



The Law Society

**Proposals for reform of civil litigation funding and costs
in England and Wales**

Implementation of Lord Justice Jackson's recommendations

Response by the Law Society

February 2011

supporting
solicitors

Contents

1.	Introduction	3
2.	Executive summary	6
3.	The Law Society's response	12
4.	Alternative recommendations.....	31

1. Introduction

- 1.1 The Law Society welcomes the opportunity to respond to the Government's Green Paper on the implementation of the recommendations in Lord Justice Jackson's (Jackson LJ) report on civil litigation costs.
- 1.2 There can be no doubt that Jackson LJ undertook his review with dedication, enthusiasm and as much thoroughness as the short timescale allowed. This should not distract from the fact that the recommendations, which have caused much controversy, raise significant concerns about how far, if they are implemented, access to justice will continue to be properly funded and affordable and widely available to consumers and businesses who need their disputes resolved.
- 1.3 It is crucial that access to civil remedies should not be denied to people because they are unable to afford the costs of litigation or are afraid of the risk of liability for the other side's costs if the action fails. That is the golden thread that runs through this, our formal response to the Government's consultation on the Jackson proposals. While we are happy to comment upon the green paper proposals and questions in sequence it would also be helpful to re-state our views on important points of principle, which we do in the executive summary that follows. The second point to note is that the green paper largely mirrors and consults upon some (but not all) of the recommendations in Sir Rupert's final report so that many of the questions are obviously aligned and consistent with it. For that reason, this response should also be read in conjunction with the Society's formal response to the Jackson report which was published on 13 October 2010. It can be found at:

<http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=431565>
- 1.4 That response also sets out the intensive and detailed consultation we embarked upon ourselves in formulating and developing our policy positions; evidence which consequently also underpins this submission.
- 1.5 The proposals in the Green Paper need to be read closely with those of the Green Paper on Legal Aid. That paper proposes substantial reductions in the scope, and eligibility for legal aid. This means that it is likely to be particularly difficult for those on low incomes to enforce their rights and it is crucial that, if legal aid is to be removed from certain areas of law, then there should be adequate means to ensure that individuals are able to finance legal actions. Our response to that consultation needs to be read in conjunction with that document.
- 1.6 In our response we set out the costs principles which we believe should apply to litigation in order to achieve a balance between access to justice and fairness to those who are involved in the litigation process. Those important principles stand to be re-stated. They are that:-

- The 100% compensation principle should apply and successful litigants should not be unreasonably out of pocket as a result of the process;
- The costs regime should facilitate early settlement of cases;
- The costs that can be claimed should reflect the level and complexity of the work involved so that cases are prepared appropriately and presented by people of the right expertise;
- The costs regime should not exacerbate inequality of arms between litigants;
- The regime should, so far as possible, encourage certainty;
- Litigants should have a choice of funding mechanisms available to them to suit their particular circumstances;
- Proportionality should not be an overriding consideration and, in particular, should recognise the right of people to obtain remedies, the cost of which may, at times, exceed the value of a claim;
- Future changes to procedural and costs rules should be supported by across the board evidence.

1.7 The Law Society shares the views of many about the current costs system, which can result in costs sometimes being too high. However, we believe that the main drivers of this are: court processes which can and should be streamlined in appropriate cases, delays in dealing with claims due to insufficient court resources and finally a failure by many defendants to deal with claims expeditiously and settle those claims which should be settled at the earliest stage possible. We deal with these points in more detail below. Finally, we hope that government and Ministers will also accept that while stakeholders can engage in a legitimate debate about the causes of costs within the litigation system, it was not Jackson LJ's objective to reduce the number of cases that are brought in England and Wales. If a case is legitimate and a person has been wronged by the negligence or breach of duty of another then, in a fair and just society, they should be entitled to adequate compensation for the harm that they have suffered. We hope that the government will strongly support this contention in all its future work on these issues.

1.8 We consider that it is particularly important to remember that, in the majority of cases currently before the courts, an individual will have suffered some wrong which has caused them loss or damage. It is the basis of English law that that person should receive compensation which puts him or her in the same position and that the compensation should not be diminished by the costs of pursuing it. It is important to remember that the majority of defendants are in a position to limit those costs by settling cases early and that since they are generally backed by insurance or are public organisations are usually in a much stronger position than the claimant. Under the present system that claimant faces a potentially expensive legal process and is at risk of the other side's costs in the event of failure. This places a substantial barrier for many claimants and creates a significant inequality of arms. This is substantially ameliorated by the existence of legal aid and funding

arrangements whereby the risk is taken by third parties (usually solicitors) and insurers all of whom have incentives to insure that unmeritorious cases are not brought.

1.9 The system is not perfect and, as we have made clear in our response, it is inevitable that a complex legal process will create costs and, for some low value claims, those costs will appear disproportionate. However, that is not a reason why the actions should not be brought, though it may be a reason for reviewing the processes that lead to those costs.

1.10 The Law society considers that a completely new system of irrecoverability of additional liabilities, increasing damages and qualified one way costs shifting will:-

- create enormous uncertainty;
- inevitably lead to satellite litigation as its effects are explored by parties;
- may not work at all in delivering access to justice; and
- may have a significant number of unintended consequences

1.11 Finally, a few points to put the proposals into context:-

- Despite claims to the contrary, legal costs are not the only factors taken into account by insurers when premiums are calculated. The value of investments and the performance of the financial markets are also relevant factors.
- Approximately 80% of all personal injury claims in England and Wales are a result of a road traffic accident.
- Since April 2010 a new stakeholder negotiated and agreed streamlined fixed cost process for road traffic accident claims has been operating. It is in its early stages but appears to be very successful in dealing with the concerns which Jackson LJ raises.

It is therefore regrettable that the current proposals regarding civil litigation costs which are based upon the recommendations of Lord Justice Jackson are a move away from evidence based stakeholder negotiations to what is effectively a series of 'opinion based' suggestions. There is a history of such evidence based stakeholder negotiations providing effective and workable reforms.

2. Executive summary

2.1 In this Executive Summary we re-state our considered views on a number of the most important issues. These are in relation to:

- Conditional Fee Agreements (CFAs) and Success Fees
- 'After the Event' (ATE) insurance premiums
- Proposed 10% increase in general damages in personal injury cases
- Part 36 Offers
- Qualified One Way Costs Shifting
- Alternative Recommendations on Recoverability
- Proportionality
- Damages Based Agreements

Conditional Fee Agreements and Success Fees

2.2 One of the central recommendations in the Jackson report is that the success fees in Conditional Fee Agreements (CFAs) should not be recoverable but that general damages should be increased to compensate for the costs that the claimant will now have to bear. As suggested above, the Law Society does not agree that claimants should generally be required to pay costs out of their damages, particularly since, in practice, this is likely to be the only way in which they can finance the action. This offends against the full compensation principle which we support. If it is accepted that general damages are too low then they should be increased, but not simply so that they can in effect be reduced to pay costs. We believe that the proposals to abolish recoverability of success fees and ATE premiums are likely to reduce the damages that claimants recover significantly and may mean that many claimants will not pursue what would otherwise be entirely legitimate claims to recover for loss or injury.

2.3 That said, the government has made it clear that it believes that Jackson LJ's proposals to abolish recoverability and require claimants to contribute potentially up to 25% of general damages and past loss should be implemented. We are also aware that his proposals form a package that, with the exception of Part 36, need to be implemented together. Whilst disagreeing with the principle we have therefore tried to concentrate, in this response, on the workability of such proposals

2.4 The purpose of success fees for lawyers under conditional fee agreements ('CFAs') is to provide additional fees over and above the 'base costs' (which are generally referable to the cost of time expended by the lawyer on the successful case). This serves as a fund for the lawyer to compensate for the time expended on cases which are lost or abandoned. The success fee is therefore analogous to an insurance premium. Under the Access to Justice

Act 1999 the cost of this insurance was to be borne by wrongdoers as a class through recoverability of success fees.

- 2.5 Disputes over how much should be paid by way of success fee in an individual case have been minimised for the vast majority of personal injury cases by the introduction of fixed success fees (e.g. for road traffic and employers' liability accident and disease claims). Fixed success fees were set in the Civil Procedure Rules after negotiated agreements between stakeholders informed by analysis of data by Professor Paul Fenn and Professor Neil Rickman so as to provide a revenue neutral additional fee to be applied to all successful cases on the standard insurance principle of *'the many paying for the few'*. This system could be extended to public liability and clinical negligence.
- 2.6 Alternatively, if there are concerns that lawyers are receiving inappropriate windfalls for cases which settle early, then it would be possible to introduce staged success fees (as, in fact, many lawyers currently do) which would provide defendants with an incentive to settle cases early.
- 2.7 If the government proceeds with Jackson LJ's proposal to abolish recoverability of the success fee without also implementing his proposal to increase general damages by 10%, this would transfer the cost of 'insurance' of the risk of losing cases entirely from the wrongdoer (or rather from their insurers, as most personal injury claims are against wrongdoers who have taken out compulsory third party insurers) to the victim. This would be unfair and would offend against the principle of *'sharing the risks of litigation'* just as the government believes the present system of full recoverability does. This was recognised by Jackson LJ which is why he made his recommendation to balance the abolition of recoverability with the increase in general damages.
- 2.8 The Society therefore believes that considerable caution needs to be exercised in dealing with the recommendations in this context and that, to ensure that people still have access to justice it would be much preferable to look at procedural reform and staged CFAs rather than the abolition of recoverability of success fees. The Society would be keen to further explore such avenues with the government.

'After the Event' (ATE) insurance premiums

- 2.9 The availability of ATE insurance, together with the recoverability of the premiums, has demonstrably improved access to justice. One of the strongest deterrents to legal proceedings being brought by a claimant is the risk of there being a major cost liability in the event of the claim being lost, both in respect of their own costs and those of the defendant. By being able to insure against the loss of a claim, more claimants of low and moderate means do not face that risk: it has, in effect, been transferred to the insurer who is, of course, able to set the premium to reflect the risk and to judge whether or not the action is likely to succeed. It has been suggested by Jackson LJ that qualified one way costs shifting ("QOCS") would eradicate the need for ATE insurance but the Society disagrees as it is likely that claimants will still require ATE

cover for the funding of disbursements, at the very least. Additionally, QOCS is only proposed for personal injury actions. There are still further categories of legal proceedings where the claimant is in a vulnerable position and still needs the protection that ATE provides in order to bring a claim.

- 2.10 The Society therefore remains particularly concerned about the impact on the ATE market if the current system is changed and QOCS is introduced. There is a danger either that the ATE market may collapse altogether or that premiums will become unaffordable, thus providing a significant deterrent for those who have legitimate actions to bring.
- 2.11 Given that CFAs supported by ATE insurance were introduced as a means of replacing legal aid, should the government feel that it still wishes to abolish the recoverability of ATE premiums then we believe that alternative proposals (such as staged ATE premiums) need to be deployed to ensure that access to justice is still possible for the indigent and vulnerable in society. We would be happy to work with the government on developing such proposals.

10% Increase in General Damages

- 2.12 In 1999 the Law Commission published a report in which it recommended an increase in general damages by 50%.¹ This suggests that existing levels of damages are in fact not too high but too low. We are disappointed that the government has chosen not to take this opportunity to review general damages levels in accordance with the Law Commission's recommendations. This would help to resolve a number of issues for claimants if the recoverability of success fees and ATE premiums is abolished and changes are made to the definition of proportionality.
- 2.13 If the government does proceed with its intention to abolish the recoverability of success fees and ATE premiums then damages must be increased by - at the very least - the proposed 10%. However, Lord Justice Jackson based his proposal to increase damages by 10% upon advice received from Professor Paul Fenn that *"such an increase in general damages will in the great majority of cases leave claimants no worse off."* Whilst there is no reason to doubt the accuracy of Professor Fenn's calculations we do not consider that it is right that fundamental reform should be implemented without further scrutiny of this very significant assertion. Such scrutiny will show that, with the inclusion of road traffic accident (RTA) claims, at least 39% of claimants would be worse off. The majority of RTA claims can be very straightforward and since April 2010 a new streamlined fixed cost RTA process has been operating which is estimated will encapsulate approximately half a million personal injury claims each year. If RTA claims are removed from Professor Fenn's calculations it is likely that the great majority of the remaining claimants would be worse off despite a 10% increase in general damages.

¹ Damages for Personal Injury: Non-Pecuniary Loss (LC257)

Part 36 Offers

- 2.14 The effect of the claimant failing to beat a Part 36 offer is that it is a potentially very severe punishment for conduct that is not necessarily unreasonable. For example, early defendant offers are common in cases (such as in clinical negligence) where the true value of the claim is not known until the prognosis is clearer. The balance of risk as between the parties in making and considering Part 36 offers is a highly delicate one and needs to be set very carefully so as to incentivise both parties to make and accept reasonable offers.
- 2.15 If a further brake is needed to give the claimant a direct financial incentive to accept reasonable offers then it should be proportionate to the risk and the quantum of damages at stake.
- 2.16 Protection from the proposed qualified one way costs shifting rule is of little benefit if the claimant has no protection from the Part 36 risk. If a claimant without ATE insurance fails to beat a defendant's Part 36 offer they are likely to have to pay several thousands of pounds in costs.
- 2.17 Without ATE insurance there is a risk that claimants will refuse reasonable offers but there are greater risks that they will under settle by accepting the first Part 36 offer.
- 2.18 We note that the proposals on Part 36 are the only ones which are fully separable from the others (i.e. not linked into the overall package).

Qualified One Way Costs Shifting (“QOCS”)

- 2.19 We are concerned that, as drafted, the proposed Qualified One Way Costs Shifting rule is too vague and uncertain and may result in extensive satellite litigation. For example, as presently proposed there is insufficient clarity about what level of income and assets an individual would need before the protective ‘shield’ could be removed and, also, about what would constitute unreasonable behaviour. This uncertainty could make it much harder for lawyers to advise potential claimants of the risks that they face. It cannot be in anyone’s interest to return to the so-called ‘costs wars’ experienced within the litigation system some years ago. Because of this the Society believes that the sanctions should only be available in wholly exceptional cases and this should be clear from the rule.
- 2.20 The Law Society understands that there has also been a mixed reception from defendants and insurers about these proposals who also consider that this may lead to an increase in spurious and frivolous claims.
- 2.21 The rationale for this proposal as expressed in the Jackson report was that the majority of personal injury claimants are successful. However, this is not the case, for example, in some types of claim such as those involving disease

or public liability. Under the present regime successful defendants receive their costs but under a one way costs shifting regime they would not - and this may unfairly pressurise defendants into settling claims with little merit.

- 2.22 ATE insurance currently covers the claimant's liability for disbursements in losing cases. Under QOCS the ATE insurance premiums would not be recoverable and so claimants would have to fund either the disbursements or the ATE premium themselves. The cost of disbursements in personal injury litigation starts at about £400 which would need to be borne either by the claimant (which may be a substantial disincentive for claimants who are on relatively low incomes) or by the solicitor, who may not feel able to do so in cases where they are already taking the risk of a conditional fee agreement. If suitable ATE products became available then the premium would be yet another deduction from a claimant's damages.
- 2.23 A preferable model that might be proposed would be retaining recoverability limited to the ATE for disbursements premium. Again, this is a model we would be happy to further discuss with government.

Proportionality

- 2.24 The Society considers that changes to the proportionality test as proposed in the green paper will lead to a very significant increase in satellite costs litigation.
- 2.25 Proportionality is a good concept and an important objective which can be of significant benefit in higher value cases, however, it *must not* override the sometimes competing objective that people should be able to pursue legitimate redress when they have been wronged. Current procedural requirements impose a significant number of duties and tasks which have to be achieved by both sides in order to progress a claim and much of the work which needs to be undertaken is the same whether the value of the claim is £2,000 or £20,000. It has been stated by Professor Dame Hazel Genn that:

"The amount of work done on a case is a reflection of many factors and that there appears to be an irreducible amount of work that must be done even to recover damages of £2000 or less".²

- 2.26 The Law Society also rejects the idea sometimes expressed that if the amount of damages at stake is small compared to the costs of pursuing the claim then the claim is somehow less legitimate. While the amount of damages recovered may be small, the significance of it to the claimant depends on their own financial situation. For the more indigent in society even winning a small claim may be very significant to their personal circumstances especially when they have been damaged by the wrong-doing or negligence of others.

² Jackson Costs Review Birmingham costs seminar – June 2009

- 2.27 The Law Society therefore has serious concerns about the approach taken to proportionality in the Jackson report. Whilst the new test as proposed will benefit higher value claims the problem becomes particularly acute in the relationship between the quantum of costs and damages involved in smaller value but complex cases.
- 2.28 The Society therefore considers that access to justice should take precedence when there is a conflict with proportionality and this is likely to occur particularly with lower value claims. So far this has been successfully achieved with the principles laid down in cases such as *Home Office v Lowndes*³ which we support. The Society invites the government to assert these principles in its approach to the concept of proportionality.

Damages-Based Agreements

- 2.29 The Law Society considers that the wider introduction of damages based agreements in contentious business (DBAs) would be helpful as an additional method of funding litigation. However the Society would express some reservations. First, that there should be no requirement for independent legal advice on such arrangements. This is unnecessary and will add significant costs. There is no evidence that solicitors, who are a highly regulated profession (and are required to provide full explanations of costs to clients), are providing inappropriate advice to claimants in respect of CFAs, which are arguably more complex.
- 2.30 Second, further research needs to be undertaken on deciding what the correct level of cap on the percentage recovered from damages should be in such cases. It is also important that the same costs rules apply to DBAs as they do to CFAs as this will avoid arguments by unsuccessful defendants that a DBA should have been used instead of a CFA, so as to avoid costs liability.

³ [2002] EWCA Civ 365

3. The Law Society's response

Section 2.1 – Conditional fee agreements and success fees

The proposal: that CFA success fees should no longer be recoverable from the losing party.

Question 1:

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

Response

No. We remain committed for the reasons that we have set out in the executive summary to the principle that claimants ought to receive 100% of their damages and that there ought to be no deductions from damages.

Question 2:

If your answer to Question 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?

Response

Yes. Success fees which have been fixed based upon proper research ensure fairness and certainty and these have worked well since their introduction.

Question 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)?

Response

Yes. Most claimants will not be able to afford to pay the success fees from their own pockets and this will prevent them from making what would otherwise be a perfectly valid claim. Therefore access to justice will suffer.

Question 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?

Response

No. Based upon current modelling a 25% success fee equates to an 80% chance of success.⁴ Solicitors will be unlikely to take on cases where the chances of success are less as most clients will not have the funds to pay the additional success fee from their own funds in cases where damages are not claimed.

This proposal will particularly impact on all judicial review claims. The Law Society considers that local and national government should always remain accountable as a matter of public policy and this proposal will stifle the ability of people and organisations to ensure that accountability. This would significantly undermine the principles of the Rule of Law.

Question 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?

Response

As previously stated, we consider that recoverability of success fees should remain for all cases. It is likely that more complex claims will particularly suffer if this is changed as significant costs can be incurred in the early stages of a case. Clinical negligence cases are particularly complex and difficult to judge at the outset.

Question 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?

Response

This is the case at the moment in employers liability cases (including disease) and road traffic claims, which are estimated to be over 80% of all litigation claims. The success fees in those cases were fixed after stakeholder engagement, negotiation and mediation by the Civil Justice Council and they are the correct percentages based upon data provided by Professor Paul Fenn.

⁴ Cook on Costs – 2011 – para 45.6 – pages 824/825

The only other possible areas where a maximum success fee could be applied would be clinical negligence and public liability cases. Although it is likely to be complex to fix fees in these cases it should not be impossible. A similar process of stakeholder engagement would ensure viability for this model.

Question 7:

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

Response

Yes, for the reasons that we have outlined.

Question 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?

Response

Yes but there should be an option to seek approval to exceed that – see our response to question 9 below.

Question 9:

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

Response

The cap should be 25% unless the court has given approval for that cap to be exceeded as there could be significant practical difficulties caused in some cases, for example, where a claimant is not awarded full compensation due contributory negligence.

Prior to 2000 the Law Society recommended a cap of 25% of damages as a maximum in respect of the success fee. This was voluntary but the Society is not aware of any solicitor who exceeded that cap. However, the 25% was applicable to all damages, including future losses and care.

A fixed mandatory cap of 25% on general damages may not be sufficient in complex claims (e.g. clinical negligence involving catastrophic injury) to cover the success fee, especially if it is only calculated on the element of general damages. This will impact unfavourably on access to justice for some victims, particularly those with very serious injuries.

Question 10:

If your answer to Question 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?

Response

See answer to question 9 above. The court should be granted discretion to give permission to exceed the cap in appropriate circumstances,

Section 2.2 – After event insurance premiums

The proposal: that the ATE insurance premiums should no longer be recoverable from the losing party

Question 11:

Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of litigation?

Response

No – we do not agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation. The Law Society remains committed to the principle that claimants ought to receive 100% of their damages.

However we recognise that concern has been raised about the level of premiums and what is perceived to be a lack of transparency. We therefore believe that there ought to be an investigation into current ATE premium rates as to whether they accurately represent risk.

In addition, in our response to Jackson LJ's report we suggested that the present system could be refined so that there could be a greater emphasis on staging premiums thus properly reflecting risk. We would urge the Government to develop and refine these products rather than looking at wholesale change.

Question 12:

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

Response

We believe that ATE premiums should remain recoverable in all categories.

Question 13:

If your answer to Question 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?

Response

No. It will require in depth investigation into the personal financial circumstances of each claimant and will also have the potential to cause significant satellite litigation, as has happened in the past.

Question 14:

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

Response

Yes. As stated above we believe that ATE premiums should remain recoverable across the board. However, should the Government wish to look at this as an alternative, we would urge it to make full investigations with the ATE industry as to whether this is a sustainable option.

Question 15:

If your answer to Q14 is yes, should the recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?

Response

Yes. If the current system of recoverability is to change then ATE premiums for all non-legal representation disbursements should remain recoverable.

Question 16:

If your answer to Question 14 or 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?

Response

Not applicable. However, in the event that the Government chooses to introduce this as an option it is likely to create uncertainty for claimants and lead to satellite costs litigation.

Question 17:

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

Response

We anticipate difficulties in disbursements being funded in the absence of ATE insurance. In normal circumstances in the absence of such funding a solicitor would request a client to provide the funds. However, this may not be possible or practicable for the most vulnerable or less well off clients. We foresee huge difficulties in clients raising the funds to pay for disbursements, particularly in claims where the costs of the disbursements could run into thousands of pounds. A clinical negligence case is a good example of this type of claim.

It has been suggested elsewhere that perhaps the disbursements could be funded by claimant solicitors. The Law Society surveyed the profession for their views on this. Only 5% of firms suggested that they would take the risk if funding disbursements themselves and take the same sorts of case as at present. Approximately 13% said that they would take the risk of funding disbursements but would restrict the type of cases they took on.

The data suggests that a majority of clients would be left without disbursement funding. Further, that some people would be denied access to justice if solicitors were not prepared to take certain cases on if they were funding disbursements themselves.

There remains the possibility of third party funding but to date third party funders have shown an unwillingness to become involved in smaller claims and those are the claims which are likely to require disbursement funding.

Question 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?

Response

No. The recoverability of the self insurance element of membership organisations should not be abolished. We believe that such schemes allow access to justice for members of such organisations. In the absence of alternative proposals for us to consider on this subject, we believe that this element ought to remain to be recoverable.

Section 2.3 – 10% increase in general damages

The proposal: that there should be an increase in general damages of 10%.

Question 19:

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

Response

Yes – in the event that the recoverability success fees and ATE premiums from a defendant is abolished. However, this is subject to a number of reservations about the detail of the proposal.

We agree with the Government's analysis of the issues which arise with the approach of Jackson LJ⁵. For those reasons we agree that a preferable way of framing the recommendation might be to *"retain an element of the success fee which is recoverable by the claimant, but to provide for this to be calculated as a sum equal to 10% of the general damages award in each case (including settled cases). This would focus the provision on cases funded by CFAs and would achieve the same result in those cases as Sir Rupert's proposal without creating a fundamental and anomalous change to the basis on which damages are calculated."* This is a solution to the problems raised by the proposals of Jackson LJ on recoverability and general damages whilst not losing their essence.

Question 20:

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

Response

Yes. In so far as civil litigation remains within scope of legal aid, we see no reason why defendants should not pay an amount equivalent to 10% of damages to give effect to SLAS proposals.

⁵ Litigation Costs and Funding Consultation CP13/10 – pages 36 – 37, paras 97 – 99

2.4 Part 36 Offers

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

Question 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?

Response

Yes

Question 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.

Response

No, because it would be too complicated to value non financial remedy cases.

Question 23:

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

Response

Yes – it should apply to any Part 36 offer made pre or post issue of proceedings

Question 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.

Response

Yes – in high value cases a 10% increase in damages could be a significant sum which would be a disproportionate penalty for a defendant to pay. A sliding scale could be introduced based upon value.

Question 25:

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

Response

This could be one way of the system operating, but it could be excessively complex. We would be happy to work with the government on further examining such a proposal.

Question 26:

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

Response

Yes, in the interests of certainty.

Question 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?

Response

No.

A more proportionate model would be to require the claimant to pay only a fixed proportion or amount in the event that they fail to beat a Part 36 offer, perhaps 30% of their damages or of the defendant's costs. This way the costs liability can be quantified more readily and the risk is more approximate to the costs liability. We urge the government to undertake further research in this complex and nuanced area, where the risk of unintended consequences must be considered to be severe.

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.

Question 28:

Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraphs 135 – 137)? If not, please give reasons

Response

No. Whilst the proposal has the potential to replace the current ATE funding system in personal injury cases, as currently proposed it is an imperfect model that may create as many problems as it solves.

The suggested refinement is that there is a presumption that the claimant is not to pay the defendant's costs unless the defendant persuades the court otherwise on application. That procedure may give a claimant some measure of reassurance, but unless more guidance is given on the threshold level that reassurance may prove worthless.

The proposals provide that the shield of QOCS is removed if the claimant's conduct is unreasonable. It is not clear how unreasonable conduct will be defined. As a result it will be impossible to advise claimants at the outset what their liability for adverse costs may be. This uncertainty will deter claimants from bringing legitimate claims.

Howsoever the reasonableness test is defined it is likely that satellite litigation will follow. Defendants may apply to remove the shield (or use the threat of an application tactically) in cases where they allege unreasonable claimant behaviour. Claimants who lose the shield and so may face financial ruin are very likely to challenge the decision.

Similarly, the costs protection shield is lost if the claimant is "sufficiently – or 'conspicuously' to use Sir Rupert's term – wealthy such that they are easily able to pay the winning defendant's legal costs". A measure would need to be found that captured only those claimants who truly were "easily able to pay", but is that realistic? How, when and by whom would financial resources be assessed?

The possible refinement to QOCS which requires a defendant to make an early application to the court deals only with the financial resources issue. Conduct issues will fall to be dealt with at the end of the case and so a claimant will have the risk of an application to remove the costs protection shield hanging over him throughout the litigation.

Question 29:

Do you agree that QOCS would significantly reduce the Claimant's need for ATE insurance?

Response

Yes – but only if it operated so as to satisfy the claimant that ATE insurance was not necessary. Even then it is likely that claimants will need ATE insurance for disbursement funding (see above).

Question 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

Response

Given the proposals on legal aid and our concerns about access to justice we suggest that QOCS should extend to housing disrepair claims but there should not be any further extension until it is possible to review its operation in personal injury

and housing disrepair so as to identify whether it is in fact effective in reducing defendants' overall costs.

Question 31

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

Response

In the Society's view the principles would need to include the following factors:

- The success rate profile of that case type;
- The availability of ATE insurance for that case type;
- The relative cost of ATE insurance as against the quantum of costs recovered in cases Defendants win;
- The incidence and potential for frivolous or fraudulent claims.
- Claims which are withdrawn from the existing scope of legal aid
- Access to justice

Question 32:

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

Response

The Law Society considers that if QOCS is introduced in it should apply to all claimants and not just those on a CFA. The concept of QOCS is to avoid the necessity of expensive ATE insurance against adverse costs orders. All claimants, howsoever funded, will wish to have protection against an adverse costs order and QOCS should therefore apply equally all claimants.

Question 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

Response

Yes. It is hard to see how or why QOCS should apply to companies or NGOs, save that it may fill a funding gap in judicial review proceedings where Protective Costs Orders or costs caps are not necessary or desirable.

Question 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?

Response

Yes. See answer to Q 28 above.

Question 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?

Response

Yes. See answer to Q 28 above. For the financial resources test to work the threshold needs to be set at a high level and both objectively and clearly. Even then, if access to justice is to be maintained for those who clear the threshold, their potential liability has to be circumscribed and fixing the amount payable as defendant costs is one way of so doing.

Section 2.7 – Alternative recommendations on recoverability

Question 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?

Response

The Law Society strongly favours a package of reforms similar to Alternative Package 1. Please refer to Section 4 of this response in which we set out alternative proposals.

Question 37:

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

Response

Clinical negligence, public liability cases and defamation. These are the only non-personal injury cases where fixed success fees do not apply at present. Generally speaking fixed success fees have worked well and they create certainty for all those concerned in the process.

Fixed success fees should wherever possible be set on the basis of revenue neutrality (the insurance principle of the 'many' (winners) paying for the 'few' (losers) and be underpinned by reliable data analysed by an independent trusted third party.

In some categories of litigation, it is more difficult to find standardised risk between cases within the category. In such cases, risk might be better linked to the stage of proceedings at which the case concludes.

1) Public Liability personal injury cases:

Preliminary work on this was carried out by Professors Fenn & Rickman under the auspices of the Civil Justice Council in 2004 and 2005, including the collection and analysis of data, but for reasons which are unclear to the Law Society, the process was never completed. Furthermore, Paul Fenn undertook further analysis as part of the Jackson review in the autumn of 2009. His conclusion that in Fast Track public liability cases the success fee should be fixed at 45% for cases concluding prior to trial and 100% for cases concluding at trial is incorporated in the table of fixed costs which appears at Appendix 4 (pages 538-539) of the Final Report. This follows the current model of a single success fee throughout the case (which is currently incorporated in the CPR for all fixed success fees). However, there is no reason why an arithmetical adjustment (underpinned by analysis by Professor Fenn) could not be made if additional staging were to be introduced (see our answer to Question 36).

2) Clinical Negligence:

There has been no formal statistical analysis of clinical negligence cases to produce standardised success fees, and, it may be argued, each case is individual in risk to a greater extent than other personal injury cases. However, staged success fees (e.g. with increasing success fees pre-issue, post-issue pre-listing, post-listing and trial) may be most appropriate. Many solicitors already use this model. There is also a significant amount of data as to risk and cost available to government already (LSC data and NHSLA data) to which could be added solicitor data to underpin any staged success fees mathematically.

3) Defamation

The Civil Justice Council undertook a number of mediations between claimants and defendants in defamation cases and, the Law Society believes, came close to agreement on fixed success fees. This process should be resumed, with government making a decision on the evidence provided if the parties cannot reach agreement within a defined timescale. Staged success fees (e.g. with increasing success fees pre-issue, post-issue pre-listing, post-listing and trial) may be most appropriate.

4) Other categories of litigation

In other categories of litigation, it is likely that it will either be impossible to get sufficient statistical evidence to underpin a generic success fee (the volume of cases are unlikely to be as great as for personal injury), the risk in individual

cases may be more individualised to the facts and the time and expense taken in trying to fix success fees statistically may not be justified.

However, leaving such success fees for individual assessment at the end of the case can lead to uncertainty as to recovery and liability for costs. Therefore staged success fees (e.g. with increasing success fees pre-issue, post-issue pre-listing, post-listing and trial) may be the most appropriate.

Question 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?

Response

Yes. There is no logic in making any distinction.

Question 39:

Are there any elements of the alternative packages that you consider should not be implemented? If so, which and why?

Response

Yes. If ATE premiums cease to be recoverable (under Alternative Package 2), but two-way cost shifting is retained, there will be both a very significant cost to claimants and also a deficit in access to justice. This mechanism worked briefly between 1995 and 2000, but this was for a small number of cases and insurer's underwriters miscalculated the risk (the original underwriters of Accident Line Protect, Lexington, who priced the original policy at £85 withdrew from the market because of losses). Even routine cases require a much higher premium.

ATE premiums in non-routine cases can be very high. A significant sum of damages may be taken to pay them (e.g. in clinical negligence or catastrophic injury cases). If there is a cap on the amount underwriters will simply decline to underwrite the policy so that no insurance will be available. Very few claimants will litigate where there is the risk of bankruptcy or losing their home if they lose.

Alternative 2 is therefore the worst of all the proposals and the Society strongly opposes it. Either ATE premiums should remain recoverable (at least to some extent) or qualified one-way costs shifting should be introduced, provided this is workable – see our answers to questions 28 to 35 .

Section 2.8 – Proportionality

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

Question 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?

Response

No – subject to the caveat we refer to in respect of high value claims (see paragraph 2.25 above) the Law Society does not agree to the proposed new test of proportionality for the reasons outlined in the executive summary.

Question 41:

If your answer to Question 40 is no, please explain why not and what alternatives would you propose to achieve the objective of ensuring that costs are proportionate?

Response

The Law Society believes that the proportionality rule as proposed will make it uneconomic to run many smaller value cases. Claimants will therefore not be able to find solicitors to assist them to run such cases and they will be denied access to the courts.

The alternatives the Law Society proposes to achieve proportionality are to review and address or extend the RTA streamlined claims process and other measures designed to reduce the amount of work done in smaller value cases. In fact, reform of civil court procedure remains a key concern for the Law Society and one upon which it has already undertaken a great deal of work.

Question 42:

How would your answer to Question 40 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.

Response

Our answer would not change for the reasons outlined in the executive summary.

Question 43:

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

Response

No. The Law Society is gravely concerned that any changes to the rule of proportionality will result in increased satellite litigation relating to costs. The Law Society does not agree that a change in the rule will only be relevant to a small number of cases where costs are reasonable but nevertheless disproportionate.

Question 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?

Response

We consider that unavoidable but disproportionate costs may frequently be incurred in establishing smaller value personal injury claims, housing disrepair claims, Human Rights Act 1998 claims and Fatal Accident claims following inquests.

We also fear that general litigation in smaller value cases will be adversely affected unless there are radical changes to simplify and reduce the work needed to be done under the CPR and to satisfy professional obligations.

Section 2.9 – Damages-Based Agreements

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

Question 45:

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

Response

Yes. The Law Society considers that solicitors should be able to offer to clients the fullest possible range of funding mechanisms depending on the circumstances. However, there will be conduct and regulatory issues in the way that DBAs and CFAs may work as alternatives and these will need to be considered by the SRA.

Question 46:

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

Response

No. There is no necessity for clients to obtain independent advice before entering into a DBA. Solicitors are regulated by the SRA in the conduct of their business and their dealings with clients, including their retainer. Furthermore, such advice will be an additional cost to clients which is unnecessary.

Question 47:

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

Response

No. As previously stated solicitors are already regulated in the conduct of their work and relationships with clients.

Question 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)?

Response

Yes. We consider that if the usual two way costs shifting rule is to apply then any costs recovered from a defendant should then be used to offset the money owed by the client from his/her damages.

Question 49:

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

Response

Yes. There should be no reason why there should be differences based upon a particular type of contingency funding.

Question 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.

Response

Yes but this is conditional upon it being exclusive of VAT which must be paid by the client in addition and on the basis that base costs are recoverable from the unsuccessful party in the usual way (i.e. "the Ontario model")

Question 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?

Response

No. The maximum fee should not include disbursements as these can differ considerably from case to case depending on the circumstances and this would create difficulties for risk assessment and business planning for solicitors, especially if counsel fees are to remain as a disbursement.

For DBAs to work, disbursements, together with any VAT, need to be excluded from the maximum fee and be payable in addition thereto.

It is difficult to say if the limit should be different in different case categories without undertaking financial modelling and further research.

Question 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?

Response

Yes. We consider the maximum should be 40% plus VAT in all non personal injury claims. It should be noted that setting a cap on what can recovered from a client on a contingency basis does not necessarily mean that a solicitor will charge the full amount as this is likely to vary from case to case depending on complexity and risk.

Question 53:

How should disbursements be financed by claimants operating under DBAs?

Response

In the same way as they are to be financed under CFAs which in most cases is likely to be by virtue of an ATE policy if the ATE market continues to exist.

Section 2.10 - Litigants in Person

Question 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?

Response

Yes

Question 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)?

Response

Yes - £20 per hour

Question 56:

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

Response

Yes - £87 per day

4. Alternative recommendations

- 4.1 As previously stated in our answer to question 36 the Law Society is strongly in favour of a package of reforms along the lines of Alternative Recommendation 1.
- 4.2 It is our view that the fixed success fees in most personal injury work have been generally accepted by claimant lawyers and by insurers. The former might argue they should be higher and the latter that they should be lower, but they were fixed after extensive negotiation and were evidence based. By and large they have not been much criticised. It would be possible to extend this to other categories of litigation (see our answer to Question 37), so we agree with Alternative Recommendation 1 (a).
- 4.3 There is scope for further refinement of fixed success fees if it is felt that they need modification to drive behaviours. This was considered carefully during the negotiations and both sides in the end opted for the simple approach of a single success fee, except for the very small number of cases (less than 1%) which go to trial. The Law Society has no objection in principle to revisiting this, provided that the statistical underpinning of success fees to achieve revenue neutrality remains. If, for example, no success fee is payable at all during the pre-action protocol period (alternative recommendation 1(b)), success fees thereafter will have to rise to ensure revenue neutrality of success fees for cases which go beyond the protocol period.
- 4.4 So far as Part 36 risk is concerned, the Law Society does not object in principle to abolition of this risk forming part of the success fee as recommended by alternative recommendation 1 (c). However, this is conditional upon the decision in Carver being reversed as recommended elsewhere (see our answer to Question 26). If clients are to risk their damages there must be certainty that where they beat a Part 36 offer they get their costs and where they don't beat the offer they don't get the costs. The uncertainty created by the Carver decision that you can beat the offer but not get your costs would be unacceptable to clients who have accepted risk of refusing the offer.
- 4.5 The Law Society's model Conditional Fee Agreement currently provides alternatives which i) allows for the solicitor to waive base costs after a Part 36 offer which is not beaten, and thus seek additional success fee for taking on additional risk; or ii) base fees are still to be paid, so the solicitor is not taking on such additional risk.
- 4.6 Individual solicitors must make up their mind which is appropriate. If alternative recommendation 1 (c) is implemented, solicitors would then charge base fees after a Part 36 offer which is not beaten. The optional clause i) in the model CFA would be withdrawn. The client would be at risk of losing the costs of both sides from his damages if the Part 36 offer is not beaten. This is similar to the position that existed under legal aid. The Law Society would not object to this transfer of the Part 36 risk from solicitor to client (with the cost of that risk being borne by the defendant through an

additional success fee if the offer is in fact beaten) if the government agrees with Jackson LJ that the claimant should personally bear a greater risk. However, it should be remembered that, whilst in higher damages cases the damages are normally available to meet the client's liability to pay both sides costs after the offer was made, this is not necessarily the case in lower value damages cases. If alternative recommendation 1 (c) is implemented then claimants in lower value cases (the majority) would be at risk of having to pay costs out of their own pockets if the damages are exhausted. ATE insurers may step in to insure against this risk (at the cost of the client under alternative recommendation 1 (h)), but usually they require the solicitor to waive base costs after the date of the offer as a condition of such insurance. It is unclear whether they would continue to insure if solicitors were prevented from so doing (by implementation of alternative recommendation 1 (c)).

- 4.7 So far as alternative recommendation 1 (d) is concerned, this effectively reverses the decision in *Lamont v Burton*. This decision was a consequence of the implementation of the fixed success fee negotiations into the CPR. It can provide the absurd result that a claimant rejects an offer, fails to beat it, but because the case has gone to trial the solicitor is entitled to a 100% success fee even though the offer was not beaten. The defendant who has 'won' the case (because the Part 36 offer was not beaten) might end up paying more in costs than he has saved in damages and costs after the date of the Part 36 offer. The Law Society would not object to this change in the CPR.
- 4.8 So far as alternative recommendation 1 (e) is concerned, again the extension of success fees to detailed assessment proceedings resulted from the implementation of the fixed success fees within the CPR. The Law Society does not object to this removal. However, detailed assessment proceedings do carry their own risks. It may be appropriate to consider whether Rule 47.19 deals sufficiently with these.
- 4.9 So far as ATE premiums are concerned, these are fixed by underwriters based on the cost of insuring the risk of paying costs. They therefore may have no mathematical relationship to the damages, so the proposed cap (alternative recommendation 1(ii)) is arbitrary. If, however, the government wants to introduce some certainty about liability for ATE premiums at the outset, it might be worth exploring a cap linked to a proportion of defendant's costs (as currently used by First Assist in their ATE policy). This might, for example, be 100% of defendant costs (to enable 50/50 cases to proceed, as with the 100% success fee), or some lower percentage with the balance of the premium (if any) recoverable from the client. There is some difficulty in ascertaining the defendant's costs for the purposes of recovering the premium, but these can be overcome on assessment and, with greater cost management, there will be greater transparency in future in any event. The model has the great advantage that the amount of defendant costs (and thus amount of the ATE premium for which he is liable) is of course entirely within the knowledge of the defendant, increases during the case as defendant costs increase and is linked to the main exposure of the ATE insurer.
- 4.10 If no premium is recoverable during the protocol period (alternative recommendation 1 (g)), premiums for cases which go beyond this stage will

rise. Subject to the ATE market being able to cope, the Law Society has no objection to this.

- 4.11 If no premium is recoverable for failing to beat a part 36 offer (alternative recommendation 1 (h)), such insurance may not be available. As noted above, in lower value cases this gives rise to the risk that not only will the damages be exhausted, but also that the claimant will personally have to pay the balance. It is not known whether ATE insurers will offer this at the claimant's cost.
- 4.12 If an insurer defaults in paying out under the policy, the insured (the claimant here) always remains personally liable. If what is intended is to create an obligation on an insurer to pay out even where they can escape liability under the policy (i.e. as with motor policies), this is a significant proposed extension of the law. Very few policies have this requirement. This would presumably increase the ATE insurers risk and would lead to higher premiums. The Law Society is not aware that avoidance of the policy is a significant issue. The Law Society doubts that public policy requires this development for ATE (if indeed that is what is proposed).
- 4.13 However, notwithstanding these comments, Alternative 1 (refined as discussed above) in principle has the great advantage of building on the successes of the CFA regime, whilst meeting its perceived problems.