

# Equality Impact Assessment: Cumulative Jackson Proposals (Royal Assent)

1. Name of the proposed new or changed legislation, policy, strategy, project or service being assessed.

This EIA assesses the cumulative impact (further to the 7 individual initial screenings published at consultation stage) of implementing the proposals as set out in the Government response to the consultation, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations*. The proposals aim to reform the existing legislative arrangements for no win no fee conditional fee agreements (CFAs).

2. Individual Officer(s) & unit responsible for completing the Equality Impact Assessment.

Iram Akhtar, Civil Litigation Funding and Costs, Justice Policy Group

3. What is the main aim or purpose of the proposed new or changed legislation, policy, strategy, project or service and what are the intended outcomes?

## Aims / Objectives

The Government consulted on implementing a package of Lord Justice Jackson's recommendations. The Government response sets out that we will implement the following proposals:

1. Abolish recoverability from the losing side of conditional fee agreement (CFA) success fees and after the event (ATE) insurance premiums. Have a power to allow recoverability of ATE insurance premiums in clinical negligence cases in relation to the costs of expert reports only.
2. Specify a 25% cap on the amount of damages (excluding damages for future care and loss) which may be taken as a success fee in personal injury cases.
3. Introduce a 10% increase in non-pecuniary general damages such as pain, suffering and loss of amenity (PSLA), to apply to all tort cases, and not just those funded on a CFA.
5. Introduce a regime of qualified one way costs shifting (QOCS) for all individuals in personal injury cases, however funded in the first instance. (To consider further introduction for other types of claim in the light of its operation in personal injury claims).
6. Reform Part 36 of the Civil Procedure Rules (offers to settle), to equalise the incentives between claimants and defendants to make and accept reasonable offers. And to reverse the effect of *Carver v BAA* as soon as possible in changes to the Civil Procedure Rules - this would reflect recent a decision of the Court of Appeal.
7. Introduce a new proportionality test, as recommended by Lord Justice Jackson.

8. Allow damages-based agreements (DBAs/contingency fees) in litigation.

9. Increase the prescribed hourly rates for successful Litigants in Person (LiPs) in line with inflation since they were set.

The proposals were taken forward in the legal Aid, Sentencing and Punishment of Offenders Act which received Royal assent in May 2012. Some proposals such as QOCS, proportionality and the increase in hourly rates for LiP are subject to rules of court. During the parliamentary passage of the Act the Government made an exception that recognises the unique position of mesothelioma claims. The CFA reforms will not apply to mesothelioma claims until a review of the likely impact of the reforms on these cases has been carried out and a report published on the findings.

### **Intended Outcomes**

The intended outcomes are to:

- reduce civil litigation costs
- balance the risks of civil litigation more fairly between claimants and defendants
- encourage claimants to take an interest in the costs being incurred on their behalf and
- deter frivolous or unnecessary claims

4. What existing sources of information will you use to help you identify the likely equality impacts on different groups of people?

*(For example statistics, survey results, complaints analysis, consultation documents, customer feedback, existing briefings, submissions or business reports, comparative policies from external sources and other Government Departments).*

We have had limited information to identify the likely impact on different groups of people. Prior to launching the consultation, in addition to the data set out in Lord Justice Jackson's Review of Civil Litigation Costs: Preliminary and Final Reports, we had some data from:

- Individual law firms
- Insurers
- National Health Service Litigation Authority

During the consultation period we held a number of meetings with stakeholders on all sides of the debate (claimant and defendant representatives, ATE insurers, general liability insurers, special interest groups). We have also met with the Legal Services Commission Client Diversity Group to discuss the potential impact of the proposals on different groups.

We received over 800 consultation responses, some of which made specific comments in relation to the likely impact on different groups of people. Some included academic commentary, or analysis of data. In addition, we received a number of small datasets and case examples from individual claimant firms and a

large dataset from Jaggards<sup>1</sup> (including 30,661 cases in total). The analysis of this data set is outlined in Annex A of the Impact Assessment.

Unfortunately, the Jaggards dataset did not include information on the identity of the claimants (in terms of gender, age, race, disability or any other protected characteristic) and therefore could not be used to assess the potential impact of the proposals on different groups. Some of the smaller datasets from individual firms include information on whether the claimant was in receipt of disability living allowance. However, these datasets are too small and unrepresentative to be relied upon for the purpose of this assessment.

5. Are there gaps in information that make it difficult or impossible to form an opinion on how your proposals might affect different groups of people? If so what are the gaps in the information and how and when do you plan to collect additional information?

Unlike cases funded through legal aid on which the Legal Services Commission hold comprehensive data, for those cases which are taken on private funding arrangements like CFAs, there is no consistent, routinely collected data. The information about costs, damages and nature of the case is typically only held privately, and due to its nature the information is market sensitive.

Lord Justice Jackson as part of his review, and the MoJ since publication of his final report, have been seeking data from claimants and defendants. The initial screening which was published alongside the consultation paper explained that we were using the consultation period to reiterate our request for data. The consultation paper did ask specific questions in relation to potential disproportionate impacts.

However, as set out in section 4 above, none of the data received during this consultation period enabled us to fully assess the impact of the proposals on different groups of people. We considered the responses to the relevant questions to inform the consultation response and this full equality impact assessment.

6. Having analysed the initial and additional sources of information including feedback from consultation, is there any evidence that the proposed changes will have a **positive impact** on any of these different groups of people and/or promote equality of opportunity?

Please provide details of who benefits from the positive impacts and the evidence and analysis used to identify them.

There are elements of the package of proposals which are designed to assist claimants, such as increasing general damages by 10%, increasing the prescribed hourly rates for LiP and introducing qualified one way costs shifting in personal injury cases. The benefits of these measures would be open to all claimants.

The overall package is intended to make the costs of civil litigation more proportionate overall, so the benefits are not confined to a specific group or protected characteristic.

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<sup>1</sup> Suppliers of claims services to insurers and other compensators

7. Is there any feedback or evidence that additional work could be done to promote equality of opportunity?

If the answer is yes, please provide details of whether or not you plan to undertake this work. If not, please say why.

Some respondents suggested that we should undertake further analysis of the potential impact of the proposals, before implementing them. The Ministry of Justice has agreed to do this in respect of mesothelioma cases and will announce details and timing of the review in due course. However, there are no plans to undertake this work more widely, as we believe that it is unlikely to produce further significant data given previous attempts and that meritorious cases will continue to be funded in the new regime.

8. Is there any evidence that proposed changes will have **an adverse equality impact** on any of these different groups of people?

Please provide details of who the proposals affect, what the adverse impacts are and the evidence and analysis used to identify them.

Some respondents expressed concerns that the proposals will impact disproportionately on claimants with a disability, in respect of bringing a personal injury claim. They are concerned that they will lose a larger part of their damages in paying for their lawyer's success fee, and suggest that in some cases the claimant would be unable to bring their claim, as they would not find a lawyer willing to take it on. Some were also concerned about the impact on protected parties (children and people unable to manage their own affairs) because of the cost of the additional procedures which must be followed.

A smaller number of respondents also raised concerns in relation to gender, race and age. This was primarily in the context of bringing an Employers Liability claim but concerns were also raised in relation to clinical negligence claims and road traffic accident claims.

Finally, some respondents also suggested that people who do not have English as a first language will be disproportionately affected.

The full arguments on these issues are set out section 12 of the full impact assessment.

9. Is there any evidence that the proposed changes have **no equality impacts**?

Please provide details of the evidence and analysis used to reach the conclusion that the proposed changes have no impact on any of these different groups of people.

Many respondents answered the question by stating that there would be no disproportionate impact on different groups of people.

10. Is a full Equality Impact Assessment Required? Yes ☒ No ☐

If you answered 'No', please explain below why not?

NOTE - You will need to complete a full EIA if:

- the proposals are likely to have equality impacts and you will need to provide details about how the impacts will be mitigated or justified
- there are likely to be equality impacts plus negative public opinion or media coverage about the proposed changes
- you have missed an opportunity to promote equality of opportunity and need to provide further details of action that can be taken to remedy this

11. Even if a full EIA is not required, you are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equality impacts. Please provide details of how you will monitor evaluate or review your proposals and when the review will take place.

See section 17 of Full EIA
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## Full Equality Impact Assessment

12. Which group(s) of people have been identified as being disadvantaged by your proposals. What are the equality impacts?

This Equality Impact Assessment (EIA) largely focuses on the claimants potentially affected by the Jackson reforms. As noted in the screening EIA, equalities data on other affected groups (such as ATE insurers and those providing legal services) is not routinely available, though their feedback was requested during in the consultation period.

A summary of the feedback we have received in relation to the equality impacts of the proposals on each of the protected characteristics is set out below.

### **Disability**

Some respondents on the claimant side expressed concern that abolishing recoverability of CFA success fees and ATE insurance premiums would have a disproportionate impact on claimants with a disability, in respect of them bringing a personal injury claim. The concern is that catastrophic injury cases are often complex and costly to run. Claimants may find it harder (than now) to find a lawyer willing to take on their claim, either because lawyers would be unwilling to take a portion of damages as a success fee, or because the amount that they would be permitted to charge (25% of damages excluding damages for future care and future losses) would not be high enough to cover the risk of taking on the case. The funding of disbursements has also been raised as a particular issue in high value, complex personal injury claims where a significant number of specialist experts' reports may be required. To address this particular concern, the Government made one change to Lord Justice Jackson's key recommendations. As set out at section 13 below, there is a tightly drawn power to allow recoverability of the ATE insurance premiums to cover the costs of expert reports only in clinical negligence cases.

There is also the concern that those who are able to bring their claim will receive reduced damages (as they will have to pay the success fee and ATE insurance premium). Some suggest that claimants with a disability, who have a complex personal injury claim, will be disproportionately affected by having to pay a proportion of their damages, as their damages are likely to be higher. It should be noted that the proposals include a 25% cap on the amount of damages which can be paid to a lawyer, excluding damages for future care and future losses. A large proportion of damages in catastrophic injury cases will be for future care and future losses, and will therefore be protected.

Particular concerns were raised that the reform to CFAs is being considered at the same time as the proposal to remove clinical negligence from the scope of legal aid. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 clinical negligence cases will be removed from the scope of legal aid generally (with the exception of certain neurological injuries that result in brain damage amongst infants) we recognise that there will be some high cost cases where it may be difficult to secure CFAs. However, cases of this type will continue to receive legal aid where necessary for the UK to meet its international and domestic legal obligations via scheme for excluded case funding (please also see section 13 below).

Some respondents also raised a concern that 'protected parties' within the meaning of the Civil Procedure Rules (including those unable to manage their own affairs) would be particularly affected by the proposals. This was not explained further but the concern is presumably on the basis that these cases involve special procedures which require more work and which solicitors may be less willing to take on for a limited success fee.

Some respondents suggested that implementing the proposal to abolish recoverability of success fees and ATE insurance premiums would contravene Article 6 of the European Convention on Human Rights – the right to a fair trial. It has also been argued that abolishing recoverability of success fees and ATE insurance premiums could be challenged under Article 14, in conjunction with Article 6.

### **Sex**

Some respondents argued that women will be disproportionately affected by the proposals, as they are more likely to be on lower incomes. Some Trade Union responses identified women as being "vulnerable in the labour market" and argued that this group of people would be disproportionately affected by the proposals.

It is argued that those on lower incomes would be disproportionately affected for several reasons. Firstly, they would rely on finding a solicitor willing to act under a CFA, as they are unlikely to be able to fund the case themselves. They may also be less able to fund disbursements. Secondly, losing part of their compensation would hit the lowest paid hardest. Finally it is suggested that they would be most affected by a proportionality test, as their special damages related to loss of earnings would be limited. This suggestion may be based on a misinterpretation of the proposal; the proposed proportionality test looks at a range of factors, of which the value of the claim is only one.

### **Race**

A small number of respondents suggested that the proposals would have a disproportionate impact on people based on their race. Of those that did, the majority had a general concern that those on lower incomes would be hardest hit by the proposals (as set out above), and argued that people from black and minority ethnic groups are more likely to be on low incomes. Trade Union respondents suggested that workers from BME backgrounds are included in the "vulnerable in the labour market" group referred to under sex above.

One specific concern was raised in relation to industrial disease claims. It was argued that these are particularly complex and risky cases, and that claimants may struggle to find a lawyer willing to take on their claim in the new regime. It was further suggested that black and minority ethnic groups are more likely to bring industrial disease claims. This is based on data from an ATE insurance provider, which showed that claimants from 'non-Caucasian ethnic backgrounds' were over-represented. It is further suggested that 'those who were employed in the relevant industries during the 1960s-80s when exposure to occupational hazards was not effectively controlled came disproportionately from ethnic minority backgrounds.' Further investigation with the Health and Safety Executive suggests that this trend may be linked to specific industries in particular regions of the country. The number of claims related to these industries is thought to have peaked. The Government has made an exception in the Legal Aid, Sentencing and Punishment of Offenders Act that recognises the unique position of mesothelioma claims. The CFA reforms will not apply to mesothelioma claims until a review of the likely impact of the reforms on these cases has been carried out and a report published on the findings.

**Gender Reassignment**

There were no specific concerns raised in relation to this protected characteristic.

**Age**

Some Trade Union respondents argued that young and older workers are included in the “vulnerable in the labour market” group referred to under sex above. There were also some specific concerns raised in relation to older workers. The first is that their damages for future care and loss will be lower than for younger claimants, and therefore 25% of damages excluding these items will eat into their total damages to a greater degree. Secondly, one respondent suggested that older claimants would be more reliant on small, local solicitors firms, which they argue are more likely to struggle in the new regime.

Some respondents suggested that a large proportion of clinical negligence claimants are either children or the elderly who they argue will therefore be more affected by the proposals. As noted above others argued that protected parties (such as children and those unable to manage their own affairs) would be more affected by the proposals. In response to the specific concerns relating to clinical negligence cases, the Government has decided to have a tightly drawn power to allow recoverability of the ATE insurance premiums to cover the costs of expert reports only in clinical negligence cases.

**Religion or Belief**

There were no specific concerns raised in relation to this protected characteristic.

**Pregnancy and maternity**

There were no specific concerns raised in relation to this protected characteristic.

**Sexual Orientation**

There were no specific concerns raised in relation to this protected characteristic.

**Other issues**

In addition to the protected characteristics listed above, some respondents identified claimants who do not have English as a first language as a group who may be disproportionately affected by the proposals. This is in part due to them being in the “vulnerable in the labour market” group described by some Trade Union respondents, and also due to the need for translators in dealing with the case. Some argue that solicitors will see translation costs as another reason for not taking on the case, when the success fee would be fixed at 25% of damages (excluding future care and future losses) regardless.

**Issues raised at the Legal Service Commission Client Diversity Group meeting**

Two key concerns were raised at this meeting. Firstly, that lawyers do not always offer appropriate interpretation services (for example for people with learning disabilities or deaf people). It is argued that these are seen as an extra cost which not all solicitors are willing to bear. Secondly, that the new CFA regime will require claimants to negotiate with their lawyer the level of success fee that will be payable from damages. Some group members were concerned about how vulnerable clients would be able to do this successfully. However, it is worth noting that lawyers under their professional rules of conduct are already obliged to give their clients best advice in light of their special circumstances including where any particular diversity considerations apply. Cases where the lawyer has given negligent advice on funding arrangements or costs recovery are likely to raise conduct, service and/or legal



issues, which can be pursued via the relevant regulatory body, the Legal Ombudsman or through the courts as appropriate.

13. What changes are you planning to make to your original proposals to minimise or eliminate the adverse equality impacts? Please provide details of the proposed actions, timetable for making the changes and the person(s) responsible for making the changes.

In response to the concern about how expert reports in clinical negligence claims will be funded, there is a tightly drawn power to allow recoverability of the ATE insurance premiums to cover the cost of expert reports only in clinical negligence cases. The details would be set out in regulations. The Government will continue to engage with claimant and defendant representatives and general liability insurers, to ensure that joint expert reports can be commissioned wherever possible so that ATE insurance is not necessary.

This should help, for example, claimants with a disability who may not have been able to bring their serious injury claim due to the high costs of expert reports.

14. Please provide details of whether or not you will consult on the proposed changes, particularly with disabled people and if you do not plan to consult, please provide the rationale behind that decision.

We have already consulted on the package of proposals, and the consultation paper included a question on the possible refinement of allowing recoverable ATE insurance premiums relating to disbursements only in certain categories of case.

15. Can the adverse impacts you identified during the initial screening be justified and the original proposals implemented without making any adjustments to them? Please set out the basis on which you justify implementing the proposals without adjustments.

The package of proposals on which we consulted included balancing measures, designed to assist claimants and ensure access to justice in the new regime. These measures include: a 10% increase in general damages; qualified one way costs shifting (QOCS) to protect the majority of personal injury claimants from paying their defendant's costs; and a cap (of 25%) on the amount of damages which can be paid as a success fee, specifically protecting damages for future care or future losses.

Other than the power to allow recoverability of ATE insurance premiums in relation to expert reports set out above, we do not feel that the package of proposals requires any further adjustments. Implementation can be justified on the basis that we believe meritorious cases will continue to be funded in the new regime.

Having had due regard to the potential differential impacts identified during the consultation period, the government is satisfied that it is right to implement these proposals. To this extent the proposals are considered to be a proportionate means of achieving a legitimate aim in the reform of civil litigation funding.

16. Do your proposals miss an opportunity to promote equality of opportunity? If so, do you plan to take action to remedy this and if so, when? Please provide details.

We have not received any feedback or evidence that additional work could be done to promote equality of opportunity.

17. You are legally required to monitor and review the proposed changes after implementation to check they work as planned and to screen for unexpected equality impacts.

Please provide details of how you will monitor/evaluate or review your proposals and when the review will take place.

As indicated in the Post Implementation Review Plan, we aim to work with stakeholders on the collation of relevant data to monitor and evaluate the impact of implementing these proposals.

18. Summary details, sign off by Senior Manager and date approved.

<p>You should now complete a brief summary (if possible, in less than 50 words) <b>setting out which policy, legislation or service the EIA relates to, how you assessed it, a summary of the results of consultation, a summary of the impacts (positive and negative) and, any decisions made, actions taken or improvements implemented as a result of the EIA.</b> The summary will be published on the external MoJ website.</p>
<p>This EIA assesses the cumulative impact of implementing the proposals as set out in the Government response to the consultation, <i>Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations</i>. The proposals aim to reform the civil litigation funding and costs arrangements including for no win no fee conditional fee agreements (CFAs).</p>
<p>The package of reforms which we are implementing includes balancing measures, designed to assist claimants and ensure access to justice in the new regime. These measures include: a 10% increase in general damages; qualified one way costs shifting (QOCS) to protect the majority of personal injury claimants from paying their defendant's costs; and a cap (of 25%) on the amount of damages which can be paid as a success fee, specifically protecting damages for future care or future losses. Having had due regard to the potential differential impacts identified during the consultation period, the government is satisfied that it is right to implement these proposals. To this extent the proposals are considered to be a proportionate means of achieving a legitimate aim in the reform of civil litigation funding.</p>
<p>Name (must be grade 5 or above): Abigail Plenty</p>
<p>Department: Ministry of Justice</p>
<p>Date: 13 July 2012</p>