs; but**
  - a. Allow for a success fee to be deducted from damages (capped at 25% of the compensation); and
  - b. Provide for a 10% increase in damages for the injury itself (with no increase on the overall award) to mitigate for the acknowledged damage this will cause
2. **Clause 45 - End recoverability of ATE; but**
  - a. Provide for Qualified One-Way Costs Shifting (QOCS). Under this proposed change defendants would still pay the claimants legal costs if the claim is successful (but not the success fee or the ATE premiums). Claimants however will be not have to pay the defendant's legal costs unless the claimant is shown to have 'acted unreasonably' or is considered to be of 'sufficient financial means'.
3. **Clauses 54 and 55 - Prohibit the payment and receipt of referral fees in personal injury claims**

The remainder of this briefing will summarise the Society's view on the key Clauses and Amendments proposed to the Bill.

## Clause 43 – Conditional Fee Agreements: success fees

As it stands, the effect of Clause 43 is that a success fee under a CFA will no longer be recovered from the losing party in any proceedings.

Instead, the Clause provides for the lawyer's success fee to be recovered from the claimant's own precisely calculated damages, subject to a cap likely set at 25% of non-future loss.

The Law Society believes that the Government's proposals as drafted are deeply flawed for the following reasons:

1. They breach the fundamental principle that injured victims are entitled to 100% of their precisely-calculated damages.
2. In non-damages claims (such as contract or debt cases) the indebted party may end up losing a significant proportion of the monies legally due under contract.
3. Capping success fees at 25% of only non-future losses will provide sufficient stake only for the simplest and lowest value cases. Most claims will be uneconomic to pursue, particularly those complex cases with high early investigation costs.

### The Society's favoured solution – Recoverable success fees

In order to alleviate the existing costs burden on defendants and the future costs burden for claimants, the Law Society's joint proposed alternative with the Association of Personal Injury Lawyers (APIL) and the Motor Accident Solicitors Society (MASS) is the introduction of a new two-stage fixed recoverable success fee. This means that:

- No fee would be recoverable for any work undertaken prior to the issue of legal proceedings.
- The first stage fixed success fee of not less than 12.5% or more than 27.5% (the rate would be fixed by the Lord Chancellor depending on the type of work) would be payable from the date of issue of the proceedings until the date of filing of a listing questionnaire – the form which indicates that both parties are ready to proceed to trial - with the court.
- The second stage recoverable success fee fixed at 50% would be payable from the date of filing of that questionnaire up to and including any trial or Appeal. There would be no recoverable success fee in the costs of proceedings involving a dispute about legal costs only.

**The Society therefore invites Peers to support the below amendment to Clause 43, which would have the effect of implementing this solution:**

#### Clause 43

Page 30, line 24, leave out subsection (4) and insert

“(4) In subsection (6) of that section after “subject in the case of court proceedings to

rules of court” insert “and subject to subsections (6A) to (6C)”.

(4A) After subsection (6) insert—

“(6A) The Lord Chancellor shall by order restrict the extent to which success fees can be recovered in accordance with subsection (6).

(6B) The order must—

- (a) allow recovery of a success fee, at a rate specified in the order of not less than 12.5% and not more than 27.5% , in respect of work carried out in issuing proceedings and from then until completion of pre-trial stages, and
- (b) allow recovery of a success fee of 50% for work after the completion of pre-trial stages (including any work in respect of appeals).

(6C) The order—

- (a) must make supplemental provision in respect of subsection (6B) (in particular, provision for determining what amounts to completion of pre-trial stages);
- (b) may refer to rules of court or provide for matters to be determined by or in accordance with rules of court; and
- (c) shall not have the effect of limiting the amount of any success fee that may be charged.”

## General damages 10% uplift

The Government proposes, in line with the advice of Lord Justice Jackson, that, in order to compensate for claimants having to sacrifice a proportion of their damages, to increase general damages for pain, suffering and loss of amenity by 10%.

The Government proposes that the implementation of this general damages uplift be left to the paying parties and the judiciary to implement.

The Law Society believes strongly that this proposal should be on the face of the Bill via a New Clause detailed below. This is necessary for two reasons: first, the courts are not able to uprate damages simply because the Government, absent a lawful authority from statute, instructs them to implement Government policy; and second, because unless the increase in damages is introduced into legislation it will be virtually impossible for the requirement for defendants to pay the increase to be monitored and policed.

### **The Society's favoured solution – Putting the 10% damages uplift on the face of the Bill**

The Society therefore invites Peers to support the following Amendment which would have the effect of ensuring that the increase in damages, as proposed by Lord Justice Jackson and agreed by the Government, is actually implemented and annual reports are laid before Parliament by the Lord Chancellor on how, if at all, the increase is being achieved.

#### **After Clause 58**

Insert the following new Clause—

#### **“General damages 10% uplift**

- (1) The Lord Chancellor must take all reasonable steps to ensure that the provisions of this Part about litigation funding and costs are complemented by a 10% increase in general damages for personal injuries (as recommended at paragraph 2.4 of the Final Report of the Review of Civil Litigation Costs published in December 2009).
- (2) The arrangements may consist of or include the issue of guidance, or the provision of training, by the Judicial Studies Board.
- (3) The Lord Chancellor must lay reports before Parliament about the arrangements made under subsection (1); and
  - (a) the first report must be laid before the end of the period of one year beginning with the date on which the first provision of this Part is commenced,
  - (b) later reports must be laid at intervals of not more than a year, and
  - (c) if a report includes a statement that in the Lord Chancellor's opinion the 10% uplift has been achieved, no further reports need be laid.”

## **Clause 45 – Recovery of insurance premiums by way of costs**

Currently, Clause 45 ends the recoverability of 'after-the-event' insurance premiums from the losing party (except in very limited circumstances, namely, to cover the costs of expert reports in clinical negligence cases). ATE recoverability was initially introduced in 2000, following the Access to Justice Act 1999. The amendments made by this Clause repeal these provisions and thus return the situation to that which prevailed following the prior to the 1999 Act.

### **Law Society Position**

The Society supports this proposal if it is introduced in conjunction with the other amendments contained within this briefing paper. The Society takes the view that if claimant's, and not defendants, are liable for these payments then premiums are likely to reduce to levels nearer to those which were applicable prior to 2000.

# Qualified One-Way Costs Shifting

While not in the Bill the Government plans to introduce Qualified One-Way Costs Shifting (QOCS) in personal injury claims as part of its package of civil litigation reforms.

The current stated intention is that while unsuccessful defendants will continue to be responsible for a successful claimant's legal costs, an unsuccessful claimant will not have to pay the successful defendant's costs unless the claimant has acted unreasonably or fraudulently or his/her financial means are such that a court should make a costs order.

The Society is of the view that the 'qualified' nature of the Government's proposed system of One-Way Costs Shifting will have adverse and unintended consequences, not least:

1. The creation of legal uncertainty for claimants – As they would not know from the outset what, if any, costs they may face. This would act as a bar to justice, as claimants would not be able to proceed without the risk of serious and uncertain financial liability.
2. Uncertainty will lead to satellite litigation costs – It is extremely likely that this is going to lead to 'satellite litigation' (where proceedings are issued not related to the main issue in a matter, but matters which are ancillary to it) as parties seek to determine the extent of the terms 'acted unreasonably' or being 'of sufficient financial means'. The move will therefore not serve to reduce civil litigation costs, but will in fact increase them.

In its response to the consultation *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations* the Government also indicated that it was considering a 'minimum' requirement for unsuccessful claimants. It is not the Government's intention to introduce QOCS into legislation; instead, it is intended that the rules will be implemented via the Civil Procedure Rules Committee.

## The Law Society's favoured solution – One-Way Costs Shifting

The Society invites Peers to support the following new Clause (to be inserted after Clause 45) which seeks to embody One-Way Costs Shifting (OCS) into legislation, with the only qualification being that the protection of OCS would be lost if a court finds that the claimant has acted fraudulently in the conduct of a claim.

### After Clause 45

Insert the following new Clause—

#### **“Qualified one way costs shifting**

- (1) The Lord Chancellor must make arrangements to ensure that the implementation of section 45 is complemented by a system of qualified one way costs shifting (as recommended at paragraphs 2.6 and 2.7 of the Final Report of the Review of Civil Litigation Costs published in December 2009).
- (2) “Qualified one way costs shifting” means that—
  - (a) claimants are not required to pay defendants' costs if a claim is unsuccessful, but



- (b) defendants are required to pay claimants' costs if a claim is successful.
- (3) The Lord Chancellor may by regulations make provision for the purposes of subsection (1); and the regulations may, in particular, make provision about what courts and tribunals may and may not order in respect of costs.
- (4) The arrangements under subsection (1) may include—
  - (a) regulations under subsection (3),
  - (b) changes to rules of court, or
  - (c) any other process that appears to the Lord Chancellor to achieve the required purpose.
- (5) In making arrangements under subsection (1) the Lord Chancellor must ensure that the system of qualified one way costs shifting—
  - (a) does include an exception so that claimants may be required to pay defendants' costs where the court finds that a claimant's behaviour in relation to the litigation has been dishonest.
  - (b) does not include an exception allowing claimants to be required to pay defendants' costs having regard to claimants' or defendants' financial circumstances;
  - (c) does not include an exception allowing claimants to be required to pay defendants' costs as a result of failing to be awarded a sum greater than a sum offered by the defendants in accordance with rules of court.
- (6) Arrangements under subsection (1) may include any provision which in the Lord Chancellor's opinion is likely to—
  - (a) maintain the availability or affordability of costs insurance policies (within the meaning of section 58C of the Courts and Legal Services Act 1990) for cases in which they are still required;
  - (b) reduce uncertainty for claimants and defendants;
  - (c) reduce satellite litigation (litigation in relation to the costs of litigation);
  - (d) mitigate other potential undesirable effects of qualified one way costs shifting.
- (7) Arrangements under subsection (1) must apply to—
  - (a) claims for damages for personal injuries, and
  - (b) other classes of claim specified in regulations made by the Lord Chancellor.
- (8) Section 120(1) to (3) and (6) of the Courts and Legal Services Act 1990 (regulations) shall apply to regulations under this section.
- (9) The Lord Chancellor must lay reports before Parliament about the arrangements made under subsection (1); and
  - (a) the first report must be laid before the end of the period of one year beginning with the date on which section 45 is commenced,
  - (b) later reports must be laid at intervals of not more than a year, and
  - (c) if a report includes a statement that in the Lord Chancellor's opinion an appropriate system of qualified one way costs shifting has been implemented, no further reports need be laid."

## **Clauses 54 to 58: Rules against referral fees**

By Clauses 54 and 55 the Government intends to introduce a ban on the payment of referral fees for the introduction of personal injury casework.

The Society fully supports the banning of referral fees throughout the entire legal services sector, and is therefore disappointed that the Government has not taken this opportunity to do so. In particular, the Society opposes the payment of a fee on a 'cash per case' basis, which is the main source of income for Claims Management Companies in personal injury cases, and is also the usual basis for referrals in conveyancing, employment and other contentious matters.

### **The Government's current proposals go too far and may restrict legitimate marketing arrangements.**

Solicitors, as with all other areas of business, need to find ways of marketing their services so that clients are aware that they exist and are able to make an appropriate choice.

So, while in some respects the Society considers the scope of Clause 54, in terms of the areas of the legal services market to which it applies, to be too restrictive, in other respects it goes too far and may lead to several unintended consequences. For example:

The prohibition on a payment for passing on personal information would, in the Society's view, prohibit the following arrangements, far exceeding the Government's stated intentions:

1. Outsourced answering services which involve payment in relation to the volume of calls.
2. Any outsourced advertising involving an element of payment by results where, irrespective of the leads generated by such advertising in fact turn into instructions.
3. Consortia of smaller firms getting together to share marketing costs.

As drafted, the only sort of advertising that is likely to be permitted under these arrangements is advertising generated by individual firms in-house. In practice, particularly with the advent of Alternative-Business Structures in the legal services sector, it is likely that a few largely firms (probably claims handlers joined with solicitors) will spend significant sums marketing and will make it very difficult for small firms to compete.

This is unlikely to reduce the number of claims and it is hard to see where the public benefit of this outcome is.

In the Society's view, these problems arise out of the definition of a referral arrangement and the fact that it depends on the very wide range of activities involved in the concept of 'information'. The Society believes that it is crucial that this concept be narrowed and suggests that, instead, the prohibition should prevent fees being paid for 'instructions' or some similar concept which links the fee to the delivery of work.

The 'evil' with referral fees, so far as the Society is concerned, lies in the fact that consumers are being directed strongly towards the person who has paid for the work, rather than the most suitable solicitor and that this affects client choice and, possibly the standard of work. The Society therefore believes that the prohibition should be on the payment for instructions.

### **The Law Society's favoured solution – Exceptions for marketing arrangements**

The Society therefore invites Peers to support the following new Clause (to be inserted after Clause 57) which would have the effect of giving the Lord Chancellor the required flexibility to make future regulations to exempt certain legitimate marketing arrangements from the scope of the sections of the Bill prohibiting referral fees.

**After Clause 57**

Insert the following new Clause—

**“Exceptions for marketing arrangements**

- (1) The Lord Chancellor may make regulations creating such exceptions to the provisions of sections 54 to 57 as are desirable, in the Lord Chancellor’s opinion, to ensure that marketing arrangements are not prohibited by any of those sections.
- (2) In subsection (1) “marketing arrangements” means arrangements which in the Lord Chancellor’s opinion involve the provision of advertising, marketing or communications services to or on behalf of a regulated person.
- (3) An exception under the regulations may be subject to specified conditions.”