Ministry of JUSTICE

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

Implementation of Lord Justice Jackson's Recommendations

Consultation Paper CP 13/10
November 2010

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

November 2010

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About this consultation

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Enquiries (including requests for the paper in an alternative format) to:	Annette Cowell Ministry of Justice Postpoint 4.42 102 Petty France London SW1H 9AJ Tel: 020 3334 3555 Fax: 020 3334 4455 Email: privatefundingbranch@justice.gsi.gov.uk
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Response paper:	A response to this consultation exercise is due to be published by spring 2011 at: www.justice.gov.uk

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Ministerial Foreword

By The Rt Hon Kenneth Clarke QC MP, Lord Chancellor and Secretary of State for Justice, and Jonathan Djanogly MP, Justice Minister

The Government is very grateful to Sir Rupert Jackson, a judge of the Court of Appeal, for his comprehensive and cogently argued *Review of Civil Litigation Costs: Final Report*. This report marks a turning point in the recent history of civil litigation becoming ever more costly. He argues convincingly that disproportionate costs – as we have now – do not advance access to justice; as he puts it:

"*achieving proportionate costs and promoting access to justice go hand in hand".*

This consultation paper seeks views on implementing Sir Rupert's recommendations on reforming 'no win no fee' conditional fee agreements (CFAs), and some other recommendations on litigation funding and costs. We believe that the key recommendations – and in particular those on the reform of CFAs – would, if implemented, lead to a significant reduction in legal costs. His report is therefore particularly timely.

Civil litigation funding and costs may seem a somewhat technical subject, but it is important nonetheless. It is about how we ensure fairness and proper access to justice in civil cases for all parties, especially in the context of changes to legal aid that we are proposing. We are seeking to strike the right balance between access to justice for those who need it with ensuring that costs are proportionate and that unnecessary or frivolous cases are deterred. These are difficult issues which have been grappled with for some time, as all who are familiar with this area of law know. But it is the Government's belief that these recommendations in this major report mark the way forward.

Sir Rupert's proposals on the reform of CFAs are primarily directed at reducing the disproportionate costs of civil litigation – in particular for defendants. Given that many claims are brought against central and local government under CFAs, the additional costs of the current arrangements – in the form of recoverable success fees and after the event insurance premiums – impose a significant costs burden on the taxpayer. Implementing Sir Rupert's proposals will help to maintain access to justice at proportionate costs for claimants and defendants but will also deliver significant costs savings for government. With the current financial position, we are committed to achieving costs savings wherever possible.

This consultation should be considered against the background of costs in civil legal cases having frequently become disproportionate and unaffordable to many individual litigants and businesses – and in particular small businesses. Access to justice is important for both claimants and defendants. Some defendants have complained that the disproportionate costs of defending claims against them mean that they are denied effective access to justice. Disproportionate costs also have implications for the taxpayer who ends up footing many of the bills. In seeking to rebalance the costs of civil cases, we are endeavouring to ensure: that necessary claims can be brought; that reasonable claims should be settled as early as possible; that unnecessary or frivolous claims are deterred; and that as a result costs overall become more proportionate. These principles underpin our approach to reform.

The proposals in this consultation paper are part of a much wider programme of justice reform. The costs of legal aid are being addressed in a separate consultation paper, but – unlike the reforms of a decade ago – this Government is looking at these major changes for the funding of civil cases together and in the round.

Other initiatives are of course underway. There is a new process for low value personal injury claims in road traffic accidents which seeks to control the costs of cases at the same time as improving the speed with which they are considered. That new process came into effect only in April this year, and we are following its progress with interest. While this consultation paper covers the priority recommendations for Government arising out of the Jackson report, other recommendations are being taken forward elsewhere such as by the judiciary as set out in Section 3 of this consultation paper. Furthermore, Lord Young of Graffham’s recent report to the Prime Minister into health and safety law and the rise of the compensation culture, *Common Sense, Common Safety* – which has been accepted by the Government – provides a strong endorsement to take forward the recommendations contained here.

We are also developing proposals for reforming how the civil justice system more widely delivers its services, on which we plan to consult early next year. We will seek to support users by preventing the unnecessary escalation of legal problems or disputes wherever possible. At the same time, where it is determined that court based solutions are the most appropriate mechanism for resolving a civil dispute, we will be seeking views on proposals to offer a range of speedier and more efficient services. This approach is consistent with the approach taken across the wider justice system where, for instance, there is an increased focus on ensuring that methods of Alternative Dispute Resolution are properly explored before cases progress to court.

Kenneth Clarke
Lord Chancellor and
Secretary of State for Justice

Jonathan Djanogly
Justice Minister

1.1 Executive Summary

1. Lord Justice (Sir Rupert) Jackson was commissioned in late 2008 by the then Master of the Rolls to undertake a review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations to promote access to justice at proportionate costs. The review was established on the basis that the costs of civil litigation are too high. Sir Rupert published his report, *Review of Civil Litigation Costs: Final Report,* in January 2010. This independent and comprehensive report makes a broad range of recommendations for reducing costs in the civil justice system in England and Wales. The Government is very grateful to Sir Rupert for his report.

2. Sir Rupert makes 109 recommendations. Of these the Government is taking forward the proposals set out in this consultation paper as a priority. These include Sir Rupert's package of proposals on the reform of conditional fee agreements (CFAs) and on damages-based agreements (DBAs or 'contingency fees'). The Government believes that implementing these proposals should lead to significant costs savings, while still enabling those who need access to justice to obtain it.

3. The Government accepts Sir Rupert's assessment that the current arrangements, particularly those under CFAs, impact disproportionately on defendants. The Government agrees that Sir Rupert's primary proposals on the reform of CFAs would significantly reduce legal costs in civil litigation and make them more proportionate.

The Proposals: a package of reform for CFAs

4. Sir Rupert's primary recommendation is that, under a reformed CFA regime, success fees and after the event (ATE) insurance premiums should no longer be recoverable from the losing side **(Section 2.1 and 2.2)**. Sir Rupert believes that abolishing recoverability of CFA success fees and ATE insurance premiums would ensure that claimants on CFAs take an interest in the costs being incurred on their behalf. He also argues that access to justice is not just about allowing claimants to bring reasonable actions, but also about ensuring that defendants can resist those claims which should not succeed, without being liable for disproportionate costs.

5. In addition to abolishing the recoverability of CFA success fees and ATE insurance premiums, Sir Rupert puts forward a number of proposals designed to assist claimants with the financial implications of this major change. The first of these measures is an increase of 10% in general damages to help towards paying the success fee for which claimants would be liable if Sir Rupert's recommendations are implemented **(Section 2.3)**.

6. Sir Rupert also proposes strengthening the Part 36 arrangements which encourage parties to make and accept reasonable offers. Sir Rupert

recommends increasing by 10% the reward available to claimants who are successful in obtaining a judgment which is at least as advantageous as their own offer **(Section 2.4)**.

7. Qualified one way costs shifting (QOCS) would further assist claimants, by reducing the need for ATE insurance and therefore preserving an element of their damages which might otherwise be used to pay ATE insurance premiums **(Section 2.5)**. QOCS would offer costs protection to the vast majority of personal injury claimants, with their only having to pay a winning defendant's costs where it is reasonable to do so based on the claimant's own wealth or their unreasonable behaviour during the case.

8. Sir Rupert also puts forward two alternative packages of recommendations should the primary recommendations as outlined above not be implemented **(Section 2.7).** These packages would introduce more rigorous control over the level of success fees and ATE insurance premiums that can be recovered from the losing side. The Government considers that the radical reform proposed in Sir Rupert's primary recommendation is needed, but these alternative measures are included so that those responding can consider other options.

9. This consultation also covers three other proposals from Sir Rupert's report. The first is to ensure proportionality of total costs **(Section 2.8)**. The second is allowing lawyers to enter into damages-based agreements (DBAs) with their clients in litigation before the courts **(Section 2.9)**. The use of these agreements is currently not permitted in litigation. However, the Government agrees with Sir Rupert that allowing DBAs would give litigants greater choice in deciding the most appropriate funding method for their case, and could increase access to justice for claimants if CFAs become less attractive. The third concerns increasing the hourly rate recoverable by a successful litigant in person **(Section 2.10)**.

Recommendations not covered by this consultation

10. The final section of the consultation paper also provides an update on other recommendations from Sir Rupert's report which are not covered by this consultation **(Section 3)**.

Impact Assessments

11. The Government recognises the importance of assessing the impact of these proposals, and has published separate Impact Assessments for each of the key recommendations included in this paper. The Government is continuing to gather data on the recommendations during the course of the consultation and is seeking the assistance of those responding in doing so. These Impact Assessments will be updated in light of any evidence received in response to this consultation, and a final Impact Assessment will be published alongside the Government response.

Consultation

12. The Government welcomes responses to the questions set out in this paper. Electronic responses are encouraged, through the use of the online questionnaire, at http://survey.euro,confirmit.com/wix/p485530548.aspx. Alternatively, responses should be sent via email to: privatefundingbranch@justice.gsi.gov.uk. Responses in hard copy form should be sent to Annette Cowell, at Ministry of Justice, Postpoint 4.42,102 Petty France, London, SW1H 9AJ by 14 February 2011.

13. The Government will be responding to this consultation in spring 2011.

1.2 The Case for Reform

Background

14. In his detailed and wide-ranging 557 page Final Report[1] (taken with the equally substantial Preliminary Report[2]), Sir Rupert makes a compelling case that the costs of civil litigation in England and Wales are too high, and that they are disproportionate to the sums in issue. Sir Rupert's report sets out the facts, stakeholders' views, and his recommendations in clear detail. This consultation paper does not repeat the detail of the case, as he has eloquently set it out in his reports, although this paper will need to be read in conjunction with them. But certain of his comments are repeated for clarity, and the arguments are necessarily considered in more detail in respect of each of his recommendations which this paper covers.

15. There can be no dispute that civil litigation in general, and costs in particular, have been at the forefront of action and debate for the past fifteen years and more.

16. Lord Woolf's ground breaking *Access to Justice* report[3] was published to general acclaim in 1996. His remit was wide, but his report identified a number of principles which the civil justice system should meet in order to ensure access to justice. One of these was that system should 'offer appropriate procedures at a reasonable cost'. He went on to identify a defect in the then system as being that it was 'too expensive in that the costs often exceed the value of the claim'.

17. Many of Lord Woolf's recommendations have been implemented through the introduction of the Civil Procedure Rules 1998 (CPR) under the Civil Procedure Act 1997. However, as Lord Woolf himself has said in a recent debate in the House of Lords[4]:

    "Although the general opinion a decade later is that the recommendations I made have benefited civil procedure, it is undoubtedly the fact that one of their objects has not been achieved: the control of costs. The process, as has already been indicated in this debate, is now far too expensive."

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[1] http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/civil-litigation-costs-review-reports

[2] The Preliminary Report is available at the same website address as the Final Report

[3] Lord Woolf's report, *Access to Justice*, is available at http://www.dca.gov.uk/civil/final/index.htm

[4] Damages-Based Agreements Regulations 2010 and Conditional Fee Agreements (Amendment) Order 2010 - Motions to Approve; 25 March 2010, Hansard Col 1166

The Access to Justice Act 1999

18. The Access to Justice Act 1999 introduced significant changes: it reduced the scope of legal aid (in particular for personal injury) on the basis that these cases could rely on conditional fee agreements (CFAs) which had first been allowed in limited categories of law in 1995 (subsequently expanded to all areas of civil law in 1998). From 1995 until April 2000, the additional costs associated with CFAs (the success fee and ATE insurance premium) were borne by the claimant through a deduction from damages. To protect the client from suffering a deduction that would disproportionately reduce the damages, The Law Society issued a recommendation to solicitors that a voluntary cap should be applied to ensure that the total deduction would be limited to no more than 25% of the damages recovered. The Law Society model CFA agreement actually incorporated a provision for the 25% cap[5] on damages. The cap at 25% was a voluntary arrangement 'observed by both branches of the lawyers' professions'[6].

19. However, the 1999 Act – the relevant provisions of which came into effect in April 2000 – made CFAs more attractive by allowing the recoverability of the success fee and the ATE insurance premium in order to ensure that personal injury cases were still funded. While it is true that CFAs have helped many people bring claims, the benefits of CFAs for claimants have to be seen in the context of increased costs for others. As Lord Woolf has recently said[7]:

    "[*The recoverability changes in the 1999 Act] changed the balance between the parties in a way that was unsatisfactory, although that was not appreciated at the time, because it gave the claimant a position which was out of balance in regard to the position of the defendant."*

20. Sir Rupert says that the new recoverability regime introduced by the Access to Justice Act has had "unfortunate unintended consequences" and that "the CFA regime has emerged as one of the major drivers of excessive costs."[8]

21. The new CFA regime took some time to bed down as defendants resisted the increased costs imposed on them in the so called 'costs wars'. Those issues have now largely been resolved by decisions of the courts and amendments to secondary legislation. The previous Government sought to tackle costs issues in individual areas, for example in road traffic accident (RTA) and other types of personal injury cases[9], and in defamation cases around costs generally and CFA success fees. Because of the ongoing pressures on the budget, legal aid has been under almost continuous review for much of the past decade.

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[5] *Conditional Fees, A Survival Guide*, The Law Society 1995

[6] *Conditional Fees, A Guide to CFAs and Litigation Funding*, The Law Society 2008

[7] See footnote 4

[8] Final Report page 48, para 3.26

[9] The fixed recoverable costs and fixed success fee regimes set out in Part 45 II – V of the CPR and more recently the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

Sir Rupert's Review

22. Concern about the costs of civil litigation has therefore continued unabated. Concern was such that in late 2008 the then Master of the Rolls, Sir Anthony (now Lord) Clarke, commissioned Sir Rupert – who had himself been an assessor to Lord Woolf's inquiry – to 'review the rules and principles governing the costs of litigation and to make recommendations in order to promote access to justice at proportionate cost'. Sir Rupert's review lasted a year and his report was published in January 2010.

23. Sir Rupert's reasoning and recommendations on civil litigation funding and costs, and in particular on the reform of CFAs, are set out in his reports. He paints a stark picture of legal costs which are out of proportion to the sum in issue, and between claimant and defendant. For example, during his review, he arranged for judicial surveys of costs, and reports the findings in his Final Report:

    "The overall picture which emerges from the judicial surveys is this. First, claimant costs are substantially higher than defendant costs. Secondly, claimant costs in CFA cases are substantially higher than in non-CFA cases. Subject to the various caveats set out above[10], claimant costs in the CFA cases, which have been analysed, range from between 158% and 203% of the damages awarded. Claimant costs in the non-CFA cases, which have been analysed, range between 47% and 55% of the damages awarded."[11]

24. He gives various examples of areas where costs are disproportionate to the sums in issue, such as in defamation proceedings, and where the costs have a disproportionate impact on public authorities, such as the NHS Litigation Authority in clinical negligence cases.

25. Sir Rupert has made clear recommendations for the way forward which would meet his terms of reference:

    "I recommend that [CFA] success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. If this recommendation is implemented, it will lead to significant costs savings, whilst still enabling those who need access to justice to obtain it."[12]

26. He accepts that these recommendations will not be universally popular amongst lawyers, but considers that they have a wider benefit:

    "It must frankly be admitted that the conclusions [on CFAs] will cause dismay to many lawyers. It is, of course, congenial for claimant lawyers to see their

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[10] The caveats he refers to are that fully litigated cases are rare and therefore far from typical, although there is a similar pattern in the data from both litigated and non-litigated cases. Litigated cases play a crucial role in the civil justice process, not least in that they provide the 'shadow' – to which Professor Dame Hazel Glenn has referred – under which all other cases are settled.

[11] Final Report page 17 para 2.20

[12] Final Report page xvi, para 2.2

clients provided with comprehensive funding and insulated from all risk of adverse costs. It is congenial for both claimant and defendant lawyers to have a constant stream of work passing across their desks. Indeed, it is congenial for judges to know that the claimants who appear before them are not putting their personal assets at risk, whatever the outcome of the individual case. But these undoubted benefits have been achieved at massive cost, especially in cases which are fully contested. That cost is borne by taxpayers, council tax payers, insurance premium payers and those defendants who have the misfortune to be neither insured nor a large and well resourced organisation."[13]

27. The senior judiciary warmly welcomed the report when it was published on 14 January 2010. Lord Judge, the Lord Chief Justice, said:

"*The judiciary has been concerned for some time that the costs of civil litigation are disproportionate and excessive. Sir Rupert's fundamental review addresses these questions head on. I am extremely grateful to him for the enormous work and effort that he has brought to bear on this important, complex issue and for proposals which for the first time address the issue of costs as a comprehensive, coherent whole."*

28. This Government has been keen to prioritise consideration of his recommendations as quickly as possible since taking office in May this year, and announced to Parliament on 26 July the intention to consult in the autumn on the funding arrangement proposals.

29. Lord Neuberger, the Master of the Rolls, responded to that announcement:

"I welcome the news that the Government has decided to move forward on implementing Rupert Jackson's comprehensive recommendations for tackling civil litigation costs. There is no doubt that – as the final costs report demonstrates in stark terms – the costs generated by civil litigation are disproportionate. The judiciary has made its position clear; it supports the Review's recommendations as a means of reducing costs and making them more proportionate."

30. The Government considers that Sir Rupert's primary recommendations for the reform of CFAs provide a basis for fundamental reform of the existing arrangements and could lead to a significant reduction in legal costs, and significant savings to the taxpayer, as the funder of central and local government. They also provide the opportunity to rebalance appropriately the risks of litigation between claimants and defendants.

31. The Government agrees with Sir Rupert's conclusions that the existing arrangements impact disproportionately on defendants, and implementing his primary recommendations will remove this unfairness. The proposed changes are of course fundamental in nature, particularly for claimants who in the past ten years or so have not had to bear any legal costs in relation to

[13] Final Report page 96, para 1.10

bringing a claim. However, redistributing some of the costs as recommended under the primary package (Sections 2.1 to 2.3) by Sir Rupert, will give claimants an incentive to control their own legal costs and consider more carefully the consequences of pursuing a claim. This consultation paper now seeks views on implementing these recommendations.

1.3 The Consultation

What this consultation covers

32. This consultation primarily covers the recommendations on the reform of CFAs – namely, abolishing the recoverability of CFA success fees and ATE insurance premiums – and the associated recommendations of increasing general damages (including the recommendations made in relation to Part 36 Offers) and qualified one way costs shifting. The consultation covers Sir Rupert's primary recommendations on these issues as well as alternatives where he has offered them. The consultation also covers permitting lawyers to use contingency fees or damages-based agreements (DBAs) in litigation, as an additional, alternative, form of funding which should be available to litigants in appropriate cases. Finally, the consultation covers a proposed increase in the hourly rate which successful litigants in person can claim from opponents where the litigant cannot prove financial loss.

33. The recommendations are of course Sir Rupert's. It should be noted, however, that in some areas the Government has suggested refinements in considering the implementation of these recommendations.

34. The primary recommendations on abolishing the recoverability of CFA success fees and ATE insurance premiums, and permitting DBAs in litigation, would require primary legislation to be implemented. Many of the other changes would require changes to the Civil Procedure Rules. More detail on how the relevant recommendations would be implemented will be set out as part of the Government's response to this consultation in due course.

What this consultation does not cover

35. Sir Rupert makes 109 formal recommendations in a 557 page report. It would not be practicable to consult on all the recommendations at once; indeed, not all recommendations need consultation – some have already been implemented. Some of the recommendations fall to the Government to take forward, and the majority of those are covered in this consultation paper. Others, particularly on costs and case management, fall to the judiciary to lead on, and in many cases work is already being taken forward. The Government clearly has a keen interest in these recommendations in light of their potential impact on HM Courts Service, and will continue to work closely with the judiciary on them. Section 3 of this consultation paper outlines how some of the other recommendations not covered in this consultation paper are being pursued.

36. The Government is still considering the recommendations on fixed recoverable costs in the fast track, and on referral fees.

37. On fixed recoverable costs in the fast track, the Government is looking at Sir Rupert's recommendations in the light of the experience of the new process

for low value personal injury claims in road traffic accidents (RTA). Lord Young of Graffham in his recent report, *Common Sense, Common Safety*[14], recommended that the new RTA scheme should be extended to personal injury claims, including low value clinical negligence cases. The Government aims to extend the scheme by April 2012, subject to consultation and as part of wider civil justice reforms. The Government will also make an announcement on the way forward on fixed recoverable costs in the fast track in due course.

38. Sir Rupert recommends that referral fees in personal injury cases should be banned or alternatively capped at a lower value. This recommendation is also supported by Lord Young. The recent examination[15] by the Legal Services Board (LSB) of referral fees did not, in the LSB's view, provide sufficient evidence of consumer detriment requiring a ban. However, there is evidence of problems in relation to a lack of transparency. The LSB research indicates that disclosure is important to consumer confidence and that there are problems with its delivery. The LSB's consultation, *Referral fees, referral arrangements and fee sharing*[16], published on 29 September 2010, seeks to address these issues and deliver appropriate outcomes for consumers. However, the Government is aware that there are strong views on the issue of referral fees, and is therefore awaiting the outcome of the LSB's consultation before announcing a way forward.

Data and Impact Assessments

39. Sir Rupert considered a substantial amount of data as part of his review. Some of this is set out in his Preliminary and Final Reports. The Government is clear that Sir Rupert has made the case for reform. It is in the nature of the data that the majority of it is held in private hands. As well as the data published by Sir Rupert, the Government has access to some data where claimants are public authorities and has received some data from the insurance industry and some individual solicitors' firms but clearly more data from others (notably solicitors' firms) will assist in making final decisions. A set of preliminary Impact Assessments is published alongside this consultation, based on the information available to date.

40. The Ministry of Justice has been calling for further data since Sir Rupert's Final Report was published in January 2010; it has since received further data, and more is promised. The Ministry of Justice has prepared a template for data collection purposes which has been sent to The Law Society, representative bodies and individual solicitors' firms which have requested it. The template is published on the Ministry of Justice website alongside this document. Consultees are therefore requested to provide any suitable data they hold by completing and returning the data template. It would be helpful

[14] http://www.number10.gov.uk/news/latest-news/2010/10/lord-young-report-55605

[15] This consisted of research by Charles River Associates into the impact of referral fees on the legal services market as well as the Consumer Panel's advice on the impact on referral on consumers.

[16] http://www.legalservicesboard.org.uk/what_we_do/consultations/open/index.htm

to receive the data as soon as possible without necessarily awaiting the end of the consultation. Ministry of Justice officials are happy to assist consultees with any questions they have on data issues.

Next Steps

41. This consultation runs from 15 November 2010 to 14 February 2011. The Government will thereafter set out its response and the way forward. Primary legislation will be needed to implement Sir Rupert's primary recommendations on CFAs and on other proposals such as allowing damages-based agreements in litigation. If the Government, in the light of consultation, decides to implement these recommendations, then legislation would be taken forward as the Parliamentary timetable allows. Changes would also be needed to the Civil Procedure Rules.

2.1 Conditional Fee Agreements and Success Fees

The proposal: that CFA success fees should no longer be recoverable from the losing party[17]

Background

42. Conditional fee agreements (CFAs) are the most common type of 'no win no fee' agreements in England and Wales. Under these arrangements lawyers do not receive a fee from their client if they lose a case, but can charge an uplift on top of their base costs[18] – otherwise known as a 'success fee' – if they win. The success fees can be up to 100% of the base costs in all categories of case. After the Event (ATE) insurance can be taken out by parties in a CFA funded case to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose.

43. CFAs were first made enforceable under section 58 of the Courts and Legal Services Act 1990, which was brought into effect in 1995. The first Order[19] made it possible for CFAs to be enforced in personal injury claims, insolvency proceedings and applications before the European Court of Human Rights. The initial introduction of CFAs was intended to plug the access to justice gap for those who did not qualify for legal aid but were too 'poor' to afford to pay for legal services. In 1998[20] the category of case in which CFAs were permitted was extended to all civil proceedings, but not to family and criminal cases.

44. The normal 'costs shifting' rule in civil proceedings is that the 'loser pays' the reasonable costs of the winning party, in addition to their own costs. Under the original Courts and Legal Services Act 1990 regime, in CFA funded cases only the lawyers' base costs could be recovered from the losing side. That regime operated on the basis that the success fee and ATE insurance premium would be deducted from the client's damages[21]. In order to protect the client from disproportionate deductions, The Law Society recommended a voluntary cap of 25% of the damages recovered[22].

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[17] Final Report Chapter 10
[18] Their costs for work done on an hourly rates basis.
[19] The Conditional Fee Agreements Order 1995
[20] The Conditional Fee Agreements Order 1998
[21] This was based on the Scottish model of speculative fee agreements, which are no win no fee agreements under which the success fee element (of up to 100%) is payable by the claimant.
[22] As Sir Rupert notes, the legal aid statutory charge is another example of damages being reduced by a levy, agreed by the client as a condition of funding, under the legal aid scheme. Connected to this, at one time, was the provision which required lawyers acting under a legal aid certificate to pay 10% of the costs recovered to the Legal Aid Board.

This arrangement is thought to have worked effectively in the past[23].

45. The first Order in 1995 set the maximum success fee at 100% of base costs. It was considered that this would facilitate greater access to justice – if lawyers can charge an uplift of up to 100% it would encourage them to accept cases with a 50:50 chance of success which, if the uplift were lower, it may not be appropriate for them to take. Although the maximum was set at 100% it was not thought that the figure of 100% would become the normal uplift for all CFA cases.

The Access to Justice Act 1999

46. The Access to Justice Act 1999 brought about two major changes to the CFA regime which significantly enhanced the use of CFAs from April 2000, when the relevant provisions came into force. First, the Act excluded personal injury cases from the scope of civil legal aid. Second, it introduced the recoverability of success fees and ATE insurance premiums from the unsuccessful opponent[24]. Recoverability was introduced primarily to ensure access to justice for people outside legal aid eligibility, the so-called MINELAS[25] – people who had means above the legal aid threshold but who could not afford to litigate without putting their homes or assets at risk. The intention was to ensure that the expense of all or part of the risk in costs - whether to a solicitor under a CFA or an insurer under an insurance policy - were met by the losing party and not by the claimant, for example out of their damages. The Act also made provision[26] for the Lord Chancellor to approve membership organisations eligible to recover the self-insurance element of their costs from losing opponents to allow them to reinvest those costs in providing better services to their members. The maximum success fee which lawyers could charge and recover from the losing opponent was fixed at 100%[27].

47. The combination between 1998 and 2000 of (i) removing legal aid for personal injury cases, (ii) extending CFAs to all civil cases (except family) and (iii) introducing recoverability of success fees and ATE insurance premiums caused a cultural shift in the role of CFAs as a core method of funding litigation.

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[23] Preliminary Report page 481, para 4.1 (ii)

[24] Sections 27 (success fees) and 29 (ATE insurance premiums) provide that a success fee and ATE insurance premium due under a CFA are to be treated as part of the costs recoverable under an order for costs.

[25] 'Middle Income Not Eligible for Legal Aid Support'

[26] Section 30 allowed the Lord Chancellor to prescribe by order 'membership organisations' which could claim the self-insurance element (see Section 2.2 of this consultation paper).

[27] Conditional Fee Agreements Order 2000, SI 2000/823. The Order prescribes the maximum success fee that solicitors can charge at 100% in all categories of case, although under section 27 of the Access to Justice Act 1999 the Lord Chancellor has the power to make different arrangements for different categories of case.

48. Since 2003, the recoverable success fee has been fixed in certain types of personal injury cases (based on relevant data to ensure that the fixed rates were cost neutral) depending on the stage at which the case is concluded. For example, for a case which concludes before trial a recoverable uplift of 12.5% is set for road traffic accident claims[28], 25% for employer's liability claims[29] and 27.5% for employer's liability disease claims[30]. The recoverable success fee in cases which proceed to trial remains at 100% (and see Section 2.7 of this consultation paper on Sir Rupert's alternative recommendations). The fixed recoverable success fees were brokered with interested parties by the Civil Justice Council and were based on relevant case data collected through extensive research. These arrangements appear to have worked well in the areas where they apply.

49. It was intended that both the client and the losing opponent should be able to challenge the success fee (and ATE insurance premium) through costs assessment by the courts. However, in practice this is thought to be rare due to the time and expense involved. The potential outcome is that in a large number of cases where CFAs are permitted, the maximum of 100% may be regularly claimed. The current maximum percentage of 100% was considered to encourage lawyers to accept cases with a 50:50 chance of success. However, it appears that the maximum prescribed limit has become unexceptional for all CFA cases which are resolved at trial.

50. There is a general consensus that CFAs have increased access to justice for those who might otherwise not have been able to afford to bring a claim since they first became enforceable in 1995, and particularly after the Access to Justice reforms which made CFAs an especially attractive funding method for claimants. Recoverable costs represent a source of funding for the winning party and thus promote access to justice. On the other hand, recoverable costs represent a burden on the losing party and inhibit their access to justice. The recoverable costs to the litigation system associated with CFAs have caused much concern in the last ten years. Under the current arrangements, claimants on CFAs generally have no interest in the costs being incurred on their behalf, because win or lose they do not have to pay anything towards those costs. High success fees and ATE insurance premiums significantly increase costs with the claimant having no incentive to keep these costs down. Success fees are probably being set too high (except where they are fixed) which arguably overcompensates claimant lawyers and impacts disproportionately on defendants. The benefits for access to justice for claimants in CFA cases have therefore been achieved at a substantial additional cost to defendants.

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[28] From October 2003; see Section III of Part 45 of the CPR

[29] From October 2004; see Section IV of Part 45 of the CPR (employer's liability - accident)

[30] From October 2005; see Section V of Part 45 of the CPR (employer's liability - disease)

Sir Rupert's Review

51. During his review, Sir Rupert considered the present CFA arrangements in all areas where CFAs are currently used, their impact on costs and specifically whether 'additional liabilities'[31] (success fees and ATE insurance premiums) should continue to be recoverable from the losing party. Sir Rupert discussed these issues at length with a wide range of interested parties in a large number of meetings, forums, seminars and conferences. He also received a large number of written submissions.[32] Sir Rupert considered the views expressed in finalising his conclusions and recommendations in the Final Report.

Recoverability of CFA success fees and ATE Insurance Premiums

52. The introduction of recoverable success fees and ATE insurance premiums was informed by the following objectives:

    1. Full compensation for claimants – the desire to ensure that claimants – who would previously have received 100% of damages if supported by legal aid – should be no worse off if bringing a case on a CFA; and that the compensation awarded to a successful party should not be eroded by any uplift or premium and the party in the wrong should bear the full burden of costs.

    2. Wider availability of CFAs – by making CFAs more attractive, in particular to defendants and to claimants seeking non-monetary redress. Prior to recoverability being introduced, these litigants could rarely use CFAs, because they could not rely on the prospect of recovering damages to meet the cost of the success fee and ATE insurance premium.

    3. Discourage weak cases and encourage settlements – it was thought that as the lawyer risked not being paid this would encourage them to take on strong and meritorious cases. On the other hand, the risk of paying for 100% success fees and ATE insurance premiums if they lose, would encourage defendants to settle cases.

    4. Provide a mechanism for regulating the success fee uplifts that solicitors charge – through rules and regulations.

53. The recoverability of success fees and ATE insurance premiums was a fundamental change to the original CFA regime in 2000. It was therefore at the heart of many problems during the 'costs wars' – technical challenges led by defendant insurers between 2002 and 2005 to the enforceability of CFAs – given the significant sums at stake. Even at the time, some had argued

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[31] 'Additional liability means the percentage increase, the insurance premium, or the additional amount in respect of provision made by a membership organisation, as the case may be.' Part 43.2(1)(o) of the CPR.

[32] Annexes 1 and 2 of the Final Report indicate that Sir Rupert received 21 written submissions between January to May 2009 and over 300 after May. Annex 3 lists the number of conferences, seminars and meetings attended by Sir Rupert as 67.

against recoverability on the basis that the recoverability of additional liabilities (i.e. success fees and ATE insurance premiums) under the CFA arrangements gave rise to the position where there was no incentive for clients to keep the costs down because they would not be liable whatever the outcome[33].

Flaws in the Recoverability Regime

54. In considering the causes of excessive costs in the civil litigation system, Sir Rupert identifies the CFA regime with recoverable success fees and ATE insurance premiums as one of the major drivers of excessive costs[34]. Against the above objectives Sir Rupert points to what he considers to be the key flaws in the recoverability regime:

CFAs used by the wealthy and well-resourced

55. The recoverability regime is, in Sir Rupert's view, unfocused. There is no eligibility test: any person of whatever means is entitled to enter into a CFA and take out ATE insurance so long as there is a willing solicitor and insurer. This Sir Rupert believes has led to unintended consequences, for example insurance companies being able to bring claims against local authorities using collective CFAs for tree root claims[35], thereby doubling the costs burden on council taxpayers. Sir Rupert argues that it is absurd that insurance companies – who could well afford to pay solicitors on a traditional hourly rates basis – should use CFAs to fund such litigation themselves.

56. Over the years, some have also questioned the use of CFAs with success fees (and ATE insurance) by those who can afford to pursue litigation on a standard or hourly fee basis, and therefore have access to justice without them, for example wealthy celebrities in defamation cases[36].

CFA clients have no interest in the costs being incurred on their behalf

57. Whether the case is won or lost the client usually pays nothing. If the case is lost, claimant solicitors almost always forego their costs, and the costs of disbursements will usually be covered by ATE insurance. If the case is won, the solicitors will recover whatever they can from the other side. The result is that the claimants exert no control over the costs being incurred on their behalf.

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[33] SCCO in response to consultation, *Making Simple CFAs a Reality*, June 2004

[34] Final Report page 48, para 3.26

[35] Final Report page 106, para 3.25

[36] The Culture, Media and Sport Select Committee recognised in its report *Press Standards, privacy and libel* (9 February 2010) that there is nothing to prevent wealthy individuals from using CFAs, and a number have. It noted that this is seen by media groups as exploitation by rich claimants of the CFA system, with its pattern of escalating costs, to force the media into settling claims. http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/36202.htm, page 72-73, paras 290 and 292

CFAs lead to an excessive costs burden

58. The third flaw identified by Sir Rupert in the recoverability regime is that the costs burden imposed upon the losing party is excessive and sometimes amounts to a denial of justice[37]. The fear of costs can have a "chilling effect" which can drive opposing parties to settle cases even through they may have good prospects of success. This is particularly evident in defamation cases. In Sir Rupert's view, access to justice covers not only the ability of claimants to bring reasonable actions; it also covers the ability of defendants to be able to resist properly those claims which should not succeed and to do so at proportionate cost.

CFAs lead to cherry-picking by lawyers

59. Sir Rupert believes that the recoverability regime presents an opportunity for lawyers to increase their earnings substantially by "cherry picking", that is selecting cases which are almost guaranteed to succeed. The success fee of up to 100% was intended to reward lawyers for carrying the risk of not being paid but also to cover the cost of cases which they lose. However, Sir Rupert reports that some claimant lawyers "cherry pick": "they generally conduct winning cases on CFAs, they reject or drop at an early stage less promising cases and thus generate extremely healthy profits"[38].

How the original objectives have fared in practice

60. The above flaws raise the question whether the current CFA regime with recoverability of success fees and ATE insurance premiums is continuing to meet the objectives which it was designed to meet as set out above, namely:

1. Full compensation for claimants

CFAs with 100% success fee and ATE insurance premium recoverability ensure full compensation for claimants. Some say that these principles should always take priority over costs rules. The removal of recoverability of success fee and ATE insurance premiums would reverse these priorities in personal injury and clinical negligence claims.

However, the current CFA arrangements mean that claimants currently carry no financial risk and are not usually liable to pay the ATE insurance premium taken out to cover against adverse costs, win or lose; claimants therefore show no interest in keeping their lawyer's fees down. Full compensation for claimants has therefore come at a substantial cost to the litigation system.

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[37] He questions whether success fees and ATE insurance have allowed litigation to move too far away from considerations of proportionality. He explains that the provisions of the Costs Practice Direction (paras 11.4, 11.5 and 11.7 to 11.11) relating to these additional liabilities make costs disproportionate in every case. Final Report page 39, para 5.23

[38] Final Report page 111, para 4.18; this is presumably because so many cases settle well before trial, and the risks of costs not being recovered are often quite low – even for cases which are not particularly strong in legal terms.

2. Wider availability of CFAs

In theory CFAs are available to defendants as well as claimants. However, as Sir Rupert recognises in his report, CFAs are generally used by claimants and much less frequently used by defendants. The Culture, Media and Sport Committee report on press standards, privacy and libel[39] recognises this in relation to defamation cases. Although CFAs with recoverable success fees can be used in cases where damages are not sought, their use in such cases is not thought to be common.

3. Discourage weak cases and encourage settlements

In theory CFAs are thought to discourage weak claims as lawyers carry the risk of not being paid if the case is lost. However, defendants in some types of proceedings argue that claimant lawyers use CFAs to prolong the litigation process by taking the case to trial in order to secure 100% success fees. CFAs have been blamed for fuelling a 'compensation culture' by encouraging people to pursue weaker claims at absolutely no cost to them in the hope that a defendant may make a commercial decision to pay the claimant off by settling rather than defending the claim, at potentially much greater financial risk. Lord Young of Graffham in his recent report to the Prime Minister, *Common Sense, Common Safety*[40], expresses concern about the consequences of the reforms in the Access to Justice Act 1999. One of Lord Young's key recommendations is to implement Sir Rupert's recommendations on CFAs to address those concerns.

4. Provide a mechanism for regulating the success fee uplifts that solicitors charge

In practice, the recoverability regime has not led to effective regulation of success fee uplifts. In cases which go to trial, recoverable success fees of 100% appear to be unexceptional. One of the reasons for this is that it is not possible for costs judges effectively to control success fees retrospectively[41].

61. It is suggested that defendants and their insurers who are liable for causing injury are far better placed to bear and spread the costs of litigation, rather than individual claimants as the victims of a civil wrong. However, with 100% recoverable success fees and ATE insurance premiums the costs burden on defendants is excessive. It is an inherent part of recoverability that defendants are made liable for costs which to at least some extent have nothing to do with the case in issue and over which they have no control. Paradoxically, opposing litigants are, in many cases, funded by taxpayers: for example the NHS Litigation Authority (NHSLA), local authorities, police authorities etc and the additional costs imposed on them by the recoverability regime are very substantial.

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[39] See footnote 36

[40] http://www.number10.gov.uk/news/latest-news/2010/10/lord-young-report-55605

[41] Final Report page 111, para 4.17

62. CFAs appear to be meeting two of the above objectives, namely facilitating access to justice (at least for claimants) and ensuring full compensation for claimants. However, this has come at a substantial cost to defendants, who will often ultimately be funded by the taxpayer. The principle of the parties 'sharing the risk of litigation' under which the use of CFAs was extended and further encouraged through recoverability does not appear to apply to the existing arrangements. The litigation is risk free for claimants with defendants picking up all the costs (exacerbated by 100% success fees and ATE insurance premiums). This is considered by some as unfairness inherent in the current system, not to be seen in any other jurisdiction.

The solution – Sir Rupert's primary recommendation: abolish recoverability

63. Sir Rupert's primary recommendations on the reform of CFAs are that the recoverability of success fees and ATE insurance premiums from the losing party should be abolished. In addition, to help protect claimants from the consequences of this major change, he recommends: (i) a 10% increase in general damages[42] to assist the claimant in paying for success fees, and (ii) a regime of qualified one way costs shifting as an alternative for ATE insurance to protect the most vulnerable from adverse costs. Sir Rupert suggests that this protection should clearly be afforded to claimants in personal injury cases but also in cases relating to housing disrepair, actions against the police, judicial review, and defamation or breach of privacy.

64. Abolishing recoverability means reverting, to an extent, to the CFA arrangements which existed prior to the Access to Justice Act 1999 changes and would deal with the concerns around high costs arising out of 100% success fees and ATE insurance premiums while preserving access to justice for claimants. Sir Rupert argues that the CFA arrangements prior to April 2000 were satisfactory and opened up access to justice to a range of people[43]. He points out that success fees and ATE insurance premiums are not recoverable in Scotland[44] where the equivalent speculative fee agreement system works satisfactorily. Sir Rupert is convinced that if recoverability were abolished then success fees and ATE insurance premiums would become subject to market forces. Claimants would shop around for lower success fees and ATE insurance premiums. Currently as claimants generally pay nothing, win or lose, there is little control on the success fees and ATE insurance premiums, and the burden of both falls onto defendants. While it is true that these costs can be challenged on

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[42] General damages are awarded to compensate claimants for pain, suffering and loss of amenity, while special damages are awarded to cover any financial loss incurred as a result of the injury suffered and future financial loss which will be incurred such as care costs and loss of earnings.

[43] *Access to Justice with Conditional Fees*, a consultation paper issued by the Lord Chancellor's Department in 1998 states that between 1995 and 1997 34,000 CFAs were agreed.

[44] Lord Gill's *Report of the Scottish Civil Courts Review* published in September 2009; http://www.scotcourts.gov.uk/civilcourtsreview. Lord Gill says "... a majority of preparation actions in Scotland are founded on speculative fee agreements basis, despite the fact that success fee and ATE premiums are not recoverable". Chapter 14, para 96

assessment, there are additional costs and delays associated with that process. Further, given that any assessment necessarily comes at the end of a case, it is too late to avoid a 'chilling effect' from the fear of high costs. In any event, defendants arguably do not have the appropriate market information to challenge the ATE insurance premiums.

65. As a result, in the types of claim where claimant lawyers bring a large number of cases, the overall impact of fully recoverable success fees is that claimants' costs are transferred to the defendant - win or lose. In the cases which claimants win, they recover all their costs in the normal way. In the cases they lose, the lawyers recover the cost of these through the success fees in other cases. Either way, claimants generally pay nothing towards the success fee whereas defendants generally pay the success fee even if they win through recoverable success fees in the cases which they lose.

66. Sir Rupert recommends that the recoverability of success fees should therefore be abolished across all areas of civil litigation.

67. However, in order to assist claimants in meeting the costs of success fees which they will have to pay in successful cases out of the damages he recommends:

(a) Personal injury litigation[45] (the biggest area where CFAs are used)

i) the level of damages for pain, suffering and loss of amenity (general damages) be increased by 10% (see Section 2.3);

ii) the amount of success fees which lawyers may deduct be capped at 25% of damages, excluding any damages referable to future care or future losses;

iii) qualified one way costs shifting (see Section 2.5).

(b) Other Litigation brought by individuals

i) an increase of 10% in general damages in some other types of litigation brought by individuals namely nuisance, defamation and any other tort which causes pain and suffering to the claimant;

ii) qualified one way costs shifting[46] in some other types of litigation.

(c) All civil claims

Sir Rupert recommends reforms to Part 36 of the CPR[47], including that, where the claimant makes a Part 36 offer which the defendant fails to beat at trial, the claimant's reward will be substantially enhanced. It is proposed that the court should grant the claimant an additional 10% of (a) any financial sum

[45] References to personal injury cases in the context of Sir Rupert's recommendations include clinical negligence claims, unless otherwise stated
[46] See Section 2.5 of this consultation paper
[47] See Section 2.4 of this consultation paper

awarded or (b) the best assessment of the financial value of any non-monetary relief granted, such as an injunction or vindication on reputation. This, Sir Rupert believes, would encourage claimants to make well placed offers and encourage early settlement. This would reduce costs where offers are accepted and increase damages from which success fees may be paid where the claimant is successful at trial.

100% success fee

68. The maximum success fee which lawyers can charge has remained at 100% since CFAs were first made enforceable, and Sir Rupert does not propose that that figure be altered. The Government is not proposing to alter the maximum success fee that clients can agree with their solicitors (subject to it being, in personal injury cases, no more than 25% of damages awarded, excluding any damages referable to future care or future losses). However, the Government is proposing, in line with Sir Rupert's recommendation, that the success fee should no longer be recoverable from the losing party in all categories of case funded under CFA.

Concerns about abolishing recoverability of the success fee

69. The Government is aware of some concerns regarding the consequences of abolishing the recoverability of CFA success fees. One of the main reasons for extending the use of CFAs in all areas of civil litigation was to ensure their availability as an alternative method of funding in all cases including cases where damages are not sought. If the recoverability of success fees is abolished, some are concerned that certain types of cases might no longer be funded under a CFA. This argument could apply, for example, to judicial review and housing disrepair claims which are sometimes funded under a CFA. In the latter category a claimant may not be seeking a damages award but repairs to be carried out to a property. Currently if such a case succeeds, the success fee is recoverable from the losing side. If recoverability is abolished, the concern is that a claimant would not be able to afford to pay the success fee if the claim is successful.

70. Other concerns relate to complex personal injury cases which it has been argued may become too uneconomic to run under the capped success fee of 25% of damages, excluding any damages referable to future care or future losses, due to the complexity of the investigation. This could include some claims relating to clinical negligence, industrial disease and possibly others. A number of steps might help to mitigate the impact. One option might be to have no cap – or a cap of higher than 25% – on the damages that might be taken as a success fee, but this would clearly have implications for the damages received by claimants. Another option might be to allow an exception to the cap where necessary to preserve access to justice, perhaps with the court's agreement as a precondition. A further option might be to retain some element of recoverable success fee in specific categories of case.

71. One way of alleviating the concerns in cases where damages are not sought might be to allow for success fees to remain recoverable in such cases. However, if this were to occur, it might be preferable to cap the maximum recoverable success fee at 25%. The maximum success fee which the solicitor could charge would remain at 100%, but the defendant would only be liable for 25%.

72. Some supporters of recoverability point out that CFAs were always designed to be cost neutral, that is, that the uplifts received as a result of successful cases are intended to pay for the cases that are lost. Some say that this covers not only the cases which proceed to trial and fail but also the costs of investigating potential claims to weed out unmeritorious claims, although it is also argued that these costs are reflected in the guideline hourly rates, published by the Master of the Rolls.

73. Under the current CFA regime, the Lord Chancellor may make different arrangements in respect of different categories of case. The recoverable success fee is fixed under the CPR in certain categories of personal injury claims depending on the stage at which the case is concluded (see paragraph 48 above). It may be argued that as these fixed recoverable success fees were agreed on the basis of category specific empirical data they should be retained, even if recoverability of success fees as a general rule is abolished. However, the Government is not currently persuaded that there would be merit in retaining fixed recoverable success fees covering such a large number of cases, given the more fundamental changes to CFAs proposed. It would, nevertheless, be clear to claimants in the categories of case where recoverable success fees are currently fixed, what the rate of success fee had been. The Government would expect that in those categories, the success fee charged would be no higher than that currently recoverable. Views are sought on whether the fixed recoverable success fees should be retained, notwithstanding a general abolition of recoverability.

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

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

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

Q 4 – Do you consider that if success fees remain recoverable from the losing party in cases where damages are not sought, a maximum

recoverable success fee of 25% (with any success fee above 25% being paid by the client) would provide a workable model?

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

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

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

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

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

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

2.2 After the Event Insurance Premiums

The proposal: that the ATE insurance premium should no longer be recoverable from the losing party[48]

Background

74. ATE insurance is usually taken out in conjunction with a CFA and covers a party against liabilities which they will incur if a case is lost. This includes (a) any liability to the other party under an adverse costs order and (b) their own disbursements (this may in some cases include counsel's fees). ATE insurance premiums can be substantial. They tend to be higher in certain types of claim, for example, those less frequently litigated and higher value claims (where premiums are individually calculated), and higher the later in the proceedings that ATE insurance is taken out. Premiums for simpler low cost, high volume litigation are generally lower, but not insignificant[49].

75. Before April 2000, ATE insurance premiums were paid for by the claimant out of the damages awarded (the voluntary cap of 25% on the deduction from damages covered the success fees as well as any ATE insurance premium).

Access to Justice Act 1999: recoverability of ATE insurance premium

76. Section 29 of the Access to Justice Act 1999 made ATE insurance premiums recoverable as an 'additional liability' under a costs order, subject to rules of court. Like success fees, the intention was that both the client and the losing opponent would be able to challenge the level of insurance premium[50] through the costs assessment process and the court would have to apply the normal test of reasonableness and proportionality in assessing the level of ATE insurance premiums.

77. Although either party can take out ATE insurance, it is generally taken out by claimants. Sir Rupert is concerned that in the vast majority of cases the ATE insurance premium is itself insured - this means that payment of the premium is deferred until the outcome of the claim is known. If the action is lost, the

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[48] Final Report Chapter 9

[49] For example, for a case finalised at trial the premium for defamation proceedings may be up to £65,000 for each £100,000 insured. Premiums for low cost/high volume litigation are generally substantially lower. For example figures published in *The Essential Guide to Finance and Costs: Litigation Funding* - August 2010 issue (published by the Law Society) show that for road traffic accident claims premiums of between £350 and £400 are common.

[50] It is generally accepted that the Court of Appeal's decision in *Rogers v Merthyr Tydfil* CBC [2006] EWCA 1134, makes it difficult for defendants to challenge the level of ATE insurance premiums as they need specific evidence to show that comparable reasonable cover might have been obtained at a lower price.

premium is not payable. If the case is won, then a slightly larger amount (to pay for premiums which are not paid in lost cases) is recovered from the losing opponent. The overall effect is that, in most cases, the claimant is not required to make any payment towards the ATE insurance premium, but is insured against all liabilities[51].

78. This means that defendants end up bearing the costs in all cases. In cases that defendants lose, they pay their own costs in the normal way, as well as the claimants' costs including the success fee and ATE insurance premium. In cases that defendants win, they recover their costs but they pay in full for this by reason of their liability for ATE insurance premiums in other cases which they lose.

79. Another issue is the level of premiums being charged and whether ATE insurance premiums are unduly generous to insurers. As with success fees, claimants have no interest in the level of ATE insurance premiums because – win or lose – the claimant usually does not have to pay anything. Insurers argue that in areas like personal injury and clinical negligence, market forces (with a reasonable number of ATE insurance providers) bring the premiums down to an appropriate level, although premiums remain high in niche areas like defamation.

80. Similarly, the costs of claimants' disbursements are also transferred to the losing defendant. In cases which defendants lose, the claimants will get their reasonable disbursements refunded through the 'loser pays' rule. In cases which defendants win, claimants have their disbursements paid through recoverable ATE insurance premiums. As with success fees, it is a 'win win' position for claimants. Again, this offends against the 'sharing the risk of litigation' principle under which recoverability was introduced.

81. A range of arguments were put to Sir Rupert during the course of his review both for and against retaining the recoverability of ATE insurance premiums. Those representing claimant interests are generally in favour of recoverability (citing concerns about liability for funding disbursements) and those representing defendant interests are generally opposed to recoverability (citing excessive costs).

Sir Rupert's proposal: abolish recoverability of ATE insurance premiums

82. Having considered arguments from both sides, Sir Rupert considers the regime of recoverable ATE insurance premiums to be an expensive form of one way costs shifting. In his view, it is based on the policy objective that certain claimants need to be protected against the risk of having to pay adverse costs. However, the flaw in the current regime is that it is not targeted upon those who merit such protection but is open to all. Sir Rupert

[51] Claimants do not contribute towards ATE insurance premiums in cases which are lost, but in some cases the claimant will be required to pay any shortfall in recovery.

believes that the existing regime is unfair, and an unsatisfactory way of achieving its policy objective.

83. Sir Rupert therefore recommends that the recoverability of ATE insurance premiums should be abolished but that, in order to protect those who merit protection against adverse costs, one way costs shifting should be introduced[52].

One way costs shifting

84. Sir Rupert believes that in personal injury litigation (including clinical negligence) in particular, claimants require protection against adverse costs orders. Under one way costs shifting[53], losing claimants are only liable to pay their own legal costs including any success fee, and not the winner's costs if the case is lost. Losing defendants would continue to be liable to pay both their own and the claimant's costs in the normal way. With *qualified* one way costs shifting (QOCS), a losing defendant would continue to pay a winning claimant's costs, but a losing claimant would pay a winning defendant's costs only where – and to the extent that – in all the circumstances it is reasonable to do so. This issue is discussed in more detail in Section 2.5 but is being included here to explain how, in Sir Rupert's view, the concept of QOCS would help protect claimants from adverse costs if recoverability of ATE insurance premiums is abolished and thus remove or reduce the need for claimants to take out ATE insurance policies in the first place.

85. The aim of QOCS is to reduce the financial risk of litigation for the claimant and hence the need for ATE insurance, if the recoverability of ATE insurance premiums is abolished. The policy intention behind Sir Rupert's proposal is to provide access to justice for valid claims at proportionate cost. He proposes that the test should operate restrictively, so that claimants are only exceptionally required to meet the defendant's costs, and therefore ATE insurance is effectively unnecessary to cover that risk. He also suggests that the judge should consider at the end of the claim whether to make a costs order, and if so should determine the amount summarily.

86. Sir Rupert suggests that the overall effect of substituting one way costs shifting for recoverability of ATE insurance premiums would be costs savings. This is because the ATE insurers currently (a) pay out adverse costs in unsuccessful cases, (b) cover their own administration costs and (c) make a profit. He argues that parties would be able to take out ATE insurance should they choose to do so at their own expense. ATE insurance existed in England and Wales before recoverability was introduced and there is an ATE market in Scotland where premiums are not recoverable under costs orders.

[52] He recommends the formula contained in section 11(1) of the 1999 Act.
[53] See Section 2.5 of this consultation paper.

Disbursements

87. If the recoverability of ATE insurance premiums is abolished and replaced with QOCS, claimants would be appropriately protected against any liability against the other side's costs if their case is lost. However, a question arises as to how disbursements would be funded under the new arrangements. Disbursement costs include, for example, medical and other experts' reports, counsel's fees, court fees, photocopying costs, etc. Disbursement costs can vary considerably depending on the nature and complexity of the claim[54]. Under the current arrangements a losing claimant's ATE insurance covers the costs of disbursements as well as the defendant's costs. If the claimant wins, disbursement costs are paid by the defendant.

88. Some argue that, even with QOCS, it would still be necessary to fund disbursements and that ATE insurance cover may not be possible for disbursements alone. However, Sir Rupert is not persuaded. He is of the view that claimants' disbursements in unsuccessful cases should be borne by the claimants (or their insurer if they have taken out ATE insurance) or by their solicitors, depending on what is agreed between them. At the moment defendants indirectly pay for these disbursements through ATE insurance premiums in cases which they lose. Sir Rupert considers that there is no justification for requiring defendants either collectively or individually to pay claimants' disbursements in cases which the claimants lose as defendants will be making a sufficient contribution in these cases by bearing their own costs.

A possible refinement: recoverability of ATE insurance premium for disbursements

89. Provided ATE insurance products remain available, claimants should be able to continue to insure against the risk of having to meet their disbursement costs in cases in which they are unsuccessful, but would have to pay the premium themselves. Alternatively, claimants may choose to meet the disbursement costs themselves if they can afford to do so or the claimant's solicitor might agree to fund disbursements in exchange for an increased success fee, provided this would not take the success fee above the proposed 25% damages cap in personal injury cases.

90. Sir Rupert says that if it is considered that someone other than the claimant or the claimant's solicitor should pay the claimant's disbursements in cases which claimants' lose and no private funding option (such as ATE insurance) is available, then the legal aid fund should cover the claimants' disbursements subject to the relevant means test. However, given that the personal injury cases are already outside the scope of legal aid[55] and the

[54] Data gathered by Sir Rupert during the review indicated that in personal injury claims the median costs of disbursements was £441 - £590, with disbursements of less than £200 in between 74% and 93% of cases. For clinical negligence claims LSC data showed average disbursements in unsuccessful claims of £2,600 per case.

[55] Clinical negligence cases are currently within the scope of legal aid, although the Government is consulting on removing them.

financial constraints on the legal aid budget (and proposed changes) the Government does not consider that this is a viable option apart from in exceptional cases.

91. An alternative may be to allow the costs of ATE insurance premiums in respect of disbursements to continue to be recoverable from the losing opponent. If recoverability of ATE insurance premiums in respect of disbursements only is permitted, it may be that this should be limited to non-legal representation costs, such as experts' reports (rather than counsel's fees, for example). If such a limitation were not imposed, higher legal representation costs may be incurred as disbursements in order to secure greater ATE protection, which would reduce the benefit to lower costs of abolishing the recoverability of ATE insurance premiums. It may also be that any recoverability of the ATE insurance premium should be limited to circumstances where the claimant could show that no other form of funding for the disbursements is available.

Section 30 of the Access to Justice Act 1999: Membership Organisations

92. There are many membership organisations, such as trade unions, which provide legal services to their members as a benefit of paying a subscription. Trade unions traditionally support personal injury claims brought by their members. Before the present CFA regime was introduced trade unions bore the costs of unsuccessful cases. As a result of the recoverability regime, trade unions and their solicitors are able to cover the costs of unsuccessful cases from costs recovered from opposing parties in successful actions[56].

93. Members of trade unions and other membership organisations with a valid case may use legal representatives retained by their membership organisation, often at no additional cost. In addition, membership organisations usually undertake to indemnify their members against any liability for their opponent's costs, should their claim be unsuccessful. Most membership organisations self-insure, that is, they do not take out commercial insurance policies in respect of individual members but directly meet the costs of cases which their members lose.

94. Section 30 of the Access to Justice Act 1999 allows prescribed membership organisations[57] to recover this element of self-insurance. As a result, an additional amount may be included in costs payable to a member of such a body or other person to cover insurance or other provision made by the body against the risk of having to meet those liabilities of the member or other person. Although Sir Rupert does not make specific recommendations in respect of these arrangements, the Government is of the view that any changes to recoverability of ATE insurance premiums ought to apply equally

[56] Sir Rupert notes at Final Report page 109, para 4.4, that trade unions recover the costs of unsuccessful actions through the mechanisms of (a) success fees and (b) additional amounts not exceeding the equivalent ATE insurance premiums.

[57] The Access to Justice (Membership Organisation) Regulations 2005

to these arrangements for membership organisations. Therefore if recoverability of ATE insurance premiums is abolished, so also should be the self-insurance element currently recoverable by the prescribed membership organisations in order to remove any unfair advantage.

Q 11 – Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?

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

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

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

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

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

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

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

2.3 10% Increase in General Damages

The proposal: that there should be an increase in general damages of 10%[58]

Sir Rupert's proposal

95. In order to assist claimants to meet the success fee which they would have to pay if the recoverability of success fees and ATE insurance premiums is abolished, Sir Rupert recommends a 10% increase in general damages (damages to compensate for pain, suffering, and loss of amenity) in claims for personal injury, nuisance and other civil wrongs to individuals. It is assumed that this increase should apply to all settlements, whether or not the case goes to court (otherwise there would be an incentive to proceed to court). Sir Rupert argues that the level of such damages in England and Wales is generally low and that the abolition of recoverability would be the appropriate time to raise it.

96. Sir Rupert considers that personal injury claimants would generally benefit from his package of reforms (10% increase in general damages, the success fee that the lawyer may deduct capped at 25% of damages, excluding any damages referable to future care or future losses, and Part 36 reforms). Indeed, he says:

"I am advised by Professor Paul Fenn (economist assessor) that such an increase in general damages will in the great majority of cases leave claimants no worse off. Indeed the great majority of claimants (whose claims settle early) will be better off. At the same time proper incentives for all parties to personal injuries litigation will have been restored."[59]

97. There are a number of issues that arise from this recommendation. Firstly, adjustments to the level of general damages have hitherto been regarded as a judicial issue for the courts rather than the Government, and the general question of whether damages are currently too low is properly a matter for the judiciary.

98. In addition, the central purpose of an award of civil damages is to compensate the claimant for the loss or injury that he or she has suffered, and this principle is only departed from where clear authority has been established for doing so (for example, in the specific circumstances in which exemplary damages have been held to be available under the common law). An increase in the level of damages which is expressly made for the purpose

[58] Final Report page 112, para 5.3
[59] Final Report page 112, para 5.4

of assisting claimants to meet their costs liabilities rather than for the purpose of compensating them for the injury that they have suffered would represent a fundamental change in the nature of the general damages award, and could create a precedent for calls to depart from the compensatory principle in other circumstances.

99. A further issue is that the proposed increase in general damages is recommended for all claimants. While this would clearly assist claimants on CFAs to meet the success fee, the increase might be seen as a windfall for other claimants who are not on CFAs, for example if they are paying privately. However, the increase should presumably apply to any legal aid damages cases if they are to be subject to a SLAS (see Section 2.6). On the other hand, it might be considered as a matter of principle that the level of damages awarded should not depend on how the claim is funded.

A possible refinement

100. In the light of these difficulties, the Government considers that a preferable way of framing this 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 in 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.

101. Another issue is whether an increase of 10% of general damages would be sufficient for claimants to be able to bring claims in certain circumstances, for example where they have suffered a catastrophic injury but there are likely to be high costs and risks associated in bringing a claim relative to the level of general damages (as opposed to damages for future loss and expenses).

Damages and legal fees

102. Some have criticised Sir Rupert's proposals on CFA reform as being wrong in principle because of their potential impact on reducing claimants' damages. The argument runs that the current regime allows claimants to retain 100% of their damages, and that that principle – that damages are sacrosanct – must not be breached and should always take priority over concerns about costs. Some feel that this argument is particularly strong in relation to personal injury claimants because (i) many are impecunious, and (ii) damages awarded in personal injury cases are for the claimant's specific needs.

103. The Government does not consider that these proposed changes would always lead to damages being reduced to pay towards legal fees, particularly since an integral component of the package is that general damages be increased by 10% – with the possibility of a further 10% increase on total damages where the claimant's Part 36 offer is not beaten. Further, the proposal is to cap the success fee at 25% of damages, excluding any damages referable to future care or future losses. It is proposed that

damages for future care costs and loss of earnings should be protected and should not be used for legal costs.

104. Although it is true that recoverability of the CFA success fees and the ATE insurance premium has meant that claimants on CFAs have not had to make any deductions for legal fees from their damages, this has not been the position historically. In personal injury cases under CFAs from 1995 until recoverability was introduced in April 2000, the success fee and any ATE insurance premium had to be paid from damages or the client's own funds. Sir Rupert notes that the current CFA recoverability regime is not replicated in Scotland:

"… it is significant that in Scotland personal injury cases are conducted satisfactorily on CFAs, despite the fact that success fees are not recoverable."[60]

105. Lord Gill noted in his *Report of the Scottish Civil Courts Review*[61], published on 30 September 2009:

"It has been estimated that by the date of trial, recoverable success fees in England and Wales may be twice what they would be in Scotland, due to the recoverability of ATEs and success fees."

106. It has, furthermore, always been the case that privately paying clients who are not on CFAs may recover their damages as well as their legal costs, but they face the risk of recovering nothing – and having to pay the defendant's costs, as well as their own, if the claim fails. While it is right that defendants pay damages where necessary, the current regime requires that 100% of damages for the claimant can be obtained at the expense of defendants having to pay over 200% of the claimant's legal costs[62].

107. It has therefore only been for a relatively short period that the pursuit and receipt of damages has been a financially risk-free possibility for the claimant, but that period has coincided with an unsustainable increase in costs. In this regard, the connection between proportionate costs and access to justice is important. As Sir Rupert notes:

"For the most part, achieving proportionate costs and promoting access to justice go hand in hand. If costs on both sides are proportionate, then (i) there is more access to justice and (ii) such funding as the parties possess is more likely to be sufficient."[63]

108. Although the satellite litigation brought about by the advent of recoverability may be nearing its end, the fact remains that the costs of the existing regime are unsustainably high, particularly given their impact on some public bodies.

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[60] Final Report page 112 para 5.5
[61] http://www.scotcourts.gov.uk/civilcourtsreview, Chapter 14, page 97, para 102.
[62] Assuming a CFA success fee of 100% and recoverable ATE insurance premium.
[63] Final Report page 42, para 2.8

Of course the current arrangements are working well for claimants' access to justice but they impact disproportionately on defendants' access to justice.

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

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

2.4 Part 36 Offers

The proposal: that Part 36 of the Civil Procedure Rules (offers to settle) should be reformed[64]

Reforming Part 36 – encouraging settlement

109. Part 36 of the Civil Procedure Rules provides a process whereby parties are encouraged, via a system of penalties and rewards, to make and accept reasonable offers to settle. This is in keeping with the general principle that claims should be settled wherever possible and as early as possible, thereby controlling the costs of litigation. The Part 36 arrangements, which were introduced following Lord Woolf's recommendations, are generally considered to have worked well. However, there are two areas where Sir Rupert considers reform is necessary.

110. The first proposed area for reform is to improve the equality of impact between the parties in the way in which Part 36 operates. The proposal is to increase the reward where the claimant obtains a judgment at least as advantageous as the claimant's own offer, by an amount equal to 10% of *all* damages. In effect, this would arise where the claimant equals or beats his own offer at trial. This is intended to provide greater equality between the parties in relation to the consequences of rejecting Part 36 offers. The second proposed reform is to reverse the effect of *Carver v BAA plc*[65] so that the term 'more advantageous' in Rule 36.14(1) is clarified to mean better in *financial terms* by any amount, however small. Each is covered in turn.

(i) Proposal to improve the equality of impact between the parties – increasing the rewards for claimants

111. Sir Rupert's first proposal for reform relates to equality between the parties in the way the Part 36 sanctions apply. The current Part 36 sanctions[66] are set out in the table below. The sanctions against the defendant (costs on an

[64] Final Report Chapter 41

[65] [2008] EWCA Civ 412

[66] Part 36.14 of the CPR

indemnity basis instead of the standard basis costs[67], interest on those costs and interest on damages from the date of the offer) generally amount to considerably less than the sanctions against the claimant (total costs from the date of the offer and interest on those costs). Sir Rupert argues that these sanctions provide less incentive for defendants to agree reasonable claimant offers than for claimants to agree reasonable defendant offers, and therefore discourages claimant offers. If the defendant makes an offer that is not beaten by the claimant at trial and it is made early enough, the penalties against the claimant can substantially reduce the amount finally awarded. There is therefore a strong incentive for defendants to make early offers. It does appear to be the case currently that claimants generally do not make the first offer.

Costs sanctions applied on failure to beat a Part 36 offer at trial:

Claimant fails to beat defendant's offer (court awards less than or equal to defendant's offer)	Defendant fails to beat claimant's offer (court awards equal to or more than the claimant's offer)
Current provisions in Part 36	
Claimant must pay: • defendant's costs from the last date the offer could have been accepted (post offer) plus interest of up to 10% above base rate on those costs.	Defendant must pay: • interest on the whole or part of the damages post offer at a rate of up to 10% above base rate; • claimant's costs on an indemnity basis post offer; and • interest on costs at a rate of up to 10% above base rate.
Sir Rupert 's proposals	
Claimant must pay: • as above.	Defendant must pay • as above; and • an amount equal to 10% of the value of the claim as awarded by the court.

112. Sir Rupert therefore proposes an additional sanction for a defendant who fails to equal or beat a claimant's Part 36 offer at trial, by way of an amount

[67] Costs are usually awarded on the standard basis – in which case costs must be proportionate and reasonable; any doubt as to reasonableness is resolved in favour of the paying party. Exceptionally (for example in cases of litigation misconduct or manifest unreasonableness), costs are awarded on an indemnity basis: there is no requirement for proportionality and any doubt as to reasonableness is resolved in favour of the receiving party. Indemnity costs allow the receiving party to recover higher costs. One respondent to Sir Rupert's consultation suggested that indemnity costs are usually not less than 80-90% of costs awarded on a standard basis. Final Report page 424, para 3.5.

equal to 10% of the total damages awarded by the court. Where the court makes a non-monetary award it is proposed that, for the purpose of Part 36, the court should calculate the value of the award based on the evidence received at trial and order payment of an amount equal to 10% of that value. Recognising that the assessment of value may lead to challenge and satellite litigation, Sir Rupert proposes that appeals against such assessments should be firmly discouraged, unless (a) the judge has erred in principle and (b) that error is significant.

Increasing the rewards for claimants: benefits

113. The suggested benefits of the proposal are that it would level the playing field to make claimant offers more effective - and therefore more frequently used – and that it would encourage defendants to accept reasonable offers made. The proposals also appear to have the potential to increase the amount of damages in settled cases, because defendants may decide to settle cases rather than risk being subject to greater adverse sanctions where a claimant's offer is not equalled or beaten at trial. Ultimately, whether more settlements are achieved will depend on the anticipated cost to the defendant (i.e. the anticipated total damages and costs payable) of accepting the offer or proceeding to trial.

114. Sir Rupert also points to an additional benefit in the context of the proposed reform of CFAs. A claimant who has entered into a CFA and who equals or beats his own (rejected) offer at trial will be able to use the additional amount awarded under Part 36 towards paying the success fee and ATE insurance premiums that would no longer be recoverable from the defendant.

115. However, the extent to which the proposed uplift equivalent to 10% in damages will benefit claimants will depend on claims being decided at trial rather than settled between the parties before trial. Currently the percentage of claims decided at trial is generally low. HMCS figures suggest that 2.5% of all fast and multi track claims are decided at trial, although this figure includes a large number of undefended money claims that proceed straight to judgment without a trial. Of claims that are defended in the fast and multi track, around 25% are decided at trial. This figure is likely to vary between different types of claim.

116. Sir Rupert proposes two further modifications. First, he considers that the court should have discretion to award an uplift of less than 10% of the value of the claim where there are good reasons to do so. Second, he suggests that there may be a level beyond which an additional uplift of 10% of the value of the claim would provide too great a reward to a claimant – creating a perverse incentive to proceed to trial merely to obtain the uplift – and be too much of a penalty for a defendant. For example, where damages are £500,000, an uplift of 10% would amount to £50,000. The defendant would have to be very sure of winning at trial to press on after the claimant has made a Part 36 offer and risk having to pay an additional £50,000. The question then is at what level of damages would an uplift of 10% become too high and whether there should be one single cut off point or a staged reduction in the uplift as damages increase.

117. The current system of costs penalties is intended to reward and therefore encourage early offers. There are concerns, however, that a standard 10% uplift, no matter when during the process the claimant's offer is made, may not sufficiently encourage early offers rather than, say, offers made once the claim is listed for trial. It could also be argued that this additional adverse penalty does not lend itself to Part 36 offers relating only to issues of liability rather than quantum.

Part 36 offers and one way costs shifting

118. Sir Rupert recommends applying these reformed Part 36 incentives and adverse costs consequences to those claims that would be subject to qualified one way costs shifting. This is discussed in more detail at Section 2.5.

(ii) Reversal of *Carver v BAA Plc*: 'more advantageous'

119. Currently Rule 36.14 of the CPR applies where:

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

120. The words 'more advantageous' have been interpreted in case law as allowing the court to look at factors other than just the financial value of the offer to decide whether it is more advantageous than the decision of the court. Thus in the case of *Carver v BAA*[68] the court awarded £51 more than the defendant's offer. However, the court did not consider that this amount was more advantageous than the defendant's Part 36 offer. It took the view that the irrecoverable cost incurred by the claimant in continuing to contest the case together with the stress of the trial process, meant that the award could not be considered more advantageous than the offer made over a year previously.

121. In his Preliminary Report[69], Sir Rupert notes that the current provisions put unreasonable pressure on claimants to accept Part 36 offers which are not quite high enough and introduce an unwelcome degree of uncertainty in the Part 36 process. In his Final Report, he indicates that the overwhelming majority of respondents during the consultation phase of the review agreed with these criticisms. He accordingly recommends that the decision in *Carver* be reversed so that in relation to monetary offers, 'more advantageous' means better in financial terms, by however small the margin. This, he suggests, will provide greater certainty and clarity and allow both sides to

[68] [2008] EWCA Civ 412; [2009] 1WLR 113

[69] Preliminary Report page 476, para 6.4.

better calculate the risks of not accepting a Part 36 offer and avoid pressure on claimants to settle for lower amounts[70].

The new process for low value personal injury claims in road traffic accident cases

122. This proposed change to Part 36 has in fact already been adopted for monetary offers made under the new process for low value personal injury claims in road traffic accident cases[71]. The new rules refer specifically to the 'amount' of the offer. This is in the context of a clearly defined process for cases where liability is admitted. The new process provides a detailed framework for both parties to make early offers and to negotiate on the basis of those offers before starting court proceedings. The new process came into force on 30 April 2010 and its effect is being monitored.

123. However, reverting to the pre-*Carver* position outside this context may be seen as endorsing the principle that parties are entitled to press on to a trial – using expensive judicial resources and increasing their legal costs – even where there is very little difference between the two parties' respective positions and where they ought reasonably to have settled the claim much earlier in the process.

124. The Government strongly believes as a matter of policy that parties should attempt to reach an agreement to settle as early as possible during the lifecycle of the claim. Parties should be discouraged from incurring additional costs and using court resources by proceeding all the way to trial where there are only small differences between the amounts at which the parties would settle.

A possible refinement

125. An alternative approach would be to devise a system which introduces certainty as to when the Part 36 sanctions will apply whilst at the same time discouraging the parties from wasting resources in unreasonably pursuing claims to trial. This might be achieved by linking the trigger point for Part 36 sanctions to a value range rather than the exact amount of the offer. In his Preliminary Report, Sir Rupert refers to a model by the Forum of Insurance Lawyers (FOIL) which includes provisions along these lines[72].

126. The FOIL model proposes additional costs sanctions linked to a 10% range around the defendant's Part 36 offer rather than the actual offer figure. As an example of how this could work, if the defendant offers £5,000 and the court's award is more than 10% above the defendant's offer (£5,501), the

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[70] It is worth noting, however, that Lord Gill in his *Report of the Scottish Civil Courts Review* takes a different view and recommends the introduction of *Carver* into Scottish procedure: "success should be judged by looking at the conduct of the parties and the whole circumstances of the case." Chapter 8, page 194, para 90.

[71] Rule 36.21(1) of the CPR

[72] Preliminary Report, page 115, Table 10.1

court would apply costs sanctions against the defendant on the basis that the defendant had caused the claimant to proceed to trial by not making a reasonable offer. If the court's award is above, but not more than 10% above, the defendant's offer (i.e. £5,001 - £5,500), the claimant would receive costs to the date of the offer only, with each party meeting their own costs from that point onward. The rationale for this is that the final award was so close to the defendant's offer that the parties should reasonably have reached agreement and that it was unreasonable for the claimant to incur additional costs by pursuing the case to a hearing.

127. The above example is given by way of illustration. In developing any such model, the aim would be to ensure that it encourages reasonable offers early in proceedings from both parties. Such a model should also include sanctions that, as far as possible, are weighted evenly between claimants and defendants in order to avoid inappropriate pressure on either party to settle.

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

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

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

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

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

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

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

2.5 Qualified One Way Costs Shifting

The proposal: that there should be a regime of qualified one way costs shifting in certain cases[73]

The normal rule

128. The normal rule in relation to the costs in civil litigation is that 'costs follow the event': the loser pays the winner's legal costs (in addition to their own legal costs). Under the current arrangements, claimants whose cases are funded under CFAs almost invariably take out ATE insurance (see Section 2.2 for more details) to cover their liability for the other side's costs – and their own disbursements – if they lose[74]. ATE insurance premiums are based on the likely costs the claimant will have to pay if he or she loses (defendant's costs and disbursements) and the likelihood of losing.

129. If ATE insurance premiums cease to be recoverable from defendants, as recommended by Sir Rupert, claimants will have to pay those premiums. It would be expected that competition and claimant self-interest would operate to reduce premiums to some extent but claimants would still need to divert some of their compensatory damages towards meeting the ATE insurance premium.

Qualified One Way Costs Shifting (QOCS)

130. Sir Rupert proposes the concept of qualified 'one way costs shifting' as a way of avoiding this additional cost to claimants in certain categories of case – in particular personal injury (including clinical negligence) claims – "on grounds of social policy, where the parties are in an asymmetric relationship"[75]. One way costs shifting (without qualification) would mean that losing claimants are only ever liable to pay their own legal costs[76], and not the winner's costs as would happen normally under the loser pays principle. Losing defendants would continue to be liable to pay both their own and the claimant's costs in the normal way. With *qualified* one way costs shifting (QOCS), a losing defendant would continue to pay a winning claimant's costs, but a losing claimant would only pay a winning defendant's costs where – and to the extent that – in all the circumstances it is reasonable for him or her to do so.

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[73] Final Report Chapter 19

[74] CFAs are used by defendants but much less frequently and for the purpose of considering one way costs shifting the relevant consideration is the effect on CFA funded claimants.

[75] Final Report page 89, para 5.11

[76] Including the success fee if they are funded on a CFA.

131. Another way of putting this is to say that the claimant would generally have 'costs protection', that is, protection against having to pay the other side's costs. Legal aid clients in civil cases generally have such costs protection, and have had since the scheme was established in 1949[77]. The current legal aid consultation is not proposing to change the position for cases where legal aid remains available. Sir Rupert proposes to model the QOCS regime on the legal aid provisions. Outside legal aid claimants and defendants may apply to court for a costs capping order to limit the amount of future costs a party may recover – which is also a form of costs protection. In judicial review claims that concern issues of particular public interest, claimants may apply for a Protective Costs Order – limiting the amount of defendant's costs which the claimant may have to pay.

The aim of QOCS

132. The policy intention behind Sir Rupert's proposal for QOCS is to provide access to justice for valid claims at proportionate cost. He proposes that the test should operate restrictively, so that claimants are only exceptionally required to meet the defendant's costs. This would reduce the financial risk of litigation for claimants and mean that ATE insurance is effectively unnecessary to cover that risk. This in turn would help preserve compensatory damages for the claimant by removing (or significantly reducing) the need for ATE insurance premiums[78]. It would also help preserve fairness, where a wealthy defendant might otherwise seek to put pressure on the claimant to settle by increasing his expenditure on defence costs. Without either (i) ATE insurance with recoverable premiums or (ii) QOCS, there is a concern that claimants may be deterred from bringing claims for compensation. Sir Rupert suggests that the judge should consider at the end of the claim whether to make a costs order in favour of the defendant and if so should determine the amount summarily.

133. Respondents to the consultation phase of the Review, including defendant insurers, generally agreed with the conclusions of the Preliminary Report, that defendants in personal injury claims would be better off under a regime of one way costs shifting than under the present loser pays principle supported by ATE insurance premiums. There were differing views as to the extent of the potential savings and Sir Rupert also reports a wide spread of views amongst respondents on the principle of QOCS such as that one way costs shifting would be unfair to defendants who are not insured, and that it might encourage unmeritorious claims.

134. On the basis of the material provided during the review, Sir Rupert concludes that, provided rules were drafted so as to deter frivolous or fraudulent claims

[77] In some circumstances a defendant's costs not recoverable from a legally aided claimant may be recovered from the Legal Services Commission – see Section 11 of the Access to Justice Act 1999 and paragraph 5 of the Community Legal Service Regulations 2000.

[78] Claimants will still face the risk of having to pay their own disbursements if they lose; under qualified one way costs shifting they may have to pay some of the defendant's costs.

and to encourage acceptance of reasonable offers[79], the introduction of QOCS would "materially reduce the costs of personal injuries litigation"[80]. He says that QOCS is bound to reduce costs because the ATE insurance premiums currently cover not only claimants' adverse costs in unsuccessful cases but also the ATE insurers' administration costs and a profit element. Further, the Final Report notes that ATE insurance premiums will generally cover more than the other side's costs if the claim fails. The market has developed such that claimants do not in fact pay the ATE insurance premium in cases which fail; the premium is therefore 'conditional' or 'deferred' with total premiums across all cases being covered by the premiums which defendants have to pay when claims succeed.

The proposed rule on QOCS

135. The precise formulation Sir Rupert proposes is that:

Costs ordered against the claimant in any claim [covered by QOCS] shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

(a) the financial resources of all the parties to the proceedings, and

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

136. This formulation, based on the provisions for costs recovery against a legally aided party[81], would mean a claimant would have 'costs protection' and would not be liable to pay a winning defendant's costs unless (i) the claimant acts unreasonably (for example, by bringing a frivolous or fraudulent claim, or in conducting the claim unreasonably or abusively), and/or (ii) the claimant is sufficiently – or 'conspicuously' to use Sir Rupert's term[82] – wealthy such that they are easily able to pay the winning defendant's legal costs.

137. Claimants may also lose their costs protection in those cases where the parties are on an equal financial footing, for example where the defendant is not insured, or where the claimant is a large company or is conspicuously wealthy.

QOCS and Part 36

138. QOCS would not override the system of costs sanctions set out at Part 36 of the CPR (see Section 2.4) which encourage the parties to settle claims without the need for a trial. So for example, a claimant who has refused the

[79] Sir Rupert proposes changes to the Part 36 costs sanctions, designed to encourage more reasonable offers and settlements based on those offers. These are considered at Section 2.4 of this consultation paper.

[80] Final Report page 187, para 2.11

[81] Section 11(1) of the Access to Justice Act 1999

[82] Final Report page 190, para 4.8

defendant's Part 36 offer which the claimant then does not beat at trial, would continue to pay the defendant's costs arising after the date of the offer. The policy rationale for this is that a party should pay the additional costs caused to their opponent by his or her unreasonable behaviour in not accepting the opponent's reasonable offer. It would also mean that Part 36 applies similarly across all types of civil claim, whether or not QOCS also applies.

139. Claimants would have to pay additional sums due under Part 36 from damages received or out of their own funds. Claimants could take out ATE insurance (paying their own premium) to cover this sum. Alternatively they may seek to agree with their solicitor that they should meet all or part of those costs on the basis that the solicitor erred in advising the claimant not to accept the offer.

140. A potential difficulty with this approach is that defendants, in particular in cases where liability is not clear cut, could avoid liability for costs by making a derisory offer. The claimant's refusal of the offer may be reasonable but they may still lose the case on the issue of liability. In these circumstances, the claimant would receive no damages and – as QOCS would not apply - would be liable to pay the defendant's costs out of their own funds. Sir Rupert acknowledges this possible defendant strategy and suggests that such a strategy would not be successful because a miniscule offer of this kind is in effect no offer, with the implication that the claimant would continue to be protected under QOCS. However, this would mean the court having to investigate in each disputed case, whether offers had been reasonably made and rejected, and raises the possibility of satellite litigation.

141. The operation of Part 36 under QOCS could alternatively be modified so as to limit the level of any Part 36 costs sanctions payable by the claimant to the amount of damages recovered. This would protect claimants from having to pay any part of their own funds (for example the equity in a property) towards meeting the costs payable under Part 36.

The proposal – possible refinements

142. One concern raised about Sir Rupert's proposal is that it does not give sufficient certainty to claimants from the outset about whether they will be liable to pay (any part of) the other side's legal costs if they lose. This uncertainty could make QOCS ineffective if it means that claimants continue to take out ATE insurance with significant premiums. It could also impact adversely on access to justice if people were deterred from bringing reasonable claims even though in practice they would not be at risk of paying the other side's legal costs. This general deterrence has to be balanced with the concern – as Sir Rupert says – to deter frivolous or fraudulent claims.

143. One possible way of achieving the necessary certainty in personal injury claims would be to introduce a presumption that the claimant would not be liable to pay the defendant's costs, unless the court – on an application by the defendant made as early in the proceedings as possible - orders that the

financial circumstances of the parties are such that the claimant should be liable for all or a fixed amount of defendant's costs if the claim fails[83]. The court would only make such an order in the small minority of personal injury cases where it is clear that the claimant is 'conspicuously' wealthy or the defendant is uninsured.

144. If qualified one way costs shifting were to be introduced for types of claim other than personal injury (see paragraphs 153-169 below) it might be necessary for the test to be more restrictive so as to avoid an increase in unmeritorious claims. This could be achieved by introducing a fixed amount of defendant costs which the claimant may be required to pay: such that a claimant acting reasonably in respect of a valid claim, and being other than sufficiently or 'conspicuously' wealthy, would be confident that they would not be liable for the opponent's costs beyond a fixed amount (assuming that it is not more than the defendant's actual costs), except for any costs ordered to be paid as a result of not accepting a reasonable Part 36 offer. The fixed amount should be set at an amount sufficient to deter frivolous claims but which is not so large that claimants would need to take out ATE insurance as they do now.

145. A claimant could, however, be liable for less than the fixed amount or have no liability at all, if successful in persuading the judge that it is reasonable in all the circumstances of the case (including in particular the claimant's means and the importance of the claim) for the claimant not to pay it. For example, a claimant acting reasonably whose means were such as to qualify for legal aid under the legal aid means test would pay no costs. Claimants could also be liable for more than the fixed amount where, for example, the claimant is a conspicuously wealthy individual or the defendant is an uninsured individual or small organisation (provided the amount of costs to be paid by the claimant does not exceed a level that it is reasonable in all the circumstances, including the claimant's financial circumstances).

146. The rules could therefore state that, subject to the provisions of Part 36 which continue to apply and the claimant's resources being above the level that would qualify for legal aid, the claimant remains liable for the fixed amount until a judge (acting on his or her own initiative, or on the application of the defendant) declares that (a) the claimant (i) is behaving unreasonably in relation to the claim – either in bringing the claim or in relation to applications (including as to costs) during the course of the claim or (ii) is so wealthy that there should be no limit on the claimant's costs liability, or (b) the defendant is of such modest means relative to the resources of the claimant and the costs of the case that there should be no liability or a capped limit on the claimant's costs liability. The court would be encouraged to make a declaration at the earliest possible opportunity, so as to provide certainty for the parties.

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[83] Sir Rupert considered a similar default position in relation to judicial review claims, see paragraph 163 below.

147. Under this arrangement, different fixed amounts could apply to different categories of case and depending on the case track (fast or multi track) to which the claim has been allocated.

148. By analogy with the legal aid provisions, it is considered that a child claimant's financial resources rather than those of the litigation friend should be assessed for these purposes. In legal aid cases, the means of the claimant's partner are generally included in any assessment of the claimant's means, and this is appropriate because legal aid concerns the expenditure of public money. However, it does not seem appropriate for others' means to be aggregated with the claimant's for the purposes of QOCS as public money is not in issue in the same way, especially given Sir Rupert's suggestion that under the test claimants should only exceptionally be required to meet the defendant's costs.

QOCS for CFA claims or low value claims only?

149. Some respondents to the consultation phase of the Review, whilst supporting QOCS in principle, considered that it should be limited to certain types of personal injury claims – such as cases funded under CFAs, or cases valued at less than £25,000. Sir Rupert concludes that there would be difficulties in each of these approaches.

150. If QOCS is limited to CFA claims, claimants with a case funded on a traditional hourly rates basis who chose to take out ATE insurance would have to meet the cost of the premium themselves. Although it is rare to take out ATE insurance in such circumstances, this may increase if the CFA regime is reformed, and more people chose to fund their litigation on a traditional hourly rates basis. Introducing QOCS for all claimants may unfairly advantage privately funded claimants, although the court will retain discretion to order a losing claimant who can clearly afford to meet the defendant's costs to pay them.

151. There does not appear to be a case for limiting QOCS to claims of less than £25,000, whether or not limited to CFAs.

QOCS for certain types of claimant only?

152. The Government agrees with Sir Rupert that 'the loser pays', or two way costs shifting (the normal costs rule), should continue to apply to claims made by commercial organisations and is not persuaded that QOCS should be generally extended beyond claims brought by individuals. Other organisations are not obviously in such a position of inequality as to justify QOCS being applied generally to them either. Many NGOs, for example, are large well-resourced national organisations.

QOCS in other types of litigation in addition to personal injury

153. Sir Rupert proposes that QOCS should apply to all personal injury claims (including clinical negligence) as a means to help preserve the amount of damages recovered by successful claimants if success fees and ATE

insurance premiums cease to be recoverable. He indicates that QOCS is particularly suitable in personal injury claims because: claimants are successful in the majority of claims; the parties are almost always in an unequal relationship; and QOCS would be a cheaper way of protecting claimants against adverse costs orders than ATE insurance. Further, the concept of one way costs shifting is not a novel concept in this area given that before 2000 the majority of personal injury claims were protected by the limits on costs recovery from a legally aided client.

154. Sir Rupert suggests that it might be appropriate to introduce QOCS in other types of litigation where there is typically an unequal relationship between the parties and there are public policy reasons for needing to protect claimants against adverse costs. In particular, Sir Rupert suggests as possible candidates: judicial review claims; defamation claims; housing disrepair claims; actions against the police; and professional negligence claims[84].

155. He argues that types of litigation where the parties are generally in a relatively equal relationship (such as commercial or construction litigation[85]), where either the claimant or defendant could equally be the stronger financially, or claims where claimants could and regularly do take out before the event insurance (such as private nuisance claims) are unsuitable for QOCS.

156. The common characteristic of the majority of these types of claim (of unequal relationship) is that the claimant is an individual – and often of modest means – whereas the defendant has substantial means, either as a public authority, or as a large and well resourced organisation (for example in the media or insurance). However, the combination of factors that Sir Rupert indicates which make personal injury claims so amenable to QOCS, does not necessarily apply in many of the other types of claim to which he suggests QOCS should be extended. For example, whilst public authorities are often in a relatively strong financial position compared to claimants, this is not always the case – for example claims against a small local council, or claims by well-resourced businesses or other organisations. Also, unlike in personal injury and clinical negligence claims, it is not clear that defendants in these types of claim would be better off under a regime of QOCS. Nor, it appears, are the majority of these types of claim funded by way of CFA, so they will be relatively unaffected by proposals to amend the CFA regime.

Specific types of litigation to which QOCS might apply: Defamation

157. Litigation costs in defamation claims are high compared to other types of civil litigation and the government is concerned that these high costs have a ‘chilling effect’ on academic and journalistic freedom of speech which is contrary to the public interest. The Government is therefore committed to taking action to tackle this issue.

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[84] Final Report pages 89-90 paras 5.10 – 5.13

[85] Final Report pages 88-89 paras 5.5 – 5.7

158. Sir Rupert argues that as with personal injury claims, the parties in most defamation claims are in an unequal relationship and claimants are generally successful so rarely required to pay the defendant's costs. There are also issues particular to defamation claims that Sir Rupert says make defamation claims a suitable candidate for QOCS to protect claimants against adverse costs in place of ATE insurance. These include the fact that ATE insurance in this area is particularly costly. Further, although defendants can pay such high premiums, the insurance does not always meet the full costs when defendants win, because inadequate insurance cover may have been included under the policy. Also, defendants may be paying expensive ATE insurance premiums (in addition to the claimant's other costs) in cases where, for example, a wealthy celebrity claimant can well afford to finance the claim from their own funds without a CFA. In these circumstances, CFAs may be used as a litigation tool to increase pressure on defendants to settle claims.

Specific types of litigation to which QOCS might apply: Judicial Review

159. Judicial review provides the principal legal basis whereby citizens can challenge the decisions of public authorities and the state and is the mechanism by which the courts operate an important constitutional check on the exercise of public authority by, for instance, the government, local authorities and other public bodies and officials. In this context it is important that claimants are able to bring challenges. However, it is equally important that public authorities continue to take decisions in accordance with the law in the interests of society as a whole. Decisions are taken across a wide spectrum of issues by a wide range of public authorities – for example, decisions by the UK Border Agency on whether to grant asylum or a visa, decisions by planning authorities and the Environment Agency on whether to permit a waste incinerator to be built, and decisions by a local authority on the provision of grant funding or an entertainment licence.

160. A substantial proportion of judicial review claims are not granted permission to proceed which, given that the test for permission requires only that the applicant should have an arguable case that a ground exists for seeking judicial review, suggests that there are a number of unfounded or frivolous claims. For example, in relation to immigration and asylum, which is by far the biggest single area of judicial review claims, over 90% of contested judicial review claims are not granted permission to proceed[86]. In other civil judicial reviews in 2008, around 45% of claims were refused permission to proceed. It would be important to ensure that any introduction of QOCS for judicial review proceedings did not encourage an increase in such applications, which would increase costs for defendant public authorities without benefit to claimants. Any increase in costs to defendants arising from

[86] National Audit Office Report HC 124 Session 2008-9. Figures provided by the UK Border Agency indicate that in around 50% of the 2,133 immigration and asylum claims in 2009 where permission was refused on the papers, the court found that the claim was 'abusive' or 'devoid of merit' and/or ordered that a renewed oral application for permission need not be a barrier to removal.

an increase in frivolous claims or claims with a low prospect of success, would constitute a reduction in income to the public authority which would have to be met by a reduction in services or an increase in taxation, including local council tax[87].

161. Sir Rupert's proposals for QOCS should mean that the judge at the permission stage would order costs orders to be made against the claimant, as now, if the claim were found to be frivolous. And given the relatively low threshold for permission, which as Sir Rupert indicates is designed to 'weed out unmeritorious cases'[88], the Government believes that it would not be unreasonable for claimants who do not get permission to proceed to continue to pay the defendants' costs of that application as at present[89], or a major part of them.

162. As Sir Rupert indicates[90], the formulation proposed for QOCS would mean that a claimant of modest means, bringing a justified claim and acting reasonably, would not be required to pay the defendant's costs if the claim fails. However, it would allow the court to take account of the financial circumstances of both parties, the seriousness of the subject matter, importance to the claimant and, importantly in this type of claim, the litigation behaviour of both parties before deciding whether to make a costs order against the claimant.

163. Sir Rupert considered a default position[91] in relation to judicial review claims, whereby – save in exceptional circumstances – costs against the claimant would be limited to £3,000 up to the grant of permission, and £5,000 for the full proceedings. However, he did not pursue this proposal as he concluded that the basic approach based on the legal aid test (at paragraph 135 above) would be preferable because that would provide consistency for all claimants in judicial review proceedings whether legally aided or not and would introduce a test that is already familiar to both the courts and the legal profession. He also doubted that a default position would help much given the range of circumstances of different claims and different claimants.

164. The Government considers, however, that such a system could be refined to work effectively. The possible refinement proposed at paragraphs 143-146, would allow a defendant of modest means, faced with a wealthy claimant, to apply at the beginning of the case for the cap on the claimant's costs recovery to be lifted altogether or increased. A claimant of modest means would be protected by being required to pay no costs, or costs limited to the

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[87] The Government does not always recover all costs awarded in its favour, often because of the financial circumstances of the claimant. For example in 2007 – 2009 UKBA recovered about 25% of the costs awarded to it.

[88] Final Report page 310 para 4.1(iii)

[89] Where permission is refused the claimant's costs liability is limited to the costs of the defendant's acknowledgement of service (per *R (on the application of (1) Mount Cook Ltd (2) Mount Eden Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346.

[90] Final Report page 326, paras 3.10-3.12

[91] Final Report page 312, para 4.9

fixed amount, should he or she be unsuccessful. However, it is clear that some types of claim are more complex than others and therefore result in higher costs. It might therefore be appropriate, if a costs cap is to be introduced, to set different levels of cap for different types of judicial review claim based on a proportion of the general level of defendant costs associated with different types of claim.

165. A further variant in relation to judicial review claims has been suggested by the Working Group on Access to Environmental Justice in their *Update Report*[92] – that an unsuccessful claimant should not be ordered to pay the costs of any other party, save where the claimant has acted unreasonably in bringing or conducting the proceedings. This means that a well-resourced claimant bringing proceedings against a public authority of limited means would have full costs protection, subject only to their litigation behaviour. The Government is concerned that both this proposal and the default position proposed by Sir Rupert have the potential to encourage a significant increase in unmeritorious claims which would increase the costs of public bodies without any real benefit to claimants.

166. As noted above, the Government is not persuaded that QOCS should extend beyond applications brought by individuals. Where appropriate organisations such as environmental groups and local residents associations would be able to apply, as now, for a Protective Costs Order (PCO)[93] where the claim is brought in the public interest. A PCO ought to provide better costs protection than QOCS, because under a PCO it will be clear from the outset what costs the claimant would have to pay if the claim is unsuccessful. This same certainty is not achieved by QOCS given the very different financial resources of claimants who are not individuals. Some respondents to the Review reported that they do not apply for PCOs because they cannot satisfy the requirement that the applicant would be likely to drop the case if the PCO is refused and would be acting reasonably in doing so[94]. This condition is aimed at ensuring that only those claimants who genuinely require a Protective Costs Order, to limit their exposure to costs, obtain one.

167. However, in the light of Sir Rupert's recommendations, the Government is seeking views on whether, if introduced for judicial review proceedings, QOCS should also apply to non-commercial organisations bringing claims in the public interest. The level of public interest required for QOCS to apply would need to be considered. The factors set out in the current case law on PCOs would appear to be a sensible starting point.

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[92] http://www.wwfscotland.org.uk/what_we_do/about_wwf_scotland/publications/index.cfm?4228

[93] A protective costs order is an order limiting the amount of costs that a party may have to pay another party, if their claim is unsuccessful.

[94] This requirement arises from the leading case of *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

Protective Costs Orders

168. It should be noted that, in the meantime, the Government is working to amend the Civil Procedure Rules in order to codify the current case law on PCOs for environmental judicial review proceedings[95]. These new rules will make the law and procedure more certain and transparent for those who may wish to consider applying for a PCO and will more clearly meet concerns expressed by respondents to the Review in relation to costs in such cases. The rules will encourage applications early in the proceedings to be considered alongside permission for a hearing and will limit the claimant's liability for the costs of the PCO application. These rule changes are expected to come into effect by April 2011.

The Government's position

169. The Government agrees with Sir Rupert's proposal that if ATE insurance ceases to be recoverable, QOCS should apply in personal injury claims brought under CFAs and that in those cases, the costs protection for claimants should be very widely drawn as proposed by Sir Rupert. The Government's current view is that QOCS should also apply to individuals bringing claims for defamation and other publication proceedings brought under CFAs and there appears to be no reason why the same level of costs protection should not apply to claimants in these cases. However, the Government has concerns about extending QOCS to (i) cases funded on a traditional hourly rates basis and (ii) to judicial review claims. If QOCS were to be introduced for these claims, the Government considers that it should apply only to individual claimants who should be liable to pay some costs (up to an appropriate limit) – which limit may vary depending on the type of case.

Q 28 – Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135 – 137)? If not, please give reasons.

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

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

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

[95] And see the recent Court of Appeal decision in *R (Garner) v Elmbridge BC* [2010] EWCA Civ 1006. The Government is also consulting separately on proposals to codify the circumstances in which an interim injunction may be granted without a cross-undertaking in damages.

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

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

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

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

2.6 Supplementary Legal Aid Scheme

170. A Supplementary Legal Aid Scheme (SLAS) is a scheme in which a percentage of funds is recouped from cases where successful claims for damages have been made and the claimant was in receipt of legal aid, and those funds are used to supplement the legal aid costs in other cases.

171. There are various different possible models of SLAS based on how the percentage is calculated and who is required to pay it. A SLAS may be entirely self-funding but it is not required to be so. It operates as an additional revenue stream for the legal aid fund. The scheme does not require initial capital investment or separate administration as it is managed by the existing legal aid authority.

172. Sir Rupert recommends that the viability of a SLAS should be explored, subject to a decision about his primary recommendations.

173. There are several examples of SLASs operating around the world, and the Government is currently consulting on whether to implement a SLAS in England and Wales, and what form it should take[96]. The proposal is that a percentage of general damages recovered in legal aid cases should be returned to the legal aid fund. The Government believes that a SLAS would not only create an alternative funding stream to supplement the legal aid fund, but also provide the opportunity to address the inter-relationship between legal aid and the proposed reforms of CFAs outlined earlier in this paper.

174. It should be noted that the legal aid consultation proposes that the number of damages cases funded under legal aid should be reduced significantly. However, the proposal is that those cases which continue to be funded under legal aid, whether the case is within the scope of legal aid or funded through the excluded case arrangements, would be subject to the payment of a percentage of the general damages to a SLAS to help pay for other cases.

[96] Consultation paper, *Proposals for Reform of Legal Aid in England and Wales*, November 2010, available at: http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm

2.7 Alternative Recommendations on Recoverability

175. Sir Rupert emphasises that he regards his recommendations on abolishing the recoverability of success fees and ATE insurance premiums[97] as important, and not to be watered down or discarded lightly. However, if his primary recommendations on abolishing recoverability are not accepted, Sir Rupert proposes two alternative packages of measures to rigorously control the level of success fees and ATE insurance premiums that can be recovered from the losing party. The Government supports Sir Rupert's primary recommendations, but is seeking views on the alternative recommendations too so that it can take a fuller view on consultation responses. The alternative packages are outlined in this section.

Alternative Package 1: summary

176. (i) Success fees

a) Fixed recoverable success fees in all areas where CFAs are commonly used.

b) No success fees should be recoverable from the defendant or chargeable to the claimant during the relevant pre-action protocol period.

c) No recoverability of any element of the success fee which provides protection against the risk of the claimant not accepting a good Part 36 offer.

d) Where a Part 36 offer is not beaten at trial, limiting the success fee recoverable by the receiving party to the level that applied at the last date the offer could have been accepted.

e) No recoverability of the success fee for detailed costs assessment proceedings.

f) No recoverability of the success fee where the claimant could have used funding other than a CFA.

177. (ii) After the event insurance

g) No recovery of the ATE insurance premium where the defendant has admitted liability during the relevant pre-action protocol period or possibly some shorter period.

h) No ATE insurance premium to be recovered for Part 36 risks (i.e. where the claimant is found to have acted unreasonably by failing to accept a defendant's offer).

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[97] See Sections 2.1 and 2.2 of this consultation paper.

i) Recoverable ATE insurance premiums to be capped at 50% of damages awarded.

j) In cases where the ATE insurer repudiates the policy, then the insurer will pay out but will have the right to recover any payments from the policy holder.

Alternative Package 2: summary

178. (i) ATE insurance premiums cease to be recoverable (see Section 2.2).

(ii) Recoverability of success fees be limited as Alternative Package 1 above.

(iii) Two way costs shifting be retained.

Alternative Package 1: detail

179. (i) Success fees

a) Fixed recoverable success fees

180. Fixed recoverable success fees seem to be working well in the areas to which they apply and in principle there is merit in considering extending them to other areas of litigation, if Sir Rupert's primary recommendations are not accepted. However, one question is to which types of litigation fixed recoverable success fees should be extended. Responses to the Preliminary Report indicate that CFAs are used, to a greater or lesser extent, in the following types of claim[98]: public liability, clinical negligence, defamation and publication, nuisance, professional negligence, property and commercial. Occasionally, they are also used in other types of claim such as judicial review and housing disrepair claims.

181. Recoverable success fees have so far been fixed in the areas of litigation where the volume of claims is high and where there is a relatively small number of large defendants (e.g. insurance companies) from which data can reasonably easily be gathered. This allows a fair degree of certainty as to the average risks on which to base the fixed recoverable success fee model. The more disparate the defendants and the lower the claim volumes, the more difficult it will be to set a single success fee applicable to all claims of a certain type. There may also be some types of claim where the success rates are particularly volatile which would be less amenable to fixed recoverable success fees.

b) No success fees recoverable from the defendant or chargeable to the claimant during the protocol period

182. Sir Rupert proposes that no success fee should be recoverable from the paying party or chargeable to the client during the relevant pre-action

[98] Final Report pages 97-106, paras 2.4-3.25

protocol period, or at all if liability is admitted during that period. If liability is not admitted the success fee would be recoverable (and chargeable) from the date the CFA is entered into. Currently, CFAs are generally entered into at the outset of the case and before the defendant has been notified of the claim. The defendant may then immediately admit liability, but still have to pay the success fee. Sir Rupert argues that for the pre-action protocols to serve a useful purpose they should be designed to permit behaviour which reduces costs and speeds up settlement. An alternative rationale is that, once liability is admitted, the claimant must recover his costs (subject to the sanctions applicable under Part 36 discussed below) and there is, therefore, no risk to be covered by the success fee and so the success fee should not be recoverable.

183. It is possible that issues of causation (and therefore an element of risk) may remain, even where liability is admitted. It would need to be considered whether an admission of liability is sufficient, and if not what more would be required for the success fee to be non-recoverable.

184. Another issue is that there are different periods specified in the various pre-action protocols and the Practice Direction – Pre-Action Conduct within which the defendant should respond to the letter before claim[99]. Different protocol periods may not be a problem where it is clear which of the specific protocols apply. However, for claims falling within the Practice Direction on Pre-Action Conduct, claimants and their solicitors will be unclear, at least until the defendant's initial acknowledgement, how long the period of non-recoverability will be[100].

185. One possibility might be to limit the proposal to those claim types for which there is a specific pre-action protocol. An alternative option might be to introduce a standard period during which the defendant must admit liability if he or she is to avoid paying the success fee. This might be applied to all claims or to claims where a relevant pre-action protocol does not specify a fixed period for response to the letter before claim. A period of 42 days, for example, would mirror the period that currently applies for ATE insurance premiums under Rule 44.12B. This rule provides that in publication proceedings, if a party admitted liability and made an offer to settle within 42 days of being informed about the other party's insurance policy the ATE insurance premium is not payable by the paying party. The 42 days period

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[99] There are 11 pre-action protocols. The Defamation and Judicial Review Pre-action Protocols state that if a reply within 14 days is not achievable then the defendant should explain when he intends to respond. The new Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents requires a response within 15 working days. The Professional Negligence Protocol suggests an acknowledgement within 21 days and a letter of response within 3 months of the acknowledgment. The Practice Direction - Pre-Action Conduct sets flexible guidelines for response depending on the complexity of the case. (The Practice Direction is the umbrella under which the Protocols 'sit' – and provides a guide to what is a reasonable period of time for a full written response where no specific pre-action protocol applies. The guide ranges from 14 days to 90 days depending on the complexity of the matter – para 7.2 of the Practice Direction).

[100] Under the Practice Direction the period for a response is between 14 days and 90 days depending on complexity.

would fall within the period of 30 to 90 days suggested in the Practice Direction - Pre-Action Conduct for 'particularly complex' matters.

186. The proposal for non-recoverability of success fees during the protocol period may lead to an increase in success fees agreed at the initial retainer stage (payable after the protocol period if liability is not admitted), to cover claims where liability is admitted and no success fee is recoverable or chargeable. If so, whilst costs would be reduced for claims where there is an early admission of liability, there would be no reduction in overall litigation costs.

c) No recoverability of any element of the success fee relating to a claimant that does not accept a reasonable Part 36 offer[101]

187. Claimant solicitors regularly agree with their clients that they will not charge their client's base costs or the success fee for the period after a Part 36 offer was rejected, where that offer was not beaten at trial and the offer was rejected by the claimant on the solicitor's advice. The solicitor's risk of having to cover these costs should be included in the risk assessment for the success fee and therefore covered by that success fee. This means that a defendant, who makes a Part 36 offer which the claimant rejects but does not beat at trial, will be awarded his costs from the date of the offer, but will have to pay the claimant's costs and the success fee, including an element to cover the claimant's Part 36 risk, up to that date of the offer. Sir Rupert also suggests that as the claimant faces no risk, he has less interest in accepting a reasonable Part 36 offer.

188. Sir Rupert therefore proposes that any element of the success fee which protects a CFA funded party against the risk of not accepting a good Part 36 offer should not be recoverable from the paying party. The logic of this proposal suggests that it should apply equally to defendants whose case is funded by way of a CFA and to claims where the Part 36 offer relates only to the defendant's liability.

189. There are considerable practical difficulties to this proposal in that it will be very difficult to indentify that element of the success fee that refers to a possible Part 36 offer, and the process of doing so (whether by negotiation or challenge through the courts) may increase litigation costs. The Government is not therefore persuaded that it would be practical to implement this particular proposal.

d) Creating a two stage success fee model - limiting the success fee recoverable, where the receiving party does not succeed, following a Part 36 offer, to the success fee that applied at the last date the offer could have been accepted

190. This proposal reverses the decision in *Lamont v Burton*[102]. Presently where a claimant rejects a Part 36 offer and does not beat it at trial, the claimant must

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[101] See also Section 2.4 concerning proposals to amend the current Part 36 provisions.
[102] (2007) EWCA Civ 429; (2007) 1WLR 2814.

pay the defendant's costs from the date of the Part 36 offer. However, the claimant still receives the success fee applicable as at the date of the trial (usually 100%) on his or her costs up to the date of the offer. This proposal will mean that the success fee payable by the defendant on costs up to the Part 36 offer would be at the rate applicable at the point when the offer could have been accepted (so for example in RTA claims this would be 12.5%). This proposal also applies to a defendant's success fee where a claimant's Part 36 offer is not beaten at trial.

191. It is possible that limiting the recoverability of success fees in this way may discourage the use of staged success fees (which are currently used in some areas) so that a single success fee is payable throughout the proceedings.

e) No recoverability of the success fee for detailed costs assessment proceedings.

192. Success fees are currently recoverable on detailed costs assessment proceedings. This is despite the fact that once a final order has been made by the court, the risk which the success fee is designed to cover – the risk that the claimant will lose the case and that the solicitor will not recover his or her fees – no longer applies. Sir Rupert proposes that no success fee should be recoverable in relation to detailed costs assessment proceedings (i.e. once an entitlement to costs has been established) and that the relevant provisions of the Civil Procedure Rules should be amended accordingly. This would overturn the decision in *Crane v Cannons Leisure Centre*[103].

f) No recoverability of the success fee where the claimant could have used funding other than a CFA

193. Sir Rupert argues that where a success fee is claimed by a receiving party, the paying party is entitled to be shown evidence that a CFA success fee was in place for the material period so as to justify the charging of the success fee. Where the claimant could have used other funding – such as Before the Event (BTE) legal expenses insurance[104], or trade union membership[105] – which would not have resulted in a CFA being used, that should be a valid reason for disallowing any claim for a success fee, but should not otherwise invalidate the retainer or prevent recovery of base costs. This, in Sir Rupert's view, would rectify the effect of *Kilby v Gawith*[106], where it was held that the court had no discretion under Rule 45.11(1) of the CPR to disallow a successful claimant a success fee provided for in the CFA with her solicitors, notwithstanding the existence of a BTE insurance policy which would have enabled her solicitor to conduct the case without risk.

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[103] (2007) EWCA Civ 1352; (2008) 1WLR 2549.

[104] See Section 3.5 of this consultation paper

[105] Under their professional rules of conduct solicitors are required to make inquiries into alternative funding options which might be open to a client before taking a case on a CFA basis.

[106] [2008] EWCA Civ 812; 2009 1 WLR 853

194. However, it is understood from Sir Rupert that it was not his intention that success fees should be non-recoverable where the alternatives available to the claimant were either legal aid or payment on a traditional hourly rates basis.

195. (ii) After the Event Insurance

g) No recovery of the ATE insurance premium where the defendant has admitted liability during the protocol period

196. Currently, ATE insurance policies are generally taken out to support CFAs and are entered into at the point where the party signs a retainer with the solicitor. It is relatively rare for ATE insurance to be taken out by a claimant in a non-CFA funded case, or by defendants. The ATE insurance policy covers the risk as assessed at the time that the policy is taken out of the claimant subsequently losing the case and having to pay the defendant's costs. The defendant's response to the claim is not known when the policy is taken out and the ATE insurance policy risk is calculated on the basis of the claimant solicitor's assessment of the strength of the claimant's case. However, even if the defendant admits liability during the relevant pre-action protocol period – realistically the earliest opportunity to make an admission – the defendant is still liable to pay the ATE insurance premium.

197. Sir Rupert proposes that where liability is admitted during the pre-action protocol period, the defendant should not be liable to pay the costs of any ATE insurance policy taken out by the claimant. But where liability is not admitted, the ATE insurance premium would be recoverable from the defendant as now, if the claimant is successful. The logic of this proposal suggests that it should apply, whether or not a CFA is in place.

198. Similar difficulties arise with this proposal as with the proposal for non-recoverability of success fees during the pre-action protocol period: whether an admission of liability is sufficient to negate any costs risk to the claimant. In addition, specific pre-action protocols do not apply to all areas in which ATE insurance may be used and there are a variety of pre-action protocol periods that apply.

199. There is a possibility that if the above proposals are implemented, the amount of the ATE insurance premiums may increase. This is because such premiums would now only cover the higher risk cases where the defendant does not admit liability at the earliest possible opportunity. It is also possible that the parties would delay taking out ATE insurance until after the protocol period, when the defendant's position is known. Some ATE insurers have indicated concerns that in this case ATE insurance may cease to be viable.

h) No recoverability of that part of the ATE insurance premium relating to the Part 36 risk

200. The policy rationale for abolishing the recoverability of ATE insurance premiums in relation to Part 36 risks is that it is unreasonable for the defendant to pay for insurance which protects the claimant from the

consequences of his unreasonable behaviour (or his solicitor's inappropriate advice) in failing to accept a reasonable Part 36 offer. If the claimant takes out ATE insurance he should be required to pay the costs of doing so in relation to unreasonably rejecting Part 36 offers. This would be considerably lower than the ATE insurance premium for the whole case.

201. It is understood that the proposal would apply to Part 36 offers on quantum and liability made by claimants and defendants.

202. There would be a practical difficulty in deciding which element of the ATE insurance relates to the Part 36 risk, since one single premium covers the whole. Sir Rupert's Final Report acknowledges this and suggests that the costs judge may simply have to take a view as to the extent to which Part 36 cover was important to the parties to the contract. This might lead to lengthy arguments about the apportionment of the ATE insurance premium as it will be in the claimant's interests to minimise the figure and in the defendant's interests to maximise it.

i) A cap on the recoverability of ATE insurance premiums at 50% of damages

203. Sir Rupert considers that claimants currently have little interest in the amount of the ATE insurance premium because they effectively never pay it. In cases which they win, the defendant pays the premium which includes an element to cover the claimant's risk of having to pay the insurance premium if he or she loses. Where the claimant loses the premium is covered by the ATE insurer.

204. If claimants had to pay the ATE insurance premium, they would have to consider how much it was reasonable to pay for ATE insurance. On the basis that claims without at least a 50% chance of success should not be pursued, Sir Rupert concludes that a claimant would not commit more than 50% of the value of the claim towards the costs of ATE insurance cover. He therefore proposes that defendants should not be required to pay more than an amount equivalent to 50% of total damages recovered, in respect of the claimant's ATE insurance premium.

205. It is understood from Sir Rupert that, in cases involving contributory negligence, he intends that the cap should apply to damages after deduction of contributory negligence. Where no damages are claimed he suggests that the court should estimate the financial value of the remedy granted for the purpose of assessing the cap.

206. It is anticipated that this proposal would have little effect in the vast majority of litigation. However, it would work to limit the recoverability of ATE insurance premiums in low value claims and claims where ATE insurance premiums are particularly high (i.e. complex, lower volume and higher risk types of claim) and possibly in claims where damages are reduced substantially as a result of contributory negligence. There is also an issue as to how it would apply in non-monetary claims.

j) In cases where the ATE insurer is entitled to repudiate the policy, the insurer should pay out but has the right to recover from the policy holder

207. Sir Rupert notes that where an ATE insurance policy is repudiated, successful defendants have difficulty in enforcing claims. Sir Rupert considers this is inequitable in the circumstances where the ATE insurance premiums paid in cases which claimants lose meet the costs of the cases in which defendants win. Accordingly, he suggests that ATE insurance policies should operate so that where a policy is repudiated or avoided the insurer should always be required to pay the defendant's costs but should be able to recover those costs from the insured. It is assumed that the intention is for the proposal to apply in respect of all ATE insurance policies, whether taken out by claimants or defendants. If not agreed voluntarily, primary legislation would be required to implement this proposal.

208. However, the Government understands that ATE insurance premiums are only rarely avoided or repudiated by insurers and that this only happens where the claimant has knowingly provided false information or omitted to provide vital information.

Alternative Package 2

209. A further fallback option to abolishing the recoverability of success fees and ATE insurance premiums suggested by Sir Rupert is that ATE insurance premiums cease to be recoverable, but success fees remain recoverable subject to the restrictions outlined above. In this event two way costs shifting would remain. The rationale given for this is that if defendants are liable to pay success fees when they lose, they should expect to recover their own costs when they win. Claimants would be required to pay their own ATE insurance premiums, but these would be lower than presently because in Sir Rupert's view market forces would reduce the cost of ATE insurance premiums.

210. Sir Rupert's secondary recommendations as set out above would help to improve the existing arrangements to some extent. However, the Government believes that the more fundamental changes contained in the primary package are needed.

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

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

Q 38 – Do you agree that, if recoverability of ATE insurance remains, the Alternative Packages of measures proposed by Sir Rupert should also apply to the recovery of the self-insurance element by membership organisations?

Q 39 – Are there any elements of the alternative packages that you consider should not be implemented? If so, which and why?

2.8 Proportionality

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

The principle of proportionality

211. The principle of proportionality was one of the key features underpinning the civil justice reforms brought about by Lord Woolf's *Access to Justice* report[107]. The new procedural rules he proposed were intended to require the court to deal with cases in ways which were proportionate to the amount involved, the importance and complexity of the issues and the parties' financial position. This principle of proportionality is a facet of the overriding objective of the Civil Procedure Rules – dealing with cases justly[108] – and is incorporated into the test for assessing costs on the standard basis.[109]

The court's approach to proportionality: *Lownds*

212. There is, however, no definition of proportionality within the rules. That said, the judiciary have, in case law, provided guidance on the concept. The effect of the current rules, as interpreted by the courts, is set out in the case of *Lownds*[110] in which the court considered the relationship between reasonableness and proportionality as set out in the costs rules[111]. This case sets out a two stage approach: firstly a consideration of the global (total) costs; then a consideration of the costs of each item. If the global figure is proportionate then all the court needs to decide is whether each item was reasonably incurred and whether the cost of each item was reasonable. If the global figure is disproportionate, the court must decide whether each item was necessary and if so whether the cost was reasonable. This test has introduced the concept of necessity as part of the concept of proportionality and means that the reasonable costs of necessary work will be allowed even if they are out of all proportion to the value of the claim.

213. Sir Rupert points out that the test as now applied by the courts is inconsistent with the costs benefit test that a self-funding litigant would logically apply in deciding to start legal proceedings. If the costs of starting the claim (including the likelihood of losing and the potential costs payable by the claimant) are higher than the anticipated outcome of the claim (including the non-monetary value of the claim, the importance of the issues to the claimant and the

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[107] See footnote 3

[108] Rule 1.1(2)(c) of the CPR

[109] See footnote 66

[110] *Lownds v Home Office* (2002) EWA Civ 365; (2002) 1WLR 2450

[111] Rule 44.4.(2) of the CPR

likelihood of success and recovery of costs from the other party) the claimant would be unlikely to pursue the matter. Sir Rupert supports a number of commentators, including senior judiciary, in their view that whilst claimants should not be precluded from pursuing a claim, they should not be able to recover costs which are disproportionate to the value of the claim. If parties incur disproportionate costs in taking forward a claim, they should do so at their own expense.

214. Sir Rupert therefore proposes amending the rules so that, when assessing costs on a standard basis, proportionality becomes the dominant test over either reasonableness or necessity. He also suggests that the rules should state explicitly that costs necessarily incurred are not necessarily proportionate. His intention is that the courts should first assess the reasonableness of the work done and the amount on an item by item basis. The court will then consider the proportionality of the resulting total costs and, if the total amount is disproportionate, make a further reduction to a proportionate level. This would reverse the current position, described above.

Sir Rupert's proposed definition of proportionality

215. A definition of proportionality is proposed along the following lines:[112]

Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:

- *the sums at issue in the proceedings;*
- *the value of any non-monetary relief in issue in the proceedings;*
- *the complexity of the litigation;*
- *any additional work generated by the conduct of the paying party; and*
- *any wider factors involved in the proceedings, such as reputation or public importance.*

216. This definition would provide consistency when costs are assessed. It is intended to take into account non-monetary benefits of litigation: such as non-monetary remedies, protection of an individuals rights or a ruling to clarify uncertainty in the law. It also aims to take into account necessarily higher costs arising from complexities in an individual case and cases where the litigation behaviour of the paying party has led to more work being conducted. The new test would not apply to costs awarded on an indemnity basis, where the present rules, would continue to apply[113] without reference to proportionality.

[112] Final Report page 38, para 5.15
[113] Rule 44.4 applies a test of proportionality only in relation to costs assessed on the standard basis.

How the proposal would work

217. Sir Rupert intends that the additional test of proportionality should act as a long stop. It would be applied when, having first applied the test of reasonableness on the basis of the factors set out in Rule 44.5(3) of the CPR, the total figure is not proportionate. In his view the test of reasonableness will usually result in a total sum which is 'proportionate' (according to the new test) so that only in a minority of cases would the new test bite to reduce overall costs.

218. Changes to the principles of costs assessment to import a costs benefit test in the form of a definition of proportionality could be a useful tool in containing the costs of civil litigation. It would allow the courts to take a more robust approach when assessing costs, by disallowing work that was disproportionate to the case. It should support the court in making more robust case and costs management decisions with a view to containing the costs of litigation. And it should act to make the parties and their solicitors consider the costs incurred and the benefit to the case before committing to the expense of each element of work.

A possible refinement: Costs Practice Direction

219. However, concerns have been raised that the definition of proportionality as suggested by Sir Rupert may generate satellite litigation because of uncertainty as to when costs would be judged to be disproportionate. To avoid this difficulty, it might be helpful to emphasise in the Costs Practice Direction that the test is intended to be used in the small number of cases where costs assessed as reasonable are nevertheless disproportionate. The Costs Practice Direction might also set out examples of cases where it would generally be inappropriate for the paying party to seek to challenge costs assessed as reasonable on the basis of the proportionality principle.

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

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

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

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

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

2.9 Damages-Based Agreements

The proposal: that Damages-Based Agreements ('contingency fees') should be allowed in litigation[114]

Background

220. 'Damages-based agreements' (DBAs) is the statutory term under section 58AA of the Courts and Legal Services Act 1990[115] for agreements sometimes known as contingency fees. However, 'contingency fee' is a broad term which technically covers all private legal funding arrangements between representatives and claimants in which the payment of a fee to the representative is contingent on the successful outcome of the case, including CFAs.

221. DBAs are therefore a type of 'no win no fee' arrangement like CFAs as the representative is only paid if the case is successful and does not receive any payment if the case is lost. However, DBAs differ from CFAs in that the payment which the representative receives is calculated by reference to the damages awarded to the client, rather than an uplift on the representative's base costs. DBAs therefore allow representatives to claim a proportion of their clients' award of damages as their fee[116] and are therefore suitable mainly for use in cases where the claimant receives damages or some other specified financial benefit.

222. Currently solicitors are not permitted to act under DBAs in civil litigation[117]. However, solicitors are permitted to act under DBAs in 'non-contentious' business, including cases before tribunals. The use of DBAs has developed in tribunals over the past few decades and they are now commonly used in the Employment Tribunal in particular but also in some tax tribunals.

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[114] Final Report Chapter 12

[115] As amended by section 154 of the Coroners and Justice Act 2009

[116] These agreements could also be structured so that fees are calculated by reference to certain financial awards or benefits received as a result of the case, rather than damages (e.g. in an employment case relating to reinstatement, by reference to a percentage of the client's salary on reinstatement)

[117] Technically, the prohibition covers 'contentious business' by virtue of section 59 of the Solicitors Act 1974. Section 87(1) of the Solicitors Act 1974 defines 'contentious business' as business done whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator, not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Supreme Court Act 1981. 'Non-contentious business' means any business not within the definition of 'contentious business'. Rule 2.04 of the Solicitors' Code of Conduct 2007 specifically prohibits the use of "contingency fees" in litigation.

223. Barristers are not permitted to act under DBAs in civil litigation[118].

Sir Rupert's proposal: to allow DBAs in civil litigation

224. Sir Rupert recommends that both solicitors and barristers should be permitted to enter into contingency fee agreements with their clients in contentious cases, but that costs should be recoverable against opposing parties on a conventional hourly rates basis and not by reference to the contingency fee. He also recommends that contingency fees should be properly regulated and they should not be valid unless the client has received independent advice.

225. Sir Rupert believes that litigants should have the choice of as many funding methods as possible and the freedom to choose the one that they believe is most appropriate for their case, subject to appropriate regulation. He believes this will be particularly important if his recommendations relating to CFAs are implemented, and success fees and the ATE insurance premiums become irrecoverable, as the availability of DBAs could increase access to justice for litigants if CFAs were to become less attractive.

226. Sir Rupert agrees that the principle of 'no win no fee' has been established by CFAs, which have been operating in civil litigation in England and Wales since 1995, and therefore there can be no theoretical objection to allowing DBAs in civil litigation.

227. He further argues that DBAs have some advantages over CFAs as the lawyer's fee will always, by definition, be proportionate because they are calculated by reference to the damages awarded. DBAs give lawyers an incentive to maximise the damages awarded to their client in order to maximise their own fee. However, unlike CFAs, they also encourage efficiency as lawyers will attempt to reduce their own costs to maximise profit. Under CFAs there is a danger that unscrupulous lawyers could seek to increase their costs in order to maximise their success fee – which is calculated as a percentage of base costs.

228. Sir Rupert also advances the argument in his Preliminary Report[119] that some claimants prefer DBAs to CFAs as they are easier to understand and it is simpler to calculate the lawyer's final fee. This simplicity could also reduce the costs assessment and satellite litigation which have historically been associated with CFAs.

229. Sir Rupert rejects the argument that DBAs create a greater threat of conflict of interest between lawyers and their clients than CFAs. He also disagrees with the proposition that solicitors will exploit the availability of DBAs by selecting the funding arrangement most likely to benefit them rather than

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[118] Rule 405 of the Code of Conduct of the Bar of England and Wales provides: "... a self-employed barrister may charge for any work undertaken by him …on any basis or by any method he thinks fit provided that such basis is (a) permitted by the law…"

[119] Preliminary Report page 193, para 3.2

their client. He argues that solicitors willing to offer both funding arrangements have a duty to inform clients of the implications of each, and clients will then be free to decide which arrangement is more appropriate. If the solicitor is only willing to take the case on one funding arrangement or the other (for example in cases where damages are not available and which would therefore be unsuitable for a DBA), then there is no question of selection so the issue does not arise. He also believes that advice from an independent solicitor which he proposes would guard against unscrupulous lawyers seeking to use DBAs to exploit their clients. Sir Rupert proposes that DBAs should be available in principle for all cases in which damages are sought.

230. If DBAs are permitted in personal injury cases, the Government sees no reason why QOCS should not apply to DBAs cases too, for the same reasons given by Sir Rupert[120] in relation to CFAs. Whether QOCS should apply for DBA funded cases in other categories of case would presumably depend on the issues considered in Section 2.5 above.

Sir Rupert's proposal for the regulation of DBAs

231. Some have expressed concern that DBAs could create adverse incentives for lawyers by encouraging them to settle cases early in order to minimise their own costs and increase their profits. However, Sir Rupert proposes that the regulations which now apply to DBAs in the Employment Tribunal, which address the issue of unfair settlement and penalty clauses on termination of the agreement, could be adapted for DBAs in civil litigation. In addition, it should be noted that a rational privately paying litigant, if offered a reasonable settlement at an early stage, would be unlikely to pursue a case at significant expense if the expected increase in damages from doing so is likely to be minimal. If a DBA litigant and his representative made the same decision based on the limited expected return from the work necessary to take the case further, this would be an entirely rational decision.

232. Under the regulations governing DBAs in the Employment Tribunal, the maximum percentage of damages that a representative may take as a fee is 35% (including VAT). In respect of CFAs, Sir Rupert proposes that in personal injury claims the maximum percentage of damages, excluding damages awarded for future care or losses, which can be payable as a success fee should be 25%. Sir Rupert says that the cap on deductions should be the same for DBAs. He recommends that no contingency fee deducted from damages under a DBA should exceed 25% of claimant's damages, excluding damages referable to future care or losses.

233. Sir Rupert believes that solicitors should be entitled to charge a higher percentage fee under a DBA than they otherwise would if they accept the risk of liability for their client's adverse costs in the event that the case is lost[121]. He also believes that solicitors should be entitled to a higher percentage fee

[120] Final Report pages 184-185, para 1.3
[121] In cases where QOCS does not apply.

if they fund the client's disbursements. If either is funded by the client the solicitor should be entitled to a lower percentage fee. The disbursements in DBAs could include counsel's fees, or counsel could be allowed to act under a DBA and be entitled to a specified percentage of any sums recovered. If the latter is the case this must be clearly set out in the DBA itself. The issue of disbursements in respect of CFAs is considered in Section 2.2 in the context of the recoverability of ATE insurance premiums being abolished and replaced with QOCS, and how disbursements might be funded under the new CFA arrangements. Sir Rupert does not specify, and it would have to be decided, whether the 25% maximum fee in DBA personal injury claims should also apply to claims where the solicitor has accepted liability for disbursements if the claimant loses.

DBAs: costs recovery

234. Sir Rupert's proposals follow the Ontario model with regard to costs recovery, namely that in the event of success, costs are recovered from the opponent on a conventional basis. Insofar as the contingency fee exceeds what would be recoverable under a normal fee agreement based on hourly rates, the difference due to the successful party's lawyer is made up by the successful litigant. This is consistent with Sir Rupert's proposals in respect of CFAs under which the success fee is borne by the client, not the opposing party.

But do DBAs need specific regulation?

235. Sir Rupert argues that if DBAs are permitted in civil litigation they must be regulated. He proposes that The Damages-Based Agreements Regulations 2010[122], which apply to DBAs in employment cases, should be adapted for DBAs in court proceedings[123]. He also recommends that litigants should be entitled to advice from an independent solicitor before they can enter into a valid DBA[124].

236. The Damages-Based Agreements Regulations 2010 were designed specifically to deal with the use of DBAs in the Employment Tribunal. This was in light of concerns that the absence of a specific statutory framework (which had existed for CFAs but not for DBAs), was open to abuse and could lead to consumer detriment. Some had argued at the time that the regulations were being drafted that they were unnecessary because the issues they were designed to address were already subject to the relevant professional rules of conduct. It was also pointed out that regulations on CFAs following the Access to Justice Act 1999 had led to satellite litigation.

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[122] SI 2010/1206

[123] In respect of personal injury litigation he proposes that the cap on deductions should be the same for CFAs and DBAs i.e. that the fee deducted from DBAs should not exceed more than 25% of their client's damages (excluding damages awarded for future costs or losses).

[124] Sir Rupert is not convinced that this would generate satellite litigation if the simple definition of 'independent solicitor' were used. He argues than the advice could still be independent if the solicitor was paid by the lawyer entering into the DBA rather than by the client.

As a result, those CFA regulations were revoked a few years later and the issues around client care which the regulations aimed to address were covered instead by the professional rules of conduct for solicitors and barristers.

237. The reform of CFAs proposed by Sir Rupert, in effect, means that the success fee would be payable by claimants in successful cases. For DBAs he proposes costs shifting on the conventional basis, that is to say that fees chargeable on a standard hourly basis could be recovered from the losing defendant. Where the fee agreed under a DBA exceeds what would be chargeable under a standard hourly basis, claimants would be paying that difference from their damages. This means that in principle there would be little difference between CFAs (as reformed) and DBAs if introduced on the basis proposed by Sir Rupert. The Government is therefore not convinced that, aside from a cap on damages in personal injury cases (as with CFAs), separate detailed regulation of DBAs would be necessary and that the existing requirements in the professional rules of conduct for solicitors, for example, could be extended to cover the use of DBAs in litigation.

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

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

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

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

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

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

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

Q 52 – Do you consider that there should be a maximum fee that lawyers can

recover from damages in non-personal injury claims? If so, what should that maximum fee be, and should the maximum fee be different in different categories of case?

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

2.10 Litigants in Person

The proposal: that the prescribed rate of £9.25 an hour recoverable by litigants in person who cannot prove financial loss should be increased to £20 an hour[125]

238. A litigant in person is a person who acts on his or her own account in legal proceedings rather than being represented by a legal representative[126]. Litigants in person may, although unrepresented, receive advice and support from a lawyer or specialist organisation and may be represented for some part of the proceedings and unrepresented for the remainder.

239. Litigants in person will typically be individuals bringing or defending claims (such as consumer and debt claims) in the small claims track which deals with claims valued at up to £5,000 or in personal injury and housing disrepair claims up to £1,000. However, litigants in person may also be involved in higher value claims in the fast track (claims valued at up to £25,000) or in the multi track (over £25,000). Litigants in person also include small businesses, larger companies and institutions (such as local authorities[127], housing associations, charities and schools) which choose to represent themselves in legal proceedings. In these cases the work may be done by an employee or officer of that organisation who is not an in-house legal representative.

What Litigants in Person can currently recover

240. Litigants in person are generally entitled to recover two thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative (the 'two-thirds rule'[128]). This is subject to the litigant proving financial loss, for example loss of income that the litigant has suffered whilst working on the claim. Where litigants in person cannot prove a financial loss for the time spent on doing the work, a fixed hourly rate of £9.25 applies. They are also entitled to recover disbursements, reasonable payments for legal services relating to the conduct of proceedings (e.g. for legal advice) and the costs of expert assistance in assessing a costs claim. The current arrangements are set out in rule 48.6 (together with Rule 46.3(5),

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[125] Final Report Chapter 14

[126] Rule 2.3(1) of the CPR defines 'legal representative' as a barrister, solicitor, solicitor's employee, a manager of a body recognised under section 9 of the Administration of Justice Act 1985, or a person who, for the purposes of the Legal Services Act 2007 is an authorised person in relation to an activity which constitutes the conduct of litigation within the meaning of that Act.

[127] *Litigants in Person: Unrepresented Litigants in first instance proceedings*. DCA Research Series 2/05

[128] Rule 48.6(2) of the CPR

which contains specific provisions relating to a litigant in person's costs in the fast track).

241. However, the regime of costs recovery in the small claims track limits the amount that the losing party may be ordered to pay in respect of the winning party's costs. Costs recovery is limited to fixed costs arising from issuing the claim, court fees, limited expenses for loss of earnings and the expenses of a party or witness and a fixed expert's fee[129]. This means that unrepresented litigants in the small claims track, who make up the majority of litigants in person, will never claim costs for work done at the fixed hourly rate.

242. The 2009 figures from HM Courts Service indicate that for private rent possession matters in county courts, 43% of claimants and 96% of defendants were unrepresented. For specified money claims between £5,000 and £15,000, 35% of claimants and 95% of defendants were unrepresented[130]. For unspecified money claims of the same value 3% of claimants and 24% of defendants were unrepresented[131]. However, many unrepresented defendants do not take part in the proceedings and would not therefore stand to recover any costs.

243. Research undertaken in 2002 and 2003[132] indicated that the most common cases involving unrepresented defendants outside the small claims track were: harassment; mortgage and rent arrears; enforcement of tribunal awards; debt recovery; contractual claims; and claims related to the supply of goods and services. Claimants were most commonly unrepresented in contractual claims, claims relating to the supply of goods and services, uncontested commercial lease claims and professional negligence claims. The research suggested that settlement is less likely when the parties, especially the defendant, is unrepresented.

244. Having reviewed the responses to his Preliminary Report[133], Sir Rupert concludes that there is some force in the argument that a successful litigant in person should be compensated for the time spent doing work that would otherwise be carried out by a legal representative and that there is an unfair inequality of arms when the litigant in person is at risk of significant adverse costs but the represented opponent is not. On the other hand, he says, it is the policy of the law to encourage parties to be represented, because this assists the just and expeditious management and resolution of civil litigation.

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[129] Rule 27.14 of the CPR sets out the costs which may be ordered to be paid by one party to another in the small claims track. The solicitors fixed costs in Part 45 are applicable, of which litigants in person would be permitted to recover two thirds of those amounts.

[130] The figures vary little for claimants and defendants involved in only one claim in 2009 (as opposed to multiple claims), who are perhaps most likely to be individuals rather than businesses – being 40% for claimants and 96% for defendants.

[131] Unspecified claims are likely to be more complex and may include for example personal injury claims and boundary disputes.

[132] *Litigants in Person: Unrepresented Litigants in first instance proceedings* DCA Research Series 2/05

[133] Final Report pages 142-143

Sir Rupert's proposal

245. In his view, the present approach as set out in the Civil Procedure Rules strikes the right balance but the recoverable hourly rate of £9.25 per hour - which applies where no quantifiable financial loss can be proved - is too low. This fixed hourly rate would apply for example where an employed litigant takes a day's holiday rather than a day's unpaid leave to attend court. It would also apply where a self-employed person makes up for time spent on the case by working on those days he usually does not work or working longer hours. The varied circumstances of litigants in person, who may be self-employed, a company director or a company where an employee is undertaking the work on its behalf, mean that any standard hourly rate will always over-compensate some and under-compensate others. However, Sir Rupert concludes that the current rate, which was set in 1995, under-compensates very many litigants in person and over compensates very few. He indicates that the rate should be increased to a more realistic level, but should not be set so high as to actively encourage litigants, who would otherwise have chosen to have legal representation, to act in person.

246. Sir Rupert recommends a rate of £20 per hour, which he suggests should go some way to the meet the concerns, in particular of businesses, that litigants in person are currently unable to recover their full costs of pursuing claims[134] and are therefore penalised for choosing to do so.

Alternatives to £20 per hour

247. A rate of £29 per hour for litigants in person is currently applied in the Employment Tribunal[135]. A rate of £25 was set in 2006 and it increases each April by £1. However, the normal rule in the Employment Tribunal is that each party bears their own costs: there is no costs shifting. Costs orders in the Employment Tribunal are made only exceptionally and as a sanction for unreasonable conduct. By contrast, of course, a litigant in person in the civil courts can claim the recoverable hourly rate in all cases which they win outside of the small claims track. Sir Rupert therefore concludes that costs orders in the Employment Tribunal are not directly equivalent to costs orders in civil proceedings.

248. However, £20 per hour is significantly above the mean average hourly UK earnings of £14.40[136]. Over-compensation of litigants' costs is not in keeping with the general principles of costs recovery. It may also encourage unnecessary litigation, in particular by encouraging parties to press on to a

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[134] The submission of the Federation of Small Businesses refers in particular to the in-house expertise of many small businesses in conducting straightforward cases, Final Report page 143, paras 2.2-3.

[135] Rule 45 (4) of the Employment Tribunal Rules provides: "for the year commencing on 6th April 2006, the hourly rate of £25 shall be increased by the sum of £1.00 and for each subsequent year commencing on 6 April, the hourly rate for the previous year shall also be increased by the sum of £1.00."

[136] Annual Survey of Hours and Earnings (ASHE). The median hourly rate is £11.03.

hearing rather than settling, in order to obtain an order for costs. Settlements in the small claims track (where the majority of parties are litigants in person) are lower than in the multi track and fast track[137]. Any further encouragement to pursue claims to a hearing unnecessarily is not an efficient use of litigants' or courts' resources.

249. One alternative would be to increase the rate in line with inflation since 1995. Applying the Average Earnings Index, the equivalent figure for July 2010 would be £16.50 per hour. Another would be to adopt the mean average hourly UK earnings of £14.40 an hour.

250. The Government agrees that the current hourly rate for litigants in person is probably too low and under-compensates more litigants in person that it over-compensates. Subject to the views of consultees, the Government is minded to increase the current hourly rate but to £16.50 an hour rather than £20 an hour, in line with earnings inflation since the rate of £9.25 was set in 1995. This would retain the position of claimants and the balance between under and over-compensation as far as possible as they were when the rate was set. This new rate would be kept under review.

251. As noted above, litigants in person in the small claims track may recover only limited costs against the losing party. In particular, the rules specify[138] that the court can award an amount not exceeding £50 per day for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing[139]. The figure of £50 was set in January 1996. This figure relates to time spent attending a hearing rather than work done, but now is a convenient time to consider whether it should also be increased.

252. If this amount had also increased in line with the Average Earnings Index since it was last set in January 1996 the amount would now be £87.23.

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

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

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

[137] In 2008, 25% of cases allocated to the fast and multi track proceeded to trial. The figure for the small claims track was 55%. Judicial and Court Statistics 2008

[138] Part 27.14(2)(e) of the CPR

[139] The figure is specified at paragraph 7 of Practice Direction 27

Section 3: Brief update on recommendations not covered in this consultation

253. Sir Rupert's Final Report contains 109 recommendations. This consultation paper is focused on recommendations on civil litigation and costs covered mainly but not exclusively under Part 2 of the Final Report. Aside from the recommendations relating to CFAs, Sir Rupert also puts forward a range of other proposals in various areas.

254. This section outlines the current position in respect of those recommendations which are either not being implemented at this stage pending other work or where work is already underway.

3.1 Referral Fees

255. Sir Rupert recommends that the payment of referral fees should be banned in personal injury cases, either through primary legislation or changes to the Solicitors' Code of Conduct and other professional codes. If this recommendation is not accepted he proposes that referral fees should be capped at £200 in personal injury cases. He also suggests that if either of his recommendations is accepted serious consideration should be given to extending the ban or cap to other areas of litigation.

256. The Government recognises that the issue of whether or not referral fees should exist within the legal services market is a contentious issue on which views are strongly divided. Some consider referral fees to be an important part of the civil litigation landscape, a way of enabling access to justice for hard to reach claimants through third parties. Others consider them to be unnecessary and a cause of disproportionate costs. Different regulators have different rules and different approaches to compliance and enforcement. Lord Young of Graffham in his recent report, *Common Sense, Common Safety* expressed strong support for implementing Sir Rupert's recommendations to ban referral fees. The Legal Services Board (LSB) – the new oversight regulator for the legal profession – has been considering the role and impact of referral fees including on costs and access to justice within the legal service market.

257. The LSB has indicated that its examination[140] of referral fees has not provided sufficient evidence of consumer detriment requiring a ban. However, it has identified concerns around transparency of referral fees. The research indicates that disclosure is important to consumer confidence and that there are problems with this particular aspect. The LSB's consultation, *Referral fees, referral arrangements and fee sharing*[141], published on 29 September 2010, contains proposals for improving transparency and disclosure as well compliance and enforcement of the relevant requirements to address concerns around referral fees and to help deliver appropriate outcomes for consumers.

258. In light of this ongoing work the issue of referral fees is not included in this consultation paper. The Government will await the outcome of the LSB's consultation before reaching a conclusion.

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[140] See footnote 15.

[141] http://www.legalservicesboard.org.uk/what_we_do/consultations/open/index.htm

3.2 Fixed Recoverable Costs in the Fast Track

259. Sir Rupert proposes fixing the costs that may be recovered by a winning party for both claimants (if the claim succeeds) and defendants (if the claim fails) by reference to a published table linked to the stage at which the claim is resolved and its value (this is as initially proposed by Lord Woolf in his 1996 report). The proposed figures are based on current costs for each type of case, amended to take account of the reduced costs of negotiating costs themselves and better cash flow (through earlier payment of costs). Initially costs would be fully fixed for a limited range of claims (personal injury: employer's liability; road traffic accident and public liability, and housing disrepair) alongside maximum recoverable pre-trial costs for other fast track claims.

260. The Government is considering Sir Rupert's recommendations in conjunction with the experience of the new process for low value personal injury claims in road traffic accidents. Lord Young of Graffham in his recent report, *Common Sense, Common Safety,* strongly recommends extending the new process to all fast track personal injury claims (generally where damages claimed are up to £25,000) including clinical negligence. The Government aims to introduce the new extended process by April 2012, subject to consultation and as part of wider civil justice reform.

3.3 Costs Council

261. Sir Rupert recommended that a Costs Council be established to replace the Advisory Committee on Civil Costs (ACCC). The Costs Council would have a significantly wider remit than the ACCC and would in particular be responsible for regularly reviewing the fast track fixed recoverable costs recommended by Sir Rupert, as well as the guideline hourly rates used by the courts in assessing costs (currently set by the ACCC), which Sir Rupert argues are too high and should not be based on market rates.

262. Given the further work on implementing fixed recoverable costs in the fast track (see Section 3.2), the Government has yet to take a view on Sir Rupert's proposal on setting up a Costs Council. The Government will need to consider what type of supervisory role might be needed in any new regime and how this role could best be discharged at minimum cost. The Government will therefore take a view on this recommendation in due course.

3.4 Costs and Case Management

263. A range of judiciary-led costs and case management work has been continuing since Sir Rupert's report was published. For example:

- more robust costs management is being piloted in defamation cases[142] and in mercantile, technology and construction cases;
- a streamlined process with scale costs in the patents county court came into effect on 1 October 2010;
- there is a pilot of assessing disputed costs under £25,000 on the papers rather than at a hearing, in Leeds, Scarborough and York County Courts from 1 October 2010; and
- a pilot to speed up and reduce the costs of expert evidence (through 'concurrent evidence') started in June 2010 in mercantile, technology and construction cases at the Manchester Civil Justice Centre.

264. A Judicial Steering Group is considering the priorities for further implementation of the recommendations on costs and case management.

[142] The pilot was extended for six months, to run until 31 March 2011.

3.5 Before the Event Insurance

265. Before the Event (BTE) insurance is sometimes also referred to as Legal Expense Insurance (LEI) or Legal Protection Insurance. It can be purchased by individuals or businesses to insure against potential future legal costs and liabilities. When taken out by individuals, BTE insurance is often purchased as an add-on to existing insurance policies (usually motor or home insurance) although it is available as a stand-alone product. The typical annual premium for adding BTE insurance to an insurance package is £15-20. According to recent figures about 22.7 million adults in the UK have BTE insurance as a part of another insurance policy[143]. However, there is evidence that many consumers who purchase BTE insurance are not aware of the coverage it provides and may not make use of it. This is despite the fact that solicitors' professional rules require them to consider at the outset whether the client's costs are covered by insurance[144]. When taken out by businesses BTE insurance may be a stand-alone policy or may be a separate part of a more general insurance policy. BTE insurance is normally only taken out by small and medium enterprises (SMEs) as larger firms will usually prefer to meet any legal costs as and when they arise. Premiums for BTE insurance for SMEs are normally over £1000.

266. Sir Rupert suggests that positive efforts should be made to encourage the take up of BTE insurance by householders as an add-on to household insurance policies and by SMEs. BTE insurance is widely used in other countries to cover legal expenses, most notably in Germany and Sweden. The Government therefore supports Sir Rupert's view on BTE insurance and would welcome a change in culture so that there is a greater use of existing BTE insurance policies and the development of the market to expand BTE insurance coverage.

267. Lord Young of Graffham is also very supportive of encouraging BTE insurance and will be consulting with the insurance industry on developing stand-alone policies for individuals and small businesses.

[143] Preliminary Report page 152, para 2.3; Mintel Legal April 2008 Expenses Insurance UK Summary

[144] Paragraph 2.03(i)(d)(ii) of the Solicitors' Code of Conduct 2007

3.6 Third Party Funding

268. Third party funding is an arrangement whereby a third party with no direct interest in the proceedings agrees to fund litigation in return for a percentage of the damages awarded if the case is successful. Third party funding has traditionally been seen as maintenance or champerty and therefore unlawful. However, this view has been reversed in recent years. The courts in England and Wales[145] and abroad now recognise that many litigants would be unable to bring their claims without third party funding and that it is preferable for such litigants to receive a percentage of their damages than nothing.

269. Sir Rupert recommends that a voluntary code should be drawn up to which all third party funders should subscribe. He suggests that this code should contain effective capital adequacy requirements and should restrict funders' ability to withdraw support for ongoing litigation.

270. A voluntary code of conduct for third party funders has been drawn up by the Civil Justice Council (CJC) in conjunction with the Third Party Litigation Funders Association. Sir Rupert indicated in his Final Report that the code formed a good basis for voluntary self-regulation of the industry but recommended that parts of it should be revised, particularly in respect of capital adequacy requirements. The CJC revised its code to take account of these recommendations and is conducting a public consultation on a self-regulatory code for Third Party Funders[146]. The consultation closes on 3 December 2010.

[145] *Arkin v Bouchard Shipping Lines and Others* [2005] EWCA Civ 655 provides a clear judicial steer for third party funding

[146] http://www.civiljusticecouncil.gov.uk/files/TPF_consultation_paper_(23.7.10).pdf

3.7 Predictable Damages

271. The Civil Justice Council is setting up a working group to consider Sir Rupert's recommendations on predictable damages. The working group is expected to include representatives from claimant and insurance groups, and members of the judiciary. The working group will review the utility of existing software damages assessment tools, and is invited to develop proposals for a pilot scheme for assessing damages up to £10,000. Specific considerations will include:

- whether ranges of damages or specific figures provide the best access to justice for claimants;
- whether existing software provides a genuinely independent and sufficiently accurate platform for calculating damages;
- what form, source and content of data should be used to calibrate the damages assessment tool;
- whether there should be an opt-out clause for claimants linked to penalties for failing to beat an assessed figure (and by what margin);
- and how any genuinely exceptional and inappropriate cases might be identified and excluded from the pilot.

272. It is anticipated that the pilot scheme will be developed by June 2011, with a pilot operating over a period of a year to commence thereafter, to be followed by an evaluation.

3.8 The Indemnity Principle

273. In essence the common law indemnity principle prevents a party recovering more by way of costs from an opponent than it is obliged to pay to its own lawyers.

274. Sir Rupert recognises that there are conflicting views on whether the principle now serves any valuable purpose or should be abolished. Supporters of the indemnity principle suggest that it has a vital role in controlling excessive costs; opponents maintain that the indemnity principle has been the root cause of satellite litigation and should be abolished. Having extensively debated the issue with various parties during the course of his review, Sir Rupert recommends that the indemnity principle be abrogated and that Rule 44.4 of the CPR be amended to provide an effective control on recoverable costs. He sets out detailed reasons for his recommendation[147] in his Final Report.

275. The origins of the principle are tied up with the development of measures over many years to control costs between the lawyer, the client and other parties. The principle has been eroded to a significant extent by the statutory introduction of CFAs, but also by fixed rates for legal aid solicitors. Section 31 of the Access to Justice Act 1999 attempted to provide a flexible enabling power that would permit the Civil Procedure Rule Committee to take necessary action to limit the operation of the indemnity principle. While the principle has been abrogated in respect of CFAs, it was accepted that rules of court could not abrogate a rule of law and that primary legislation would be required – and that it would also be important to assess the consequences of abrogation and what might need to replace it.

276. However, the Government is not currently persuaded that abrogating the indemnity principle is a necessity and is therefore not proposing any further work on it at this stage.

[147] Final Report pages 53-58

3.9 Clinical Negligence

277. Sir Rupert also makes a number of specific recommendations in relation to clinical negligence cases. Some of these are being taken forward by the Department of Health. For example, Sir Rupert proposed a financial penalty for any health authority which, without good reason, fails to provide copies of medical records requested in accordance with the Pre-Action Protocol for the Resolution of Clinical Negligence Disputes. The Department of Health believes the current system for release of information under the Data Protection Act 1998 contains sufficient provision to meet Sir Rupert's recommendation. The Information Commissioner has enforcement powers, which includes from April 2010 monetary penalties against bodies failing to comply with the statutory requirements.

278. Sir Rupert also proposes that in respect of any claim (other than a frivolous claim) where the NHS Litigation Authority (NHSLA) is proposing to deny liability, the NHSLA should obtain independent expert evidence on liability and causation during the four month period for the response to the letter of claim[148]. As a result, the NHSLA has now implemented a policy whereby it obtains independent expert evidence on liability and causation from the outset for such claims. The NHSLA has also nominated the Chief Executive as the contact for egregious claims handling.

279. As to Sir Rupert's recommendation to implement the NHS Redress Act 2006, the Department of Health is currently considering how best to reform the approach to clinical negligence, in particular for low value claims. The NHS Redress Act 2006 missed an opportunity to improve fundamentally the way that clinical negligence claims are handled. It should have focused on improving the fact-finding phase prior to pursuit of a claim to facilitate faster resolution of claims and leaving it to the parties concerned, or ultimately the courts, to determine liability and quantum in cases not resolved by the fact-finding. The Department of Health is, therefore, currently considering ways to improve fact-finding as a means to speed up claims settlements and to reduce associated costs. A Private Members Bill was introduced on 21 October 2010 that proposes to amend the NHS Redress Act 2006. The Department of Health will respond in due course.

280. As mentioned above at Section 3.2, Lord Young recommends that the Government explore the possibility of extending the framework of the RTA scheme to cover low value clinical negligence claims.

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[148] Para 3.5 of the Pre-Action Protocol for the Resolution of Clinical Disputes amended the time limit from three to four months from 1 October 2010, as recommended by Sir Rupert, Final Report page 240, para 4.10.

3.10 Intellectual Property

281. Sir Rupert also makes a number of recommendations in respect of intellectual property litigation. New rules came into effect on 1 October 2010 to implement the recommendations of the Intellectual Property Court Users Committee (IPCUC) working group for a new streamlined process and scale costs in a patents county court. This also includes a maximum cap on recoverable costs. This will ensure that the parties – in particular individuals and SMEs – are not stopped from pursuing litigation by the threat of the costs they may have to pay if they lose, over which they have no control.

282. One element of those recommendations has not yet been implemented: a limit of £250,000 on the financial remedies available in a patents county court. The Intellectual Property Office is endeavouring to implement the necessary secondary legislation for commencement in April 2011.

283. Consideration of Sir Rupert's recommendations to introduce a modified small and fast track specifically for patents county courts is pending an assessment of the success of the new streamlined process.

Contact details/How to respond

This consultation closes on Monday 14 February 2011.

We would be grateful if you would consider, in the first instance, responding via the online questionnaire at: http://survey.euro,confirmit.com/wix/p485530548.aspx However, if you prefer, you can respond via email to:

Email: privatefundingbranch@justice.gsi.gov.uk

If you would prefer to submit a hard copy, please address it to:

Annette Cowell
Ministry of Justice
Postpoint 4.42
102 Petty France
London SW1H 9AJ

Extra copies

This paper is available on-line at http://www.justice.gov.uk/index.htm.

Alternative format versions of this publication can be requested using the contact details above.

Publication of response

A paper summarising the responses to this consultation will be published in Spring 2011. The response paper will be available on-line at http://www.justice.gov.uk/index.htm.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you

regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.

2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Consultation Co-ordinator contact details

Responses to the consultation must go to the named contact under the How to Respond section.

However, if you have any complaints or comments about the consultation **process** you should contact the Ministry of Justice consultation co-ordinator at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Ministry of Justice Consultation Co-ordinator
Legal Policy Team, Legal Directorate
6.37, 6th Floor
102 Petty France
London SW1H 9AJ

Annex A: List of consultation questions

Section 2.1 – Conditional fee agreements and success fees

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

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

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

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

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

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

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

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

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

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

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

Section 2.2 – After the event insurance premiums

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

Q 11 – Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?

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

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

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

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

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

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

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

Section 2.3 - 10% increase in general damages

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

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

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

Section 2.4 Part 36 Offers

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

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

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

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

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

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

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

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

Section 2.5 – Qualified one way costs shifting

The proposal: that there should be a regime of qualified one way costs shifting in certain cases

Q 28 - Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135 – 137)? If not, please give reasons.

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

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

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

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

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

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

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

Section 2.7 – Alternative recommendations on recoverability

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

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

Q 38 – Do you agree that, if recoverability of ATE insurance remains, the Alternative Packages of measures proposed by Sir Rupert should also apply to the recovery of the self-insurance element by membership organisations?

Q 39 – Are there any elements of the alternative packages that you consider should not be implemented? If so, which and why?

Section 2.8 – Proportionality

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

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

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

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

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

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

Section 2.9 – Damages-Based Agreements

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

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

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

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

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

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

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

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

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

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

Section 2.10 – Litigants in Person

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

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

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

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

Questions relating to Impact Assessments

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

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

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

Disability

Sex

Gender Reassignment

Race

Religion or belief

Sexual Orientation

Pregnancy & Maternity

Age

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

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