

Legal Aid, Sentencing and Punishment of Offenders Bill - Part 2

House of Lords Committee Stage briefing - Monday, 30 January 2012

The Law Society ('the Society') is the representative body for more than 145,000 solicitors qualified in England and Wales. The Society negotiates on behalf of the profession, and lobbies regulators, Government and others.

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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Part 2: Reforms to civil litigation funding

1. Part 2 of the Bill seeks to introduce selected recommendations from the review into civil litigation funding arrangements undertaken by Lord Justice Jackson. These extensive reforms which, in the view of the Society, will have very serious implications for the practical ability of many thousands of people to access justice, were debated for just 30 minutes by MPs during the Bill's Report Stage¹.
2. **Recoverability of 'success fees' and 'after-the-event' insurance premiums in Conditional Fee Agreements (CFAs)** - 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.
3. 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 1999 Access to Justice Act 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.
4. 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:
 - a. **Abolish recoverability of success fees in CFAs; but**
 - Allow for a success fee to be deducted from damages (capped at 25% of the compensation); and
 - 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.
 - b. **End recoverability of ATE; but**
 - 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'.
5. The Law Society believes that these reforms are being pushed through to tackle a problem which doesn't exist. These changes - which appeared in no party's manifesto, nor in the coalition agreement - are premised on an alleged 'compensation culture', a phenomenon which has been shown again and again to be a problem of perception rather than substance. Indeed Lord Young recently noted in his report Common Sense, Common

¹ [Hansard \(HC\), 2 November 2011.](#)

Safety that among most of those giving evidence: 'There was a general agreement that the rise of a compensation culture is largely a myth perpetrated by the national press'².

6. Furthermore, the proposals are predicated on the flawed view that claimants have no interest in costs. Quite apart from the obvious point that claimants are likely to be highly interested in issues affecting their well-being it is also clear that the solicitor taking the claim has a strong interest in not running bad cases for which they will not be paid for as they are taken on a 'no win, no fee' basis.
7. The Government's intention is to repeal provisions originally introduced to protect access to justice for those victims who would no longer qualify for legal aid, by making success fees and ATE premiums non-recoverable. The consequences of the changes will be:
 - a. **Abrogation of the restitution principle** - injured victims will no longer receive 100% of their compensation.
 - b. **In non-damages cases the creditor may lose a significant proportion of the monies legally due under contract** - as a result of which business will suffer.
 - c. **The ATE market is likely to collapse** - meaning claimants in many deserving cases will not risk taking a case because of the profound financial risks if the case is lost
 - d. **The legal services market is unlikely to be willing to absorb the greater losses that cases of lower value, higher risk or greater complexity would present** - solicitors will be disinclined to take on anything but the most winnable cases, restricting access to justice for many and prohibiting important test case litigation.
8. **While not in the Bill, Qualified One Way Costs Shifting (QOCS) will be introduced** - The Government believes that this will act as a substitute for the removal of the recoverability of ATE insurance premiums from the defendant. QOCS essentially means that there is a deviation from the usual rule where the loser pays winners costs (the 'costs follow the event' rule). A losing defendant would continue to be liable for the costs of a winning claimant, but a losing claimant would pay for a winning defendant's costs where, and to the extent, it is reasonable for them to do so. Conduct and financial resources will be taken into account, and if the claimant is considered to have sufficient funds, the successful defendant's costs will be payable.
9. The Society is of the view that the Government's proposal to move to a system of QOCS will have a number of adverse and unintended consequences:
 - a. **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.
 - b. **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.

² [Common Sense, Common Safety](#)

- c. **This position actually restricts access to justice for a defendant** - In practical terms there may be a disincentive for defendants (or their insurers) to defend a claim, no matter how strong a defence they feel they have. Thus businesses may have to settle unmeritorious personal injury claims for economic reasons.
 - d. **A system whereby a winning claimant will recover their costs, but a winning defendant must bear their own introduces a fundamental inequality between litigating parties** - QOCS could therefore serve to restrict access to justice for defendants. Not all defendants will have the support of an insurance company. The regime could therefore be particularly detrimental to private individuals and small businesses.
10. One particular negative expression of the introduction of financial uncertainty could be to restrict many cases to only the super-rich, who are able to absorb the potential financial losses. This is starkly expressed in the case of the Dowler family, who suggested in a letter to Nick Clegg and David Cameron in September that they would not have felt able to bring their case against the News of the World under the proposed legislation³.
 11. While there will therefore be many losers if the proposals are implemented - including accident victims, victims of negligence and wrong-doing, businesses, local authorities and even the Government itself – there will, however, also be a very clear set of winners: the general liability insurers. Insurers wholeheartedly support these plans. While the Government is with one hand quite rightly trying to place the victim at the heart of the criminal justice system, it is with the other removing the victim from the heart of the civil justice system, and replacing them with the insurance lobby.
 12. The likely result of the Government proposals is obvious; the decimation of the market that allows claimants to insure themselves against the risk of losing a case and facing substantial adverse costs liability. Being unable to accept these risks, claimants simply will not be able to bring cases. Thus it is the case that, when combined, Parts 1 and 2 of the Bill represent a serious affront to access to justice.
 13. **In Part 2 is a proposal of very great concern to the Society: namely to amend defendant cost orders (DCOs)** - In Clause 52 and Schedule 6 of the Bill the Government has sought to amend the *Prosecution of Offenders Act 1985* so that the Lord Chancellor has the power to cap the amounts that courts award. The Bill's explanatory notes state: 'This Bill will provide the Lord Chancellor with a power to do so for the purposes of proceedings in England and Wales, other than in relation to costs incurred in proceedings in the Supreme Court. It will also largely prevent orders being made in respect of legal costs where legal aid is available.'⁴ The consequences of the proposed change are that:
 - a. There will be no DCOs for individuals in the Crown Court (except in appeal cases) as contributory legal aid is available.
 - b. In the Magistrates Court DCOs will be capped at legal aid hourly rates.
 - c. There will be no DCOs in any circumstances for companies/corporate bodies.
 14. The Society considers the Government's proposals to be both unfair and illogical; even more so when the Government is doing nothing to reduce the burden on the legal aid fund by forcing wealthy defendants whose assets have been restrained to pay for their own defence, rather than granting them free legal aid and inflating the cost of legal aid to the taxpayer.

³ [BBC News, \(2011\), 'Dowlers back no-win, no-fee legal system' \(23 September 2011\)](#)

⁴ [Legal Aid, Sentencing and Punishment of Offenders Bill, Explanatory Notes](#)

15. **At the end of Part 2 are proposals to prohibit the payment of referral fees in personal injury claims** – By Clauses 54 and 55 the Government intends to introduce a ban on the payment of referral fees for the introduction of personal injury work. The Society is in favour of prohibiting referral fees throughout the legal services market and is disappointed that the Government has not taken the opportunity to do so. In particular, the Society is against the payment of a fee on a 'cash per case' basis which is the main source of income generation for most claims management companies in personal injury cases and is also the usual basis for referrals in conveyancing, employment and other contentious matters.
16. However, the Society has very significant concerns about the Government's current proposals which seem to go too far in prohibiting perfectly legitimate marketing arrangements. Solicitors, as with any other 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.
17. In some respects the Society considers the current drafting of Clause 54 does not go far enough and yet in other respects it goes too far and may lead to unintended consequences.
18. For example, the prohibition on a payment for passing on personal information would, in the Society's view, prohibit the following arrangements which seem to go far beyond Government policy:
- a) Outsourced answering services which involve payment in relation to the volume calls – the passing on of the details which a potential client has left on such a service;
 - b) Any outsourced advertising involving an element of payment by results, as the majority of such services will, and irrespective of whether the leads generated as a result of advertising in fact turn into instructions;
 - c) Consortia of smaller firms getting together to share marketing costs.
19. As drafted, the Bill will also prevent solicitors referring prescribed legal business to another solicitor or overseas lawyer in circumstances where the referring solicitor would be in breach of his professional obligations in continuing to act for the client. This can occur for a number of reasons, for instance where the lawyer lacks the expertise to deal with a particular aspect of the case or where there is a conflict of interest. In these cases it is better for the client to be represented by another lawyer. In many cases it will be inappropriate for the lawyer to charge for the work that has already been done and the referral fee effectively compensates the solicitor for the work done so far and enables the client to start with the new firm with a clean break. It would be very unfortunate if, as a result of this legislation, solicitors were inhibited from complying with their professional duties and the Society does not believe that there is harm from a lawyer receiving such a fee provided that the lawyer does not make a business out of such referrals.
20. In addition, the Society is concerned that the legislation will prohibit arrangements whereby some solicitors are referred work by employers or membership organisations in circumstances where, although fees are not paid, the solicitor may provide advice to members or employees on a pro bono basis. The Society believes that this facility has considerable value, particularly at a time when access to justice is likely to be affected by the reductions in the scope of legal aid. Again, this does not appear to us to be something that Government would wish to prohibit and, in the Society's view, it should be explicitly permitted.
21. The Society is also concerned that the legislation may prohibit fee arrangements which are based upon bulk work. For example, lawyers may agree a reduced fee because of membership of a panel (for example, the Treasury Solicitor's panel or an insurance panel) which effectively enables them to obtain a particular amount of work. The current drafting

of the Clauses appears to be wide enough to prohibit such arrangements and, again, the Society considers that there needs to be clarification that this is not the case. The Society does not believe that the free negotiation of prices is anything that the Government is seeking to address.

22. The current Government policy favours prohibiting the payment of referral fees in personal injury claims only - The Society does not consider that this goes far enough and. would urge the Government to consider extending the ban further. There are particular concerns about conveyancing work where, in effect, consumers are being directed by estate agents to solicitors who pay the highest fee, irrespective of whether the solicitor is the most appropriate. If, as a matter of policy, the Government considers that the payment of referral fees is unacceptable in one area of work, then the Society sees no reason why that policy should not extend to conveyancing as well. While the Society notes that the clause contains a power for the Lord Chancellor to extend the prohibition, the Society believes that the concerns on conveyancing are serious enough for it also to be included on the face of the statute.
23. These concerns are serious and the Society feels that, as drafted, the clauses are seriously flawed.

Appendix 1 - Case Studies

Background

The following case studies provide examples of how the existing CFA regime provides critical access to justice for middle income people who do not qualify for means-tested legal aid, but for whom enforcing their legal rights would be impossible if they were required to pay themselves.

Case Synopsis: Negligent mis-selling of financial products

A class action by 45 individual claimants against two multi-national banks for their part in the negligent mis-selling of a pension product that the claimants had purchased. The claim concerned a failed UK pension liberation scheme and offshore trust and administration services and was worth in excess of £20 million.

The case took over four years to reach conclusion and only settled two weeks into the 12-week trial on confidential terms.

The Claimants were represented on 'no win – no fee' agreements by their solicitors and their junior and leading counsel, coupled with After the Event (ATE) insurance totaling £6.5million, believed to be a record for a commercial case.

One Client has commented;

"Before we found solicitors willing to act on our behalf on a no win-no fee basis an individual on the other side of the litigation told me that he wasn't bothered about our claim because he knew he could out-resource us.

The man in the street needs to have access to the law or else he becomes disenfranchised from society. No win-no fee agreements provide such access to justice and seeing how they work in practice has restored my faith in the law as a force for good to allow ordinary people to protect their rights and which deters corporate bullying of individuals.

If we had not had 'no win - no fee' legal representation I would have lost my entire life savings and my home. I would have been declared bankrupt in my late fifties without any form of pension despite having worked and saved all my adult life. In the circumstances it would not have been inconceivable that my marriage would also have ended and it is important to remember how far the fabric of life and society and the lives of innocent parties are affected when access to justice is taken away from the ordinary person."

Case Synopsis: Breach of Privacy

The Claimant was a glamour model who had appeared in newspapers, magazines and websites and appeared in music videos, television commercials and on reality television shows. In 2007 the *News of the World* published an article containing the most sensitive and private material about her in hard copy and online. The newspaper did not tell the Claimant how it obtained her private details nor did it seek her permission or warn her about what it intended to do. As a result of the newspaper breaching her privacy, the Claimant's modelling work dried up and she suffered considerable financial difficulties.

Unsurprisingly, the story was picked up by other newspapers and magazines who republished the Claimant's most sensitive and personal details throughout the media and online as a result of the *News of the World's* wrongdoing. In addition to stalling her career publication also caused the Claimant considerable distress and indignity. As a consequence of publication the Claimant endured humiliating ridicule and threats of violence from strangers, both on the street and online, including messages posted on her 'myspace' website telling her to watch her back, threatening to throw acid in her face and gloating that she would not get any more work. The Claimant suffered panic attacks and grew afraid to leave her home.

Shortly after proceedings were issued the newspaper sought to negotiate a settlement and the Claimant agreed to settle her claim for £50,000 in compensation and the payment of her legal costs and disbursements. The settlement, thought to be one of the largest settlements in a privacy action at that stage reflected the gross nature of the newspaper's breach of privacy.

The Client has commented:

'The newspaper knew very well that it was publishing the most sensitive personal details about my life and that the publication of those details was an unlawful invasion of my privacy. There was no public interest in these details being published. The newspaper published because it assumed that, as a model just starting out in my career, there was no way that I could afford to sue and without the availability of a no win – no fee agreement I wouldn't have been able to.'

I don't think people realise the psychological impact it has on you to have the most private and confidential facts of your life published to the world in a newspaper and across the Internet. You feel isolated and powerless. As a result of the publication I was mocked and humiliated and no longer able to find work.

When the newspaper realised that I could sue, because I had solicitors and a barrister acting for me on a 'no win – no fee' basis, and that I was prepared to do so, it settled the claim quickly knowing that it was in the wrong. It was only when the Newspaper accepted that fact that I was able to begin rebuilding my life.'

Case Synopsis: Libel

In early 2009 the Sri Lankan army attacked Tamil communities in the north of Sri Lanka. These events led many Tamils resident in the United Kingdom to join together in mounting a spontaneous demonstration outside the Houses of Parliament. The demonstration commenced on 7 April 2009 as part of which the Claimant, a Tamil refugee, embarked on a 23-day hunger strike. After the hunger strike concluded, the Claimant was kept in hospital for 5 nights to recover.

On 9 October 2009, the *Daily Mail* published false and defamatory allegations about the Claimant that he had been secretly eating takeaway burgers throughout his hunger strike and caused the police to waste a fortune in public money. The allegations were repeated by the *Sun* newspaper on line. Neither newspaper made any attempt to contact the Claimant before publication to verify the truth of the allegations before deciding to publish them.

The damage caused to the Claimant by publication of the libels was substantial, in part, because the articles alleged that supporting evidence was caught on camera by a police surveillance team and that police surveillance teams had observed the Claimant eating. The Metropolitan Police Superintendent who was in charge of the police operation in Parliament Square subsequently confirmed that the police did not see the Claimant eating and that these allegations were false.

Both newspapers were invited to apologise and compensate the Claimant for the harm done. Both newspapers ignored that invitation. The Claimant had no means to vindicate himself and no ability to fund a legal claim against the newspapers and so the Claimant's solicitors and barrister agreed to act on a 'no win, no fee' basis and proceedings were issued. Eight months after publication both newspapers finally agreed to set the record straight and apologise in their newspapers and by way of a statement in open court as well as payment of substantial damages and his legal costs including disbursements.

On the day that the statement in open court was read out the Claimant said:

"I am relieved that this matter is now resolved and I can start to rebuild my life again. The past 8 months have been an unbearable strain on my life, to the extent that at times I have even contemplated taking my own life. As a result of the lies that the newspapers published about me, and through no fault of my own, I have lost friends, been shunned by family members and completely ostracised from the Tamil community."

I felt I had a responsibility to all those who had supported me during the hunger strike, and were sullied by association with me, to take legal action against both newspapers to prove that the allegations that were published were false.

Now that both newspapers have declared that the allegations are completely untrue and apologised, I sincerely hope that those people will accept the newspapers' apologies and understand that I have done nothing wrong. My sacrifice during the 23-day hunger strike was real and for the sake of my fellow Tamils who are suffering in Sri Lanka.

I would like to thank all those who have stuck by me through this nightmare and have not doubted my integrity."