

Title: <b>Cumulative Jackson Proposals</b> Lead department or agency: <b>Ministry of Justice</b> Other departments or agencies:	<b>Impact Assessment (IA)</b>
	<b>IA No:</b> MoJ 080
	<b>Date:</b> 27/04/11
	<b>Stage:</b> Implementation
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Primary legislation
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## Summary: Intervention and Options

### What is the problem under consideration? Why is government intervention necessary?

Legal costs in civil litigation are considered by Lord Justice Jackson, and endorsed by the Government, to be disproportionately high given the scale of damages involved, particularly in cases funded by 'no win no fee' Conditional Fee Agreements (CFAs). Aside from using resources inefficiently the current arrangements may be having an adverse impact on case outcomes as a result of generating a financial imbalance between claimants and defendants, and may also be encouraging too much litigation. Lord Justice Jackson conducted a review into costs of civil litigation and made a number of key recommendations as a package, which the Government wishes to implement. Government intervention is necessary as some of the proposals require primary and secondary legislation.

### What are the policy objectives and the intended effects?

The primary objective of the proposals is to reduce civil litigation costs so that they are more proportionate to the level of claims, to ensure that unnecessary and excessive litigation is not encouraged, and to rebalance the cost liabilities of claimants and defendants, where currently claimants are subject to significantly less financial exposure than defendants. The proposals aim to reduce costs while ensuring that parties who have a valid case are able to bring or defend a claim.

### What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The following options have been assessed against the Option 0 base case of 'do nothing':  
**Option 1:** Implement all following proposals: (i) Require clients to pay their After The Event (ATE) insurance premiums (if taken out) and if they win the case their CFA lawyer's success fees; (ii) introduce a cap on CFA success fees in personal injury<sup>1</sup> cases of 25% of damages excluding damages for future care and loss; (iii) introduce a regime of qualified one way costs shifting which would require defendants to generally to cover their own costs, even if they win the case in personal injury claims; (iv) Support a 10% increase in non-pecuniary general damages in all claims for a civil wrong; (v) Allow lawyers to enter into damages-based agreements, whereby lawyers receive their fees as a percentage of the claimant's damages; (vi) Support an additional payment by the defendant equivalent to 10% of total damages where the defendant fails to beat the claimant's Part 36 (formal) offer, and reverse the decision in Carver v BAA in order to provide more certainty about when a Part 36 offer is beaten; (vii) Introduce a new test of proportionality to recoverable costs; (viii) Uplift the litigant in person hourly rate in line with the increase in average earnings.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 10/2015

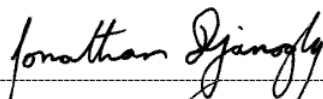
**What is the basis for this review?** PIR. **If applicable, set sunset clause date:** Month/Year

**Are there arrangements in place that will allow a systematic collection of monitoring information for future policy review?** Yes

**SELECT SIGNATORY Sign-off** For final proposal stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:



Date: 27<sup>th</sup> April 2011

<sup>1</sup> In this impact assessment – reference to personal injury claims includes clinical negligence claims unless otherwise stated.

# Summary: Analysis and Evidence

# Policy Option 1

Description: Lord Justice Jackson's primary recommendations

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: <b>Optional</b>	High: <b>Optional</b>	Best Estimate:

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional		Optional	<b>Optional</b>
High	Optional		Optional	<b>Optional</b>
Best Estimate				

### Description and scale of key monetised costs by 'main affected groups'

It is not possible to accurately monetise the aggregate costs of the proposals. The analysis in Annex A looks at a sample of CFA cases to monetise the potential financial impacts on individual cases, where possible. This backs up the analysis of non-monetised costs outlined below.

### Other key non-monetised costs by 'main affected groups'

- CFA claimants become more exposed to the costs they generate, e.g. CFA success fees and ATE insurance premiums. As a result, claimants may also pursue fewer cases and may settle for less. Some elements of the package mitigate this especially for personal injury cases e.g. 10% increase in non-pecuniary general damages, qualified one way costs shifting. In general costs to claimants mirror the benefits to defendants or services providers.
- Legal services providers, ATE insurers and other suppliers may experience a reduction in business / income but are assumed to be able to substitute other business activity and hence incur only adjustment costs. Costs to suppliers generally mirror the gain to claimants or defendants who pay for these services.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional		Optional	<b>Optional</b>
High	Optional		Optional	<b>Optional</b>
Best Estimate				

### Description and scale of key monetised benefits by 'main affected groups'

It is not possible to accurately monetise the aggregate benefits of the proposals. The analysis in Annex A looks at a sample of CFA cases to monetise the potential financial impacts on individual cases, where possible. This backs up the analysis of non-monetised benefits outlined below.

### Other key non-monetised benefits by 'main affected groups'

- Defendants better off overall as they no longer have to pay the success fee and ATE insurance premium in cases which they lose but in personal injury cases are likely to pay the claimants costs whether they win or lose due to qualified one way costs shifting. In general many of the benefits to defendants mirror the costs to claimants or to service providers.
- Non-CFA claimants in civil wrongs benefit overall. e.g. 10% increase in non-pecuniary general damages
- Wider economic efficiency gains associated with devoting less resource to litigation

<b>Key assumptions/sensitivities/risks</b>	<b>Discount rate (%)</b>
<ul style="list-style-type: none"> <li>- Neutral financial impact on HMCTS</li> <li>- Assume no net distributional benefits or costs</li> <li>- Analysis considers a broadly neutral net impact on business through benefits to defendants (often insurers and businesses) approximately equating to potential costs to other service providers.</li> <li>- Analysis assumes (apart from where explicitly stated) the claimant is an individual using a CFA lawyer and taking out ATE insurance, and defendant is an insurer, business, local authority or government body which uses neither. This is so in a high proportion of personal injury claims but less so outside personal injury</li> <li>- Assume proposals are enforceable</li> <li>- Assume that legal aid remains available where necessary for the UK to meet its international and domestic legal obligations via a proposed scheme for excluded cases.</li> </ul>	

<b>Direct impact on business (Equivalent Annual) £m):</b>			<b>In scope of OIOO?</b>	<b>Measure qualifies as</b>
<b>Costs:</b>	<b>Benefits:</b>	<b>Net:</b>	Yes	NEUTRAL

## Enforcement, Implementation and Wider Impacts

What is the geographic coverage of the policy/option?	England and Wales				
From what date will the policy be implemented?	Autumn 2012				
Which organisation(s) will enforce the policy?	MoJ				
What is the annual change in enforcement cost (£m)?					
Does enforcement comply with Hampton principles?	Yes				
Does implementation go beyond minimum EU requirements?	No				
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)	<b>Traded:</b>		<b>Non-traded:</b>		
Does the proposal have an impact on competition?	Yes				
What proportion (%) of Total PV costs/benefits is directly attributable to primary legislation, if applicable?	<b>Costs:</b>		<b>Benefits:</b>		
Distribution of annual cost (%) by organisation size (excl. Transition) (Constant Price)	<b>Micro</b>	<b>&lt; 20</b>	<b>Small</b>	<b>Medium</b>	<b>Large</b>
Are any of these organisations exempt?	Yes/No	Yes/No	Yes/No	Yes/No	Yes/No

## Specific Impact Tests: Checklist

Set out in the table below where information on any SITs undertaken as part of the analysis of the policy options can be found in the evidence base. For guidance on how to complete each test, double-click on the link for the guidance provided by the relevant department.

Please note this checklist is not intended to list each and every statutory consideration that departments should take into account when deciding which policy option to follow. It is the responsibility of departments to make sure that their duties are complied with.

Does your policy option/proposal have an impact on...?	Impact	Page ref within IA
<b>Statutory equality duties<sup>2</sup></b> <a href="#">Statutory Equality Duties Impact Test guidance</a>	Yes	26
<b>Economic impacts</b>		
Competition <a href="#">Competition Assessment Impact Test guidance</a>	Yes	25
Small firms <a href="#">Small Firms Impact Test guidance</a>	Yes	25
<b>Environmental impacts</b>		
Greenhouse gas assessment <a href="#">Greenhouse Gas Assessment Impact Test guidance</a>	No	25
Wider environmental issues <a href="#">Wider Environmental Issues Impact Test guidance</a>	No	25
<b>Social impacts</b>		
Health and well-being <a href="#">Health and Well-being Impact Test guidance</a>	No	25
Human rights <a href="#">Human Rights Impact Test guidance</a>	No	25
Justice system <a href="#">Justice Impact Test guidance</a>	No	26
Rural proofing <a href="#">Rural Proofing Impact Test guidance</a>	No	26
<b>Sustainable development</b> <a href="#">Sustainable Development Impact Test guidance</a>	No	26

<sup>2</sup> Public bodies including Whitehall departments are required to consider the impact of their policies and measures on race, disability and gender. This requirement is being extended under the Equality Act 2010 to cover age, sexual orientation, religion or belief and gender reassignment from April 2011 (to Great Britain only). The Toolkit provides advice on statutory equality duties for public authorities with a remit in Northern Ireland.

## Evidence Base (for summary sheets) – Notes

Use this space to set out the relevant references, evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Please fill in **References** section.

### References

Include the links to relevant legislation and publications, such as public impact assessments of earlier stages (e.g. Consultation, Final, Enactment) and those of the matching IN or OUTs measures.

#### No. Legislation or publication

- 1 Review of Civil Litigation Costs: Preliminary Report - <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs>
- 2 Review of Civil Litigation Costs: Final Report - <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs>
- 3 Standalone Impact Assessments – [www.justice.gov.uk](http://www.justice.gov.uk)  
<http://www.justice.gov.uk/consultations/jackson-review-151110.htm>

### Annual profile of monetised costs and benefits\* - (£m) constant prices

	Y <sub>0</sub>	Y <sub>1</sub>	Y <sub>2</sub>	Y <sub>3</sub>	Y <sub>4</sub>	Y <sub>5</sub>	Y <sub>6</sub>	Y <sub>7</sub>	Y <sub>8</sub>	Y <sub>9</sub>
<b>Transition costs</b>										
<b>Annual recurring cost</b>										
<b>Total annual costs</b>										
<b>Transition benefits</b>										
<b>Annual recurring benefits</b>										
<b>Total annual benefits</b>										

\* For non-monetised benefits please see summary pages and main evidence base section

# Evidence Base (for summary sheets)

## 1. Introduction

1. 1 Arising from concerns about the high costs of civil litigation in England and Wales, Lord Justice Jackson was appointed in late 2008 by the then Master of the Rolls to review the rules and principles governing the costs of civil litigation. Having considered the recommendations included in Lord Justice Jackson's Final Report<sup>3</sup>, published in January 2010, the Government sought views on implementing some of the key recommendations via a public consultation in November 2010 on 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales'. The consultation may be found at [www.justice.gov.uk](http://www.justice.gov.uk).

## Policy Objectives

1. 2 The current concern is that the costs of civil litigation are often disproportionately high in relation to the value of the claims being disputed. In many cases costs exceed the value of the damages received, and this appears to especially be the case for lower value claims. Looking at the dataset analysed in Annex A to this Impact Assessment, costs exceed damages in approximately 40% - 60% of cases, depending on the case category.
1. 3 Lord Justice Jackson's final report, and data provided in the Government response to the consultation document also highlight that conditional fee arrangement (CFA) cases generate additional costs, and that costs for some case types have increased over the years.
1. 4 For example, looking at the difference between CFA and non CFA cases in relation to litigated cases, the findings from the judicial surveys in Lord Justice Jackson's final report demonstrated that "subject to various caveats, 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."<sup>4</sup>
1. 5 There is also evidence in the Government consultation response to demonstrate that costs for some case types have increased over the years. A leading supermarket reported that the average costs paid out to claimants increased by 40% between 2005 and 2010. Other pieces of data, such as from the NHSLA and a general liability insurer support this conclusion. In some areas the number of claims received has also increased in recent years, as shown in the NHSLA annual report<sup>5</sup>, and insurance data referred to in Lord Justice Jackson's final report.
1. 6 These pieces of information demonstrate that in the last few years there seems to have been a shift in favour of claimants and claimant lawyers under the CFA arrangements, at the expense of defendants, and there are excessive costs and adverse incentives in the system currently.
1. 7 The intention of implementing the reforms outlined in this Impact Assessment is therefore to reduce civil litigation costs, while ensuring that parties who have a valid case are able to bring or defend a claim, including through the courts where necessary.
1. 8 Under the current arrangements, there is also an imbalance between the potential cost liabilities of claimants and defendants, where currently claimants are subject to significantly less financial exposure than defendants.
1. 9 In most cases claimants are protected from paying any costs if they bring a case on a CFA, regardless of the case outcome. If they are successful in their claim, their legal fees, success fee, and after the event insurance (ATE) premiums may be recovered from the defendant, whilst if they are not successful, in many cases the ATE insurance premium is not charged. Therefore, the incentives associated with the current arrangements might be encouraging unnecessary or too much litigation activity.
1. 10 In summary, the policy objectives are therefore as follows:

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<sup>3</sup> Lord Justice Jackson's Review of Civil Litigation Costs: [http://www.judiciary.gov.uk/about\\_judiciary/cost-review/reports.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm)

<sup>4</sup> Final Report page 17 paragraph 2.20

<sup>5</sup> NHSLA Annual Report and Accounts 2010 <http://www.nhs.uk/Publications/> pp. 13

- **Securing improved resource efficiency.** In particular, the proposals intend to avoid excessive costs in aggregate given the size of damages in question and aim to create a fairer balance between claimants and defendants in terms of exposure to costs. This may lead to fewer cases being pursued, especially cases which have a lower probability of success, or involve highly disproportionate costs compared to the amount being disputed. This should be desirable from an economic perspective, and given the sums currently involved in litigation the resource efficiency gains may be significant. Reducing the costs incurred in civil litigation is likely to involve a reduction in demand for, and supply of, legal services and other litigation support services, such as ATE insurers, claims management companies and experts.
- **Securing desired distributional outcomes.** The proposals are likely to result in a transfer of resources (wholly or partly) in favour of defendants, although some aspects of the policy will favour claimants. More generally, there will be a series of distributional outcomes on CFA lawyers (solicitors and barristers) and other parties that derive income from civil litigation. It is necessary that any improved resource efficiency is balanced with any distributional implications of the policy changes, as there may be trade-offs between the impacts considered.

## Proposals

1. 11 This IA considers the cumulative effect of Lord Justice Jackson's primary recommendations on the basis that all measures are implemented in conjunction as a package. The individual proposals are summarised below:

### Conditional fee agreements (CFAs)

- No longer allow the recoverability from the losing side of CFA success fees so that clients (who are usually claimants but may also be defendants) are liable to pay their CFA lawyer's success fees in the event they win their case, for all CFA cases. The success fee is a mark-up on the lawyer's base costs. In theory, success fees enable CFA lawyers to take on cases with lower chances of success as the losses they incur from doing so would be balanced by the success fees they earn in cases they win. Requiring the client to pay the CFA success fee where the client wins the case would provide the client with an incentive to keep down their CFA lawyer's costs.
- Cap the level of success fees in personal injury cases so that a claimant solicitor is able to charge a success fee only up to a maximum of 25% of damages (excluding any damages referable to future care or future loss). This cap is intended to protect the client's damages. A maximum success fee of 100% of base costs will continue to apply, so that the maximum success fee payable will be the lesser of 100% of base costs or 25% of damages (excluding any damages referable to future case or future loss). A cap might lead to CFA lawyers not taking on more risky cases, even though the client might be willing to pay more than 25%.
- No longer allow the recoverability of ATE insurance premiums, so that policy holders (usually claimants but may be defendants) are liable to pay their ATE insurance premium regardless of the outcome of the case. ATE insurance essentially is insurance taken out by one party against paying the legal costs of the other party, which would happen if the other party was to win the case, and the policy holder's own disbursement costs if the case is lost. It is labelled 'ATE' as the insurance is taken out after the event which triggered the case occurred. Non recoverability of ATE insurance premiums would apply to all cases where an ATE insurance policy has been taken out.
- However, expert reports can be particularly costly in clinical negligence claims. There will be a power to permit recoverability of ATE insurance premiums in respect of expert reports in certain cases in clinical negligence claims. This will help us to ensure that claimants are not precluded from bringing these claims.
- Currently there is anecdotal evidence that ATE insurance premiums are not charged by insurers when the policy holder loses the case but are charged to the other party when the policy holder wins the case. In effect the policy holder then has no incentive to ensure that the premium is reasonable, and this may result in current premiums being excessive given the risks covered. Requiring the client to pay the ATE insurance premium would provide the

client with an incentive to keep down their ATE insurance premium, and may encourage greater competition between ATE insurance providers.

#### Qualified one way cost shifting: Defence always liable for their costs even if they win

- Introduce qualified one-way costs shifting (QOCS) (i.e. a losing defendant would generally continue to pay for the winning claimant's costs but a losing claimant would only pay a winning defendant's costs in certain circumstances) in personal injury cases. QOCS would reduce the risk of claimants having to pay defendants' costs if they lose. This may affect demand for ATE insurance. However, QOCS would only apply before a 'Part 36' offer has been made by the defendant, this being a formal settlement offer. If the defendant makes a Part 36 offer, which the claimant refuses but then does not beat at trial, the claimant would be liable for costs incurred by the defendant after the defendant's Part 36 offer. The proposal would therefore introduce an incentive for the defence in particular to make a reasonable Part 36 offer quickly. This proposal would apply to all types of personal injury case, not just to cases involving CFAs.

#### 10% increase in general damages

- Increase general damages<sup>6</sup> for civil wrongs by 10% compared to current levels in all cases, not just cases involving CFAs. This would recognise a general view that general damages are too low and would also help to compensate claimants to some extent for the increased financial costs which they would incur from other parts of the package, for example the requirement to pay CFA success fees even if they win the case.

#### Damages-Based Agreements:

- Allow both solicitors and barristers to enter into damages-based agreements (DBAs) with clients with: (a) costs recovery on a conventional basis and not by reference to the contingency fee element of the DBA; (b) regulation of these agreements including a cap of 25% in personal injury cases on the maximum contingency fee or payment which lawyers can take from the damages (excluding any damages referable to future care and future loss). Under a DBA the client covers the costs of their lawyer from the damages they win. This proposal essentially allows DBAs to be used more widely so that there is greater choice between the use of DBAs and CFAs. Currently DBAs are prohibited in litigation but are used in relation to damages cases heard before a Tribunal.

#### Part 36

- Require defendants to pay an additional amount equivalent to 10% of the total damages awarded to claimants if the claimant's Part 36 offer is rejected by defendants who are then unable to beat it at trial. A Part 36 offer may be made either by the claimant or by the defendant and is a formal offer to settle. This proposal would provide an increased incentive for claimants to make and defendants to accept claimant's reasonable Part 36 offers. It would apply to all cases, not just cases involving CFAs and DBAs.
- Providing for Part 36 sanctions to apply where an offer made either by the claimant or defendant has been equalled or beaten by the opposing party by any amount, however small. This reverses the decision in *Carver v BAA* which essentially established that, in order to recover costs from the losing party, the winning party needs to win by a reasonable margin rather than just by say £1. This case law provided an incentive for parties not to incur disproportionate legal costs in pursuit of small additional amounts of damages. In so doing it introduced an element of uncertainty. Subsequent case law has substantially reduced this uncertainty. The proposed change would put the issue beyond doubt.

#### Proportionality

- Introduce a new test of proportionality in relation to the recoverability of costs. The new requirement would be to assess first on an item by item basis whether the work is reasonably

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<sup>6</sup> The 10% increase in general damages is for non-pecuniary loss such as pain and suffering and loss of amenity. However, for ease of reference this Impact Assessment uses the term general damages.

needed to be done and reasonable in amount. In relation to items which pass this test, the court would then consider the proportionality of the total costs against the complexity and value of the claim (not just financial value). If costs are deemed to be disproportionate, the court would make a reduction to a proportionate level. This new definition introduces a requirement for the courts to consider the proportionality of costs as the dominant test in civil litigation, over either reasonableness or necessity.

#### Litigant in Person (LiP) hourly rate

- Increase the hourly rate paid to LiPs in “fast track” (civil cases where the amount in question is between £5,000<sup>7</sup> and £25,000) and “multi track” cases (civil cases where the amount in question is greater than £25,000) from £9.25 in line with the increase in earnings since the current rate was set in 1995. The new LiP hourly rate would be above current average earnings.

### Economic rationale

1. 12 The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by outdated rules). In either case the proposed intervention should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and distributional reasons (e.g. to reallocate goods and services from one group in society to another).
1. 13 The reforms in this Impact Assessment relate to tackling failures in existing regulation, in particular the rules which apply to the recoverability of costs generated when resolving civil disputes. Lord Justice Jackson found that the resources used to resolve civil disputes are often disproportionately high compared to the value and nature of claims under dispute. In part this is due to the existence of externalities, i.e. those who generate costs not being sufficiently responsible for meeting those costs, or sufficiently exposed to the risk of meeting those costs. The package of reforms is intended to increase the economic efficiency of civil litigation by rebalancing the liability of costs between those who generate costs and those who might pay for them. The associated improvement in economic efficiency may involve some disputes being resolved with equivalent outcomes but using fewer resources.
1. 14 Distributional considerations also apply to the package of reforms, and there may be a balance between these considerations and the objective of securing improved economic efficiency. In particular improved economic efficiency may result in, say, defendants gaining at the expense of claimants. The parties to a dispute might be injured individuals, insurance companies, local authorities, businesses, the NHS and other bodies. Different types of service provider might also be affected by the reforms, such as legal services providers, claims management companies, experts, and ATE insurance providers. Society may place a value on some of these parties gaining at the expense of others (although individuals in general, in the form of consumers and taxpayers, may ultimately often be affected).
1. 15 The rationale for the package of reforms therefore relates to ensuring that disputes are solved more proportionately, to improve economic efficiency and free up resources for alternative uses, whilst balancing this objective against distributional concerns.

### Main affected groups

1. 16 The following individuals/sectors are likely to be affected by the proposals:
  - *Represented claimants and defendants (and defendant insurers):* All parties would be affected in all civil proceedings, not just where CFAs are used to fund cases. A distinction is made between public sector defendants and private sector defendants, given public sector bodies are funded by the taxpayer. Although any party can use CFAs, anecdotal evidence

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<sup>7</sup> Except in personal injury and housing disrepair claims where it is £1,000.



suggests that claimants more frequently use this type of funding and that it is most frequently used in personal injury (including clinical negligence) claims.

- *Litigants in person*: Unrepresented litigants would also be affected by the proposals, including the proposal to increase their recoverable hourly rates and those relating to the proportionality test, Part 36 and QOCS in personal injury claims.
- *Lawyers (solicitors and barristers)*: Changes to the work undertaken in cases, or to the overall volume of cases will impact on both claimant and defendant lawyers, in particular in CFA cases. CFAs are most commonly used in personal injury and clinical negligence cases. However, they are also used across a wide spectrum of litigation, including defamation, intellectual property, judicial review and commercial claims. Also DBAs are likely to become available in categories of case where CFAs are currently permitted.
- *Insurers*: Firms that offer ATE insurance would be affected. Whilst insurance companies offer ATE insurance policies including insurance intermediaries/brokers and underwriters, there are some firms that offer specific ATE insurance for specific categories of law. Lord Justice Jackson estimates that there are currently between 20 and 36 ATE insurers.
- *HM Courts and Tribunals Service (HMCTS)*: Changes to current policy may impact on the volume of cases pursued and the volume of cases reaching court and / or requiring cost assessment.
- *Trades Unions and other membership organisations*: These bodies may agree to meet their members' legal costs. In so doing in cases where they succeed they are currently able to recover an amount to cover their risk of having to pay the defendants costs in cases which they lose. This 'self insurance element' is akin to claimants recovering ATE insurance premiums.
- *Other affected parties*: Changes in the volume of cases or the average work per case pursued overall would impact other sectors that derive income from civil litigation. This may include, for example, claims management companies, costs practitioners and experts. The scope of the options considered in this Impact Assessment extends to specified areas of civil litigation, and type of funding option.

## 2. Costs and benefits

- 2.1 This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing the policy package. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded), where possible, however, there are important aspects that cannot sensibly be monetised. These might include how the proposals impact differently on particular groups of society, and the value of any distributional change.
- 2.2 In particular, distributional impacts are difficult to quantify. It may be possible to identify which groups in society might incur benefits and which might incur costs as a result of the reforms, e.g. individuals seeking compensation, insurance companies and the NHS. Placing a monetised value on the fact that some groups are gaining or losing at the expense of others is not possible, and placing a non-monetised value might also be somewhat subjective.
- 2.3 More generally, in this context, the majority of the financial implications on different parties cannot be sensibly monetised. This stems from a lack of robust baseline data, which prevents us from being able to aggregate the impacts on each group, as well the fact that we do not have the necessary data and evidence to quantify how the baseline factors would change in the future.
- 2.4 In order to construct a robust baseline, we would need the following pieces of information:
  - Baseline information on volume and mix of cases currently brought, using a CFA lawyer or otherwise (as some of the proposals apply to non CFA cases).
  - Case outcomes and point at which case settles, including detail of damages if paid.
  - Case costs, broken down by components to both parties and including ATE insurance premiums, CFA success fees and baseline legal costs.

- Number of service providers, income levels for all service providers, profitability levels for all providers, and detail of their volume and mix of work.
2. 5 It is possible to obtain some of the above baseline data from looking to a representative sample of cases. However, there is no central source by which all the above information is recorded. Baseline data for certain categories of personal injury cases brought on a CFA (and where damages are paid) has been presented in Annex A. However, there are significant information gaps and other uncertainties within this.
2. 6 In order to monetise the aggregate impacts, we would need to understand and quantify how all of these factors would change in future in the light of the package of reforms. This would hinge upon a combination of unknown behavioural changes and unknown market dynamics. These would include, amongst other things:
- Claimants' willingness and ability to pay CFA success fees and ATE premiums.
  - Parties' attitudes towards risk and inclination to continue pursuing a case.
  - Parties' behaviour towards how they settle claims in light of the costs of pursuing a case.
  - Claimants' ability to negotiate CFA success fees and ATE insurance premiums.
  - The degree of competition which exists between legal service providers, ATE insurance providers, claims management companies and other service providers.
  - The scope for further productivity and efficiency improvements and the degree of surplus profits amongst these providers.
  - How QOCS and the Part 36 reforms alter settlement behaviour and dynamics amongst claimants and defendants.
2. 7 These factors are all not known well enough in order to monetise the aggregate impacts. Any such figure would largely be a reflection of a series of inter-linked assumptions which are not well grounded in evidence.
2. 8 We present a series of partial conclusions in Annex A, which considers the impacts of non-recoverability of success fees and ATE insurance premiums, the 25% cap on success fees, and a 10% increase in general damages on claimants and defendants. These support our qualitative analysis below in highlighting that defendants are likely to gain from the reforms, and the impact on claimants and legal services providers will depend upon the specifics of the case, including the ratio of costs to damages, and whether it is brought on a CFA or not.
2. 9 Below we consider a qualitative analysis of the costs and benefits of the policy package. As many of the impacts are transfers, and have distributional implications, we highlight where the impact on one group links to the costs and benefits to other groups, as well as where changes to economic efficiency may arise.
2. 10 The analysis assumes that the proposals would be enforceable, including proposals which are not implemented via primary legislation but by judicial powers, procedural rules or regulations, and whose implementation might be more difficult to monitor in practice, such as the proposal to introduce a new test of proportionality.
2. 11 The analysis is also based upon CFAs being used by claimants and not by defendants. However, CFAs are also used by defendants in a number of areas. An overview of the different impacts on defendants using CFAs is therefore included below.

## **Option 0: Base Case (do nothing)**

### **Description**

2. 12 The current position would continue to apply in future and none of the reforms outlined in the Introduction would be implemented.
2. 13 One key assumption which applies to the base case is that currently too many cases are being brought forward which are either relatively less meritorious (i.e. less likely to succeed) or where the amounts at stake are disproportionately small compared to the costs of pursuing the case or that too much litigation activity is taking place relative to the importance and value of the case. As such it may be in society's interests not to proceed with such cases or devote less resource to them as the resources devoted to them might otherwise be spent on more productive activity.

This might also apply if case outcomes were to some degree worse for claimants but if this was more than outweighed by the savings from devoting fewer resources to the case.

2. 14 Under the current position it is arguable 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.

### Costs and benefits of option 0

2. 15 Because the 'do nothing' option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV).<sup>8</sup>

### Option 1: Cumulative Jackson proposals

#### Description

2. 16 The proposals summarised in the Introduction would all be implemented as part of a package.
2. 17 The following analysis assumes that the claimant is an individual who uses a CFA lawyer and takes out ATE insurance, and that the defendant is a business, insurer, local authority or government body which does not use a CFA lawyer and does not take out ATE insurance.
2. 18 The consultation exercise has supported the view that this assumption applies in most cases. In particular, the defendants in cases where CFAs are used are often insurance companies (which often do not make use of CFAs), as many other businesses take out insurance to cover their potential liabilities. CFAs are likely to be used where the party has a chance of success. The concept of success is less clear cut for defendants, for whom success may mean reducing the damages or other loss arising under a claim rather than withstanding the claim entirely.
2. 19 If the defendant used a CFA lawyer then the impacts on the defendant would be similar to those on the claimant as set out below. There are two main differences. Firstly, the defendant will not generally receive damages (unless they have a counter claim, for example in a motor accident where both parties are injured and there is a dispute concerning liability), so if successful the defendant would not benefit from the 10% increase in general damages. The success fee would also have to be paid from their own funds. Secondly, if successful, the defendant would still be liable for their base costs (or at least part of them) under QOCS. Indeed this particular proposal would make CFA lawyers less likely to support defendants in future.
2. 20 If the defendant used a CFA lawyer then the impacts on the claimant (in cases when they did not use a CFA lawyer) would be similar to those on the defendant as set out below. In particular, the claimant would no longer be liable for the defendant's CFA success fee and ATE insurance premium.
2. 21 These differences would feed through to the analysis of distributional impacts. In particular, in cases where the defendant uses a CFA lawyer and the claimant does not then defendants would be worse off and claimants would be better off, i.e. the position below would be reversed.

### Costs of Option 1

2. 22 Following implementation of the package of proposals there are likely to be some one-off adjustment costs for all parties concerned. For example, there may be adjustments in terms of the market determining what success fees to apply to which types of case in a competitive environment. In relation to proportionality and most of the other proposals, there may inevitably be an initial period of increased litigation to determine the meaning of the new legislation.

#### Claimants

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<sup>8</sup> The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

2. 23 In general many of the costs to claimants mirror the benefits to defendants or to service providers.
2. 24 Abolishing the recoverability of CFA success fees and ATE insurance premiums would place costs on claimants. In addition this might lead to claimants pursuing fewer weaker cases and claimants might also settle earlier and for lower amounts. A power to permit recovery of ATE premiums for expert reports in personal injury claims in some cases, would help ensure that claimants are not prohibited solely by the costs of these reports from bringing these claims.
2. 25 The cap on CFA success fees might lead to CFA lawyers no longer taking more risky cases, leaving claimants to litigate in person or consider alternatives, including potentially no longer bringing the case.
2. 26 Claimants might experience reduced levels of customer service and reassurance.
2. 27 Claimants would incur search costs and negotiation costs from selecting a solicitor willing to offer a favourable CFA, ATE insurance products (including potential search and negotiation costs for ATE products to fund disbursements), and agreeing a success fee. Claimants would incur similar costs from deciding whether to select a DBA or a CFA.
2. 28 Claimants are assumed to select a DBA instead of a CFA if they consider that this is beneficial to them. If this initial judgment turns out to be wrong then claimants may be worse off under a DBA.
2. 29 The proposal to introduce a new test of proportionality might reinforce the effects on claimants, given either that lower costs may be incurred, or that claimants may now be liable for more of their solicitors' costs. However, if base costs are lower to achieve the same result, claimants could benefit from lower success fees and therefore increased damages, net of the success fee.
2. 30 In order to monetise the aggregate impact on claimants we would need to know the volume of cases where CFAs are involved, volume of cases funded through other means, and how these volumes might change in future. This will depend upon solicitors' willingness to take on cases in future (which would be linked to factors including risk, profitability, and their ability to undertake productivity and efficiency improvements), as well as claimants' attitudes and behaviours, such as towards risk, how they settle claims in light of the costs of pursuing a case, and their ability to negotiate CFA success fees and ATE insurance premiums.
2. 31 For those cases no longer brought (under any funding type), claimants would lose out on their damages. We do not know the value, nor number of cases, in which this would apply. However, this cost to claimants would be a benefit to defendants, who would no longer pay out damages. Whether this will generate a net benefit overall will depend on the volume and mix of cases no longer brought, and whether the efficiency savings outweigh any distributional concerns. Given that cases that may no longer be brought are likely to include those with high costs compared to damages, economic theory would imply that this would generate a net benefit.
2. 32 For those cases that continue to be brought, in order to monetise the aggregate impact on claimants we would need to know: average general damages; average total damages; average CFA success fees and how these might change; and average ATE insurance premiums and how these might change. We would also need to know how the Part 36 and QOCS reforms affect market dynamics. We do not hold robust evidence on these factors.
2. 33 The impact on claimants in cases that would continue to be brought is ambiguous. In some cases, there may be a cost to claimants if lower total general damages are taken home. This cost would be a transfer of funds to the legal services provider. Some claimants may also shift to different types funding, so may pay a fee even if they are not successful in their case. This again would represent a transfer from the claimant to the legal services provider.
2. 34 To fully assess the impact on claimants in these cases, we would also need to examine how outcomes may differ in the future. For example, claimants may now settle for different levels of damages. This depends on a number of factors including the resource devoted to bringing the case, and how the Part 36 reforms affect settlements.
2. 35 In Annex A we attempt to monetise the potential impact on claimants in personal injury cases brought using a CFA lawyer. Based on the data available, we are only able to look at non-recoverability of success fees and ATE insurance premiums (and the 10% increase in general damages) under a series of simplifying assumptions. The annex highlights how different types of

case may be impacted differently, and important factors in influencing outcomes, for example the extent to which CFA lawyers may lower their success fees.

2. 36 There are no expected costs to claimants who currently bring cases through other funding sources.

### *Defendants*

2. 37 In general many of the costs to defendants mirror the benefits to claimants or to service providers.
2. 38 The QOCS proposal (i.e. defendants generally pay their own costs, subject to costs sanctions applying where a defendants' formal offer has not been beaten at trial) would generate direct financial costs for defendants in all personal injury claims, and would encourage defendants to make an earlier Part 36 offer. This proposal might also encourage claimants to make more claims, especially lower value claims, which defendants might be inclined to settle given that the defendant would still incur legal costs if they win the case. This would be mitigated to some extent by this proposal not applying after a Part 36 offer has been made. Therefore claimants would still be liable to pay the defendants' costs under Part 36 if they refused but then do not beat the defendants' offer at trial. This would apply to all cases, not just those involving CFAs.
2. 39 Proposals which increase general damages by 10% would generate direct financial costs for defendants and would apply to all claims for civil wrongs, not just those involving CFAs.
2. 40 The decision by claimants on whether to use a CFA or DBA is assumed to have no impact in aggregate on defendants.
2. 41 Reversing the *Carver v BAA* case might lead to claimants being able to recover their costs from defendants in more cases, however this has substantially been achieved by case law already.
2. 42 Uprating the litigant in person hourly rate might generate increased costs for defendants in cases where these costs are recovered from defendants.
2. 43 Defendants may incur cash flow costs if cases were resolved more quickly.
2. 44 In addition, defendants may incur increased costs in the short term as a result of claimants pursuing claims more quickly in order to take advantage of the current CFA arrangements (before e.g. they become liable for CFA success fees and ATE insurance premiums).
2. 45 In order to monetise the aggregate impact on defendants we would need to know in each type of case: the volume of cases where CFAs are involved and the volume of cases brought by other methods; how these volumes might change; average general damages; average current CFA success fees and average current ATE insurance premiums. We would also need to know how the Part 36 reforms and the QOCS reforms affect market dynamics. We do not hold robust evidence on these factors.
2. 46 Annex A focuses on the potential cost to defendants (in cases where damages are paid out) of a 10% increase in general damages. As with the analysis on the claimant side, a number of simplifying assumptions are made, for example the annex does not consider any potential impact on the value of damages in future, which may arise due to changes in incentives around the Part 36 policy. The cost associated with QOCS has not been incorporated as we do not have information about current recoverability, nor how any change in the volume of cases in the future could affect defendant costs in future.
2. 47 In both cases, the cost to defendants of a 10% increase in general damages, or from not recovering their costs in cases where they are successful will represent a transfer from the defendant to the claimant.

### *Legal services providers (solicitors and barristers)*

2. 48 In general, any costs to legal service providers from reduced levels of business or income would mirror the gains to claimants and defendants who use, and pay for, these legal services.
2. 49 In this instance, the reforms are expected to lead to reduced overall net levels of legal services business and income, especially for CFA lawyers. The expected overall net reduction in

business and in income would be driven largely by claimants having to pay CFA success fees and ATE insurance premiums and by the cap on CFA success fees. This might lead to lower success fees, to claimants pursuing fewer cases, to CFA lawyers taking on fewer higher risk cases, and to more competition in relation to success fees. The level of resource devoted to each case might also be lower. In addition, the reforms to proportionality and the increase in litigant in person rates might place downward pressure on legal services business.

2. 50 The scale of any reduction in overall net income and levels of business is not known. In addition to a reduction in business volumes and the resource required per case, there might also be implications for profit margins. For example, this might stem from increased downward pressure on success fees and from increased competition in relation to success fees. There might also be increased pressure on legal services providers to identify increased efficiencies in their operations.
2. 51 From a macroeconomic perspective, if all markets are considered to adjust and clear efficiently enough, then if there was a reduction in the resources required on the supply side to provide goods and services in one particular market, this may lead to those resources being redeployed in other particular markets. As a result, the providers affected would incur adjustment costs. The levels of income and profitability associated with those providers might also differ in the new market compared to the initial market.
2. 52 In this instance, the reforms would involve legal services providers in the CFA market incurring adjustment costs. This would relate to them engaging in other types of case or other types of work. The nature and extent of this adjustment and the associated costs are not known. In the absence of such evidence we are unable to conclude that there would be an ongoing change in income or in profitability for those providers affected. There is a risk that this might be so.
2. 53 In addition, legal services providers who remain in the CFA market may incur other adjustment costs as a result of familiarisation with the new arrangements in the CFA market and with any changes in market dynamics. There might also be an ongoing increase in administrative burdens, for example as a result of negotiating CFA success fees with clients or taking out an additional loan in order to fund disbursements for clients.
2. 54 In order to monetise the aggregate impact on legal service providers, we would need to know: the current volume and profitability of CFA work; how the volume and profitability of this work would change in future; the extent of any surplus resources and where else they would be deployed in the economy; the adjustment costs associated with this redeployment including the duration of adjustment; and how the output and profitability of those resources would differ compared to now. We do not hold robust evidence on these factors.
2. 55 Annex A focuses on claimants and defendants. However, in doing so it incorporates data on success fees paid to claimant CFA solicitors. It provides information on the percentage of cases within our dataset that may be subject to the cap on success fees, assuming that general damages are at their current levels plus 10%. However, in the annex we are unable to make any assessment of the other potential impacts on future success fees, including competition, the impact of any change in volume or mix of cases taken on by CFA lawyers, and their ability to drive additional efficiency savings.
2. 56 Comparing the expected reduction in income for CFA providers to the expected saving to defendants (also often businesses), the saving from these cases should exceed this loss to CFA providers. This is because defendants will save on success fees at their current levels. However, the CFA lawyer will only lose from the potential reduction in success fees, not the whole amount (in those cases that continue to be brought). We would also expect savings to defendants to be ongoing, however, any potential loss to CFA lawyers should only take place during the transition period, unless profitability is lower in any new market compared to the initial market.

### *Insurance providers*

2. 57 The position for insurance providers is similar to that for legal services providers. In general, any costs to insurance providers from reduced levels of business or income would mirror the gains to claimants and defendants who use, and pay for, this insurance.

2. 58 In this instance, the reforms may lead to reduced overall net levels of ATE insurance business and income, which might be substantial and have implications for the extent of ATE insurance coverage in future. In particular, the proposal to abolish recoverability of ATE insurance premiums is likely to result in increased competition in the ATE insurance market and to ATE insurance premiums reflecting more accurately the risks they cover. Fewer ATE insurance policies may be taken out by claimants.
2. 59 In addition, part of the package relates to legislative change in effect reducing the scope of the ATE insurance market. In particular, the proposal to introduce QOCS in personal injury claims would remove or substantially reduce the need for ATE insurance, as the claimant would no longer be exposed to the defendant's costs in relation to costs which this reform applies to. This would not apply to costs incurred by the defendant after a Part 36 offer has been made by the defendant and where the claimant is unable to beat this Part 36 offer. In this case, the claimant would remain liable for the defendant's costs.
2. 60 We cannot calculate the exact scale of any reduction in overall net income and levels of business. It is likely to depend on each individual firm and the products it is viable for them to provide in future. In addition to a reduction in business volumes, there might also be implications for profit margins. For example, this might stem from increased downward pressure on ATE insurance premiums and from increased competition in relation to these. There might also be increased pressure on ATE insurance providers to find increased efficiencies in their operations.
2. 61 As for legal services providers, from a macroeconomic perspective if all markets are considered to adjust and clear efficiently enough, then if there was a reduction in the resources required on the supply side in one particular market, this may lead to those resources being redeployed in other particular markets. As a result, the providers affected would incur adjustment costs. The levels of income and profitability associated with those resources might also differ in the new market compared to the initial market.
2. 62 In this instance, the reforms would involve ATE insurance providers incurring adjustment costs. This would relate to them engaging in other types of case or other types of work. The nature and extent of this adjustment and the associated costs are not known. In the absence of such evidence we are unable to conclude that there would be an ongoing change in income or in profitability for those providers affected. There is a risk that this might be so.
2. 63 In addition, ATE insurance providers who remain in the CFA market may incur other adjustment costs as a result of familiarisation with the new arrangements in the CFA market and with any changes in market dynamics. This may especially be the case in clinical negligence where there may be a power to permit recoverability of the ATE insurance premium for expert reports. There might also be an ongoing increase in administrative burdens for example as a result of negotiating ATE insurance premiums with clients.
2. 64 In order to monetise the aggregate impact on ATE insurance providers we would need to know: the current volume and profitability of ATE insurance work; how the volume and profitability of this work would change in future; the extent of any surplus resources and where else they would be deployed in the economy; the adjustment costs associated with this redeployment including the duration of adjustment; and how the output and profitability of those resources would differ compared to now. We do not hold robust evidence on these factors.
2. 65 Annex A incorporates data on current ATE insurance premiums in different types of personal injury case. However, due to the data limitations outlined above, we are unable to model the expected impact on ATE providers. Behavioural responses are also a key driver here. For example, the more risk averse claimants are, especially in relation to the potential Part 36 costs risk, they are more likely to take out ATE insurance. The handling of disbursement costs by claimants, claimant lawyers, defendants and ATE providers will also have a significant impact, as it may be that ATE is a necessary financial vehicle for some claimants to support their disbursement costs during the claim, or disbursement cost risk if liability has not been admitted. We do not have robust evidence from the consultation responses as to how disbursement costs and cost risks are likely to be dealt with in the future.
2. 66 As in the context of legal services providers, the loss to ATE insurance providers may be outweighed by the saving to defendants, who would save on the full ATE insurance premium in each case. Furthermore, it is expected that any gain to defendants would be ongoing, however,

the potential cost to ATE insurance providers would be during the transition period only, unless profitability is lower in any new market compared to the initial market.

#### *Other service providers including claims management companies*

2. 67 Other service providers who would be impacted by the proposals include claims management companies, experts, costs draftsmen, and others providing legal support services.
2. 68 Of these, claims management companies may be one of the most affected groups. Claims management companies provide an introduction service for legal services providers, particularly in the area of personal injury claims, for a referral fee. Most claimants introduced in this way are funded by CFAs. Without this referral service, legal services providers might otherwise devote resources to attracting business and marketing themselves. If the reforms lead to potential claimants being less inclined to bring claims, or CFA lawyers being less inclined to take certain cases on, this might also lead to a reduction in business for claims management companies or to claims management companies having to spend more on advertising to attract the same level of claims.
2. 69 A similar consideration applies to experts and to other service providers whose business is related to the volume of cases.
2. 70 To some extent claims management companies might be viewed as outsourced service providers. It is possible that claims management companies (and other outsourced service providers) offer a more efficient means of attracting business for legal services providers, that some legal services providers make only limited use of claims management companies (and other outsourced service providers), and so the reforms may generate an incentive for legal services providers to improve efficiency and to make greater use of claims management companies (and other outsourced service providers). If so this might offset the reduction in business for claims management companies (and other service providers) associated with reduced case volumes.
2. 71 Another possible impact for claims management companies might relate to any possible reduced profitability of legal services providers. It is possible that referral fees might be a function of the profitability of legal services providers. If so then it is possible that there might be downward pressure on referral fees as a result of the reforms. This might impact upon the nature and type of services provided by claims management companies, and might lead to claims management companies finding other efficiencies or moving into other markets.
2. 72 Some claims management companies also offer ATE insurance to claimants and may receive a brokerage fee for doing so. If fewer claimants in the future require ATE insurance, this may result in reduced revenues for some claims management companies.
2. 73 The net overall impact on claims management companies and other service providers is ambiguous - it depends upon a number of market dynamics and behavioural responses. It is not possible to look only to changes in volumes of work for these companies, for changes in profitability must also be known.
2. 74 As above, in order to monetise the aggregate impact on a group of service providers we would need to know: the current volume and profitability of their work; how the volume and profitability of this work would change in future; the extent of any surplus resources and where else they would be deployed in the economy; the adjustment costs associated with this redeployment including the duration of adjustment, and how the output and profitability of those resources would differ compared to now. The data received over the consultation period did not extend to providing data on other service providers, including claims management companies.

#### *Her Majesty's Courts and Tribunals Service (HMCTS)*

2. 75 In accordance with HM Treasury requirements, HMCTS civil fee income aims to cover HMCTS costs (net of the cost of providing fee remissions) without making a surplus or a loss.
2. 76 The reform package is likely to lead to a reduced number of cases at the margin, and perhaps also to more cases involving litigants in person. Litigants in person are considered on average to have the same cost implications for HMCTS as those who use legal representatives.



2. 77 If there is a reduced volume of court cases then if fees per case stay the same there would be reduced total fee income. In order for overall HMCTS costs recovery to remain the same, HMCTS overall costs would need to reduce accordingly. It is unlikely that any such adjustment would lead to a reduction in fixed costs such as a reduction in HMCTS capacity (e.g. staff numbers and estate). This is because the impacts are likely to be spread across the estate and therefore might have a limited effect in each area.
2. 78 Alternatively, if HMCTS overall costs remained the same, for example if they could not be reduced due to indivisibilities, and if case volumes fell, then in order to maintain the same level of overall cost recovery, the fees charged per case might rise. Any increase in fees would be met by claimants and defendants (depending upon which party is successful). There are no intentions at this stage to increase HMCTS fees per case as a result of these reforms.
2. 79 On the other hand, if both HMCTS overall costs and HMCTS fees per case remained the same, then, any reduced volume of cases may lead to reduced overall cost recovery, depending on changes to the HMCTS case backlog.
2. 80 If HMCTS overall costs remained the same, then a reduced volume of cases may be associated with reduced backlogs and waiting times or with other improvements in service standards. This could also bring forward fee income from other cases, so maintaining a neutral cash flow impact. If this was not the case then the implication would be that HMCTS productivity would be lower.
2. 81 Which of these outcomes emerges is difficult to predict. This would depend upon the extent of any reduction in the volume of cases at local level, which is unknown, and on how this is managed by local court managers.
2. 82 The position might be complicated further if there was a change in case duration, as might occur for example if cases were settled more quickly or if fewer legal resources were devoted to each case, potentially making hearings in court longer.
2. 83 For the purpose of this Impact Assessment, in the absence of specific evidence to the contrary, it has been assumed that the overall net impact on HMCTS might be broadly neutral, but that there are risks of other outcomes emerging as outlined above. Indicative evidence highlights that the vast proportion of cases settle before they reach a court hearing.

### *Trades Unions and other membership organisations*

2. 84 Where trades unions and other membership organisations fund a case on behalf of their members and are successful they would no longer be able to recover the 'self insurance element' from the losing party. This 'self insurance element' covers such bodies against the risk of paying the other party's costs in unsuccessful claims.
2. 85 The proposals for QOCS should mean that the risk of having to pay adverse costs in personal injury claims is reduced. The QOCS proposal would not apply after a part 36 offer has been made. Therefore trades unions and similar bodies would still be liable to pay the defendant's costs under Part 36 if they refused but then did not beat the defendant's offer at trial.

### *Distributional costs*

2. 86 The proposals may lead to some claimants not pursuing cases in future or litigating in person, in particular claimants with weaker cases, claimants with damages which are low compared to the legal costs involved, or claimants seeking a remedy other than damages.
2. 87 Abolishing the recoverability of CFA success fees and ATE insurance premiums means that claimants in future might incur costs as a result of successfully pursuing cases where they suffered damage or losses through no fault of their own. Currently claimants funded by CFAs generally do not incur any such costs.
2. 88 The introduction of QOCS in personal injury claims would lead to defendants incurring losses when successfully defending claims against them which might be ill founded. This proposal might also encourage an increase in spurious low value claims.
2. 89 Therefore, in distributional terms defendants are likely to be better off overall and CFA claimants are likely to be worse off overall. Claimants might be individuals and defendants might be

insurers, businesses (which might be insured against liability claims), local authorities and central government bodies including the NHS. Ultimately any gains to defendants might filter back to their customers and to those who otherwise finance them such as taxpayers, who might gain in future.

2. 90 The overall distributional position is unclear in the sense that there is no objective to favour individuals at the expense of business, insurers, local authorities or other government bodies per se.
2. 91 If there was an objective to ensure that the impacts of the reforms fall relatively evenly between claimants and defendants then some of the reforms might support this. In particular the proposals to increase general damages by 10% in claims for civil wrong and to introduce QOCS in personal injury claims would specifically benefit claimants in these types of case at the expense of defendants. The proposal to increase rates for litigants in person might also have this effect.
2. 92 There is no distributional objective in relation to the impacts on litigants (claimants or defendants) and the impacts on service providers (legal service providers, ATE insurers and other service providers).
2. 93 It is assumed that there will be some cases where it may be difficult to secure CFAs but that individual cases will continue to receive legal aid where necessary for the UK to meet its international and domestic legal obligations. This is currently subject to a separate parallel review.

#### *Wider social and economic costs*

2. 94 Overall the package of proposals should lead to improved economic efficiency. Within this package some proposals which have distributional impacts may be associated with reduced economic efficiency.
2. 95 In particular, the proposal to increase general damages by 10% in claims for civil wrong claims would weaken the incentives (coming from other proposals) on claimants to put downward pressure on legal costs. These incentives are associated with the proposals to abolish recoverability of CFA success fees in particular, and increasing general damages by 10% in certain claims would work against them.
2. 96 The QOCS proposal for personal injury claims would in many cases be associated with other economic inefficiencies. This proposal may lead to defendants settling unmeritorious claims where doing so was cheaper than defending the claim. This proposal might also lead to an increase in the volume of such claims, which are likely to be lower value claims.

## **Benefits of Option 1**

### *Claimants*

2. 97 In general many of the benefits to claimants mirror the costs to defendants or to service providers.
2. 98 The cap on CFA success fees in personal injury claims and market forces may lead to claimants being able to agree lower success fees with their CFA lawyers; the cap may provide a safeguard for claimants who are less able to negotiate effectively.
2. 99 The QOCS proposal in personal injury claims would reduce exposure to defendant's costs, providing claimants with direct financial benefits, and would encourage defendants to make an early reasonable Part 36 offer. This proposal might also encourage claimants to make more claims, especially lower value claims. This would apply to all personal injury cases, not just those involving CFAs.
2. 100 Proposals which increase general damages by 10% would provide claimants with direct financial benefits and would apply to all cases for civil wrongs, not just those involving CFAs.
2. 101 Claimants are assumed to select a DBA instead of a CFA if they consider that this is beneficial to them. If this initial judgement was well founded then claimants may be better off under a DBA.

2. 102 Reversing the *Carver v BAA* case would provide claimants with greater certainty about when their costs can be recovered from defendants. Reversing the *Carver v BAA* case might, in some cases, lead to claimants being able to recover their costs from defendants in more cases.
2. 103 Proposals to increase the penalty on defendants who refuse but then do not beat a claimant's Part 36 offer at trial, should encourage defendants to accept reasonable claimant offers, potentially leading to earlier settlements and reduced costs.
2. 104 Uprating the litigant in person hourly rate would benefit claimants who do not appoint a legal representative.
2. 105 The proposal to tighten the proportionality rules might benefit claimants as they might be liable for less of the defendants' costs (in cases where this applies).
2. 106 Annex A to the Impact Assessment highlights that, in some cases, claimants with a case brought on a CFA may benefit through taking home higher damages than currently. This is the case in situations where the 10% increase in general damages outweighs the costs to claimants of non recoverability of success fees and ATE insurance premiums. However, the annex is limited in that we are not able to quantify what future success fees and ATE insurance premiums may be.
2. 107 Claimants who do not bring their case on a CFA would also benefit from higher general damages; however, we do not have the available data to quantify this impact.

### *Defendants*

2. 108 In general, many of the benefits to defendants mirror the costs to claimants or to service providers.
2. 109 Abolishing the recoverability of CFA success fees and ATE insurance premiums would provide direct financial benefits to defendants. However, this benefit of recoverability might not apply in relation to ATE insurance premiums for disbursements in clinical negligence claims which may still be recoverable in the future. Overall, the changes to recoverability might lead to claimants pursuing fewer weaker cases or cases where no damages are claimed and claimants might also settle earlier and for lower amounts.
2. 110 The cap on CFA success fees in personal injury claims might lead to CFA lawyers no longer taking more risky cases on behalf of claimants, leaving claimants to litigate in person or consider alternatives. This might benefit defendants.
2. 111 The decision by claimants on whether to use a CFA or DBA is assumed to have no impact in aggregate on defendants.
2. 112 The proposal to tighten the proportionality rules might benefit defendants as they might be liable for less of the claimant solicitors' costs (in cases where this applies).
2. 113 Annex A highlights the benefit to defendants of abolishing recoverability of CFA success fees and ATE premiums in the sample of cases provided. Unlike in assessing the impacts on other groups, for defendants the benefit relates to the saving of CFA success fees and ATE premiums at their current levels. This is one reason that this benefit to defendants is likely to outweigh costs to other legal services and insurance providers.

### *Legal services providers*

2. 114 In general the benefits to legal service providers from increased levels of business or income would mirror the costs to claimants and defendants who use, and pay for, these legal services.
2. 115 In this instance whilst the reforms are expected to lead to reduced overall net levels of legal services business some elements of the package might mitigate this to some extent and support higher levels of business than would otherwise be the case. In particular the proposed 10% increase in general damages in civil wrong claims should encourage claimants to pursue more of these cases and to pursue them with increased legal resources than would otherwise be the case. The qualified one way cost shifting proposal in personal injury claims might also encourage claimants to pursue a greater volume of claims.

### *Insurance providers*

2. 116 In general the benefits to insurance providers from increased levels of business or income would mirror the costs to claimants and defendants who use, and pay for, these insurance services.
2. 117 In this instance whilst the reforms are expected to lead to reduced overall net levels of ATE insurance business, some elements of the package might possibly mitigate this to some extent and support higher levels of ATE insurance business. This might lead to higher case volumes, some of which might take out ATE insurance cover. In particular, the proposed 10% increase in general damages might encourage claimants to pursue more cases for civil wrongs and may make ATE insurance cover more affordable for claimants. The power to allow recoverability of ATE insurance premiums for expert reports in clinical negligence claims is designed to help claimants bring such cases. These mitigating effects might only be marginal.

#### *Other service providers including claims management companies*

2. 118 As explained in the costs section, the impact on claims management companies, experts and other service providers is ambiguous and depends upon a number of market dynamics and behavioural responses. The impact on different providers may also vary. For example, it is possible that the reforms might lead to increased outsourcing by legal service providers. If so, claims management companies and other service providers might benefit from greater volumes of business. Any such increase in business would need to be balanced against the reduction in business associated with lower total overall case volumes. Similarly, cost negotiators may benefit if more solicitors decide to outsource costs negotiation work. Other service providers including experts may not benefit in the ways outlined above. Changes in the profitability of legal services providers might also impact upon the position of other service providers, as explained in the costs section.

#### *HMCTS*

2. 119 As explained in the costs section, in the absence of firm evidence on the possible reduction in case volumes or on the possible reduction in case duration, this Impact Assessment assumes that the overall net impact on HMCTS might be broadly neutral, but other outcomes may emerge as outlined in the costs section.
2. 120 A potential positive impact would be a reduction in court backlogs and improved quality of service for court users.

#### *Trades Unions and other membership organisations*

2. 121 Where trades unions and other membership organisations pursue a case on behalf of their members and are not successful they would face a reduced risk of having to pay the other party's costs. This would apply to the extent that QOCS applies. As explained, QOCS would not apply after a Part 36 offer has been made. Therefore trades unions and similar bodies would still be liable to pay the defendant's costs under Part 36 if they refused but then did not beat the defendant's offer at trial. This position existed before the recoverability of CFA success fees and ATE insurance premiums was introduced.

#### *Distributional benefits*

2. 122 The proposals should tackle the current situation whereby claimants may generate significant and excessive costs which are passed to defendants in successful cases and which may pressure defendants to agreeing excessive damages for the sake of avoiding increased legal costs.
2. 123 This view may relate to the fact that increased costs for defendants (insurers, businesses, local authorities, government bodies including the NHS) are ultimately borne by their customers and by those who otherwise fund them, including taxpayers.
2. 124 As explained, in distributional terms defendants are likely to be better off overall and claimants are likely to be worse off overall. Claimants are more likely to be individuals and defendants might be insurers, businesses (which might be insured against liability claims), local authorities and central government bodies including the NHS. Ultimately any gains to defendants might filter

back to their customers and to those who otherwise finance them such as taxpayers, who might gain in future.

2. 125 The overall distributional position is unclear in the sense that there is no objective to favour individuals at the expense of business, insurers, local authorities or other government bodies per se.
2. 126 If there was an objective to ensure that the impacts of the reforms fall relatively evenly between claimants and defendants then some of the reforms might support this. In particular the proposals to increase general damages by 10% in claims for civil wrong and to introduce QOCS in personal injury would specifically benefit claimants in these types of case at the expense of defendants. The proposal to increase rates for litigants in person might also have this effect.
2. 127 There is no distributional objective in relation to the impacts on litigants (claimants or defendants) and the impacts on service providers (legal services providers, ATE insurers and other service providers).

#### *Wider social and economic benefits*

2. 128 Overall the package should be associated with improved economic efficiency. In particular, fewer resources would be used, freeing up these resources for alternative uses which may generate social and economic benefits.

### **Net impact of Option 1**

#### *Claimants*

2. 129 In line with the policy objectives of the proposals, claimants using a CFA lawyer should be worse off overall as a result of being more exposed to the legal costs which they generate. Claimants are likely to be worse off financially due to paying CFA success fees and ATE insurance premiums. In turn this might lead to cases settling for less (in particular CFA funded cases), to claimants pursuing fewer cases, and the cap on success fees might also lead to CFA lawyers no longer taking on higher risk cases. Claimants would also incur increased search and negotiation costs from the new arrangements.
2. 130 The 10% uplift in general damages in claims for civil wrong and the introduction of QOCS in personal injury claims would offset these impacts although it is not clear to what extent. In non CFA funded cases of this type there would be clear benefits to claimants.
2. 131 Other proposals might have a broadly neutral impact. Claimants would gain from increased litigant in person rates, which might help mitigate against CFAs no longer being used in cases. But losing claimants might lose out from the proportionality reforms. The reversal of *Carver v BAA* might have a positive impact in some cases.

#### *Defendants*

2. 132 Defendants should be better off overall as a result of the reforms. Defendants would no longer pay CFA success fees and ATE insurance premiums. There might be fewer cases and cases might settle for lower amounts. This would be an ongoing saving, as defendants are not assumed to go through any further adjustments.
2. 133 These benefits would be offset to some extent by the 10% uplift in general damages in civil wrong claims and by the introduction of QOCS in personal injury claims. The latter in particular would generate particular costs for defendants. Defendants facing claimants using non CFA funding may in theory be worse off overall from the package of proposals.
2. 134 The other proposals might have a broadly neutral impact. Defendants would lose from increased litigant in person rates but might gain from the proportionality reforms. The reversal of *Carver v BAA* might have an adverse impact for defendants in some cases.

#### *Legal services providers*

2. 135 It is expected that the reforms would lead to an overall reduction in the level of income and business for legal services providers. Within this overall position, some reforms should lead to a reduction in legal services business and others would have the opposite effect and would mitigate this to some extent.
2. 136 In general, any net overall increased costs to legal service providers from reduced overall levels of business or income would mirror the gains to claimants and defendants who use, and pay for, these legal services.
2. 137 On the understanding that, from a macroeconomic perspective, all markets adjust and clear reasonably efficiently then if there was a reduction in the resources required on the supply side in one particular market this may lead to those resources being redeployed in other particular markets. As a result the providers affected would incur adjustment costs.
2. 138 In this instance, there is insufficient evidence to identify exactly what this adjustment would involve. In the absence of such evidence we are unable to conclude that there would be an ongoing change in income for those affected.

#### *ATE insurance providers*

2. 139 It is expected that the reforms would lead to a reduction in the overall net level of ATE insurance business, which might be substantial and may affect levels of future ATE insurance coverage. The proposal to allow recoverability of ATE insurance premiums for expert reports in clinical negligence claims might mitigate this to some extent.
2. 140 In general, any costs to insurance providers from reduced levels of business or income would mirror the gains to claimants and defendants who use, and pay for, this insurance.
2. 141 On the understanding that, from a macroeconomic perspective, all markets adjust and clear reasonably efficiently then if there was a reduction in the resources required on the supply side in one particular market this may lead to those resources being redeployed in other particular markets. As a result the providers affected would incur adjustment costs.
2. 142 In this instance there is insufficient evidence to identify exactly what this adjustment would involve. In the absence of such evidence we are unable to conclude that there would be an ongoing change in income for those affected.

#### *Other service providers including claims management companies*

2. 143 The impact on other service providers is ambiguous. They may experience a reduction in business volumes as a result of the overall reduced volume of cases. This may be offset to some extent if other services provided in effect have been outsourced by legal services providers, and if the reforms generate an incentive for the latter to engage in more outsourcing.

#### *HMCTS*

2. 144 As explained above, in the absence of firm evidence on the possible reduction in case volumes or on the possible reduction in case duration, this Impact Assessment assumes that the overall net impact on HMCTS might be broadly neutral, but that there are risks of other outcomes emerging. These other outcomes include impacts on overall HMCTS costs recovery, on overall HMCTS productivity, on case backlogs, and on waiting times and service standards. Whether any of these impacts emerges would depend upon how the implications of these reforms are managed at local court level. There are no plans at this stage to change court fees as a result of these reforms.

#### *Trades Unions and other membership organisations*

2. 145 Where trades unions and other membership organisations fund a case (on behalf of their members) they might be worse off where they are successful but better off to some extent where they are unsuccessful.

#### *Distributional impacts*

2. 146 In distributional terms defendants are likely to be better off overall and CFA claimants are likely to be worse off overall. Claimants might be individuals and defendants might be insurers, businesses (which might be insured against liability claims), local authorities and central government bodies including the NHS. Ultimately any gains to defendants might filter back to their customers and to those who otherwise finance them such as taxpayers, who might gain in future.
2. 147 The overall distributional position is unclear in the sense that there is no objective to favour individuals at the expense of business, insurers, local authorities or other government bodies per se. Equally there is no distributional objective in relation to the impacts on litigants (claimants or defendants) and the impacts on service providers (legal services providers, ATE insurers and other service providers).

### *Wider social and economic impacts*

2. 148 Wider social and economic costs are expected to be positive. There should be wider benefits from the increased economic efficiency associated with the proposals. Some particular proposals, however, are likely to be associated with reduced economic efficiency, in particular the proposal to increase damages by 10% in civil wrong claims and to introduce QOCS in personal injury claims.

### **Summary of One In One Out (OIOO) position**

2. 149 The package of reforms to which this Impact Assessment relates does not introduce any new regulation. The package is expected to lead to fewer overall resources being used to resolve civil disputes, and to increase economic efficiency overall.
2. 150 This may involve reduced levels of business income and profitability for legal services providers, claims management companies, ATE insurance providers, experts and other service providers. At a macroeconomic level where fewer providers are required on the supply side to provide goods and services in one particular market, assuming that all markets clear and adjust efficiently enough, those providers should reallocate to other particular markets. Adjustment costs might be incurred, and the levels of business income and profitability relating to those providers in the new markets might differ. Other adjustment costs might be incurred by providers who remain in the CFA market as they get used to the new arrangements and market dynamics, and ongoing administrative burdens might also rise. Insufficient information exists to monetise the aggregate impacts.
2. 151 On the other hand, the package of reforms is also expected to reduce costs for business, in particular in cases where the defendant is a business such as an insurance company, or other businesses which might be self-insured or uninsured. Defendants are expected to gain from the reforms as a result of no longer being liable for CFA success fees and for ATE insurance premiums. Claims might also be settled earlier for lower amounts, although this may be offset by the 10% increase in general damages. Insufficient information exists to monetise the aggregate impacts.
2. 152 The gains to defendants from no longer paying CFA success fees and ATE insurance premiums should outweigh the costs to claimants of paying these fees and premiums, as we would expect lower fees and premiums in the future (for those cases that continue to be brought on a CFA). The analysis above concludes that, in aggregate, claimants would not pick up all of these costs but instead might pursue fewer cases and might pay lower fees and premiums. This would equate to the reduced income facing all service providers in aggregate, although in these cases a saving would be seen to defendants.
2. 153 As such, if all defendants were businesses then the proposals would generate an 'Out', as business would be better off overall. However in practice defendants are not always businesses, and in any case this gain to defendants is offset by other parts of the reform package such as the 10% increase in general damages and elements of QOCS.
2. 154 These main impacts are shown in the table below. This shows that the Outs may well outweigh the Ins, assuming that many defendants are businesses (such as insurers, or firms which self insure), and excluding the potential second round effects such as the impact on claims

management companies. For this reason, we consider that the overall impact on business overall is likely to be broadly neutral.

Outs	Ins
<p>- Defendants save CFA success fees and ATE premiums (at their current levels) in <i>all cases</i> currently brought on a CFA where damages are paid. (As defendants will save these on current volumes and at current levels, this benefit to defendants will outweigh the loss to CFA lawyers and ATE insurers).</p>	<p>- In cases currently on a CFA where damages are paid, CFA lawyers lose total CFA success fee in those cases that may no longer be brought, and may see a lower success fee than currently in cases that continue to be brought.</p> <p>- ATE insurance providers may lose some, or all of their premiums depending on whether cases continue to be brought and dependent on claimant and ATE insurance provider behaviour.</p> <p>- Defendant pays an additional 10% in general damages in all cases, not just those brought on a CFA.</p> <p>- Under QOCS, in cases where defendants successfully defend personal injury claims, they may recover fewer costs than currently.</p>

2. 155 This table shows that the costs to service providers relate to increased economic efficiency and are likely to have positive implications for economic growth; they do not relate to an increase in regulatory burdens as such. For example, the reforms do not require business to engage in additional activities or provide additional safeguards. In several respects, the reforms introduce additional market freedoms, for example through removing the restriction on solicitors and barristers on the use of DBAs, and through the litigants in person policy.

### 3. Enforcement and Implementation

3. 1 The assumption for all the proposals is that they will be implemented in autumn 2012. Some of the proposals will require primary legislation and some can be taken forward in secondary legislation (including amendments to the Civil Procedure Rules). Once implemented, it is anticipated that the changes will be monitored as set out in the Post Implementation Review Plan set out below.



## 4. Specific Impact Tests

### Competition Assessment

4. 1 The preliminary impact assessment stated that the overall impact of the proposals is likely to increase competition between legal firms. With CFAs, claimants are likely to compare the level of success fees being charged by different solicitors. The introduction of DBAs may enhance the ability of solicitors and barristers to compete.
4. 2 We specifically asked consultation respondents to comment on this competition assessment; analysis of responses are available in the main government response document. Opinion was split between those who agreed that the proposals would increase competition between claimant law firms, and those who were concerned about the competition impact, particularly on the ATE insurance market.
4. 3 Of those who agreed that the proposals would increase competition, some argued that defendant legal services market is already very competitive, and that abolishing recoverability of CFA success fees, and allowing DBAs in litigation would enhance the incentive for claimant lawyers to compete.
4. 4 Others were concerned about the impact of the proposals on ATE providers, arguing that abolishing recoverability will severely reduce their income. However, we do not consider this to impact competition. Instead the reforms may lead to increased competition in the ATE insurance market as claimants shop around. Some also claimed that claimants should not be encouraged to shop around for a lawyer based only on the price of the success fee, and that quality of service was equally, if not more important. Our proposals do not prohibit claimants from shopping around based on quality and price.

### Small Firms Impact Test

4. 5 Small firms will be affected by these proposals, as claimants and defendants in civil litigation, where the impact would be the same as that set out in the main impact assessment. Small firms would benefit from the increase in hourly rates for litigants in person, and would be able to recover a significantly higher hourly rate for work done in preparing their case than is currently permitted.
4. 6 The proposals for reform of CFAs might impact disproportionately on small legal firms who rely heavily on civil cases funded by CFAs as part of their business model. These firms could face a reduced income if they are no longer able to charge 100% success fees in successful cases. On the other hand, allowing small legal firms to enter into DBAs will allow them to offer a wider range of funding agreements.
4. 7 A body representing the interests of small businesses indicated that they agree with our assessment of the impact on small businesses.

### Carbon Assessment

4. 8 We do not anticipate any significant carbon impacts as a consequence of these proposals.

### Other Environment

4. 9 We do not anticipate any significant environmental impacts as a consequence of these proposals.

### Health Impact Assessment

4. 10 We do not anticipate any direct health impacts from these proposals.

### Human Rights

4. 11 These proposals are compatible with the Human Rights Act 1998.

**Justice Impact Test**

4. 12 The justice impacts of these proposals have been outlined in the main impact assessment.

**Rural Proofing**

4. 13 This policy is not likely to have a different impact in rural areas.

**Sustainable Development**

4. 14 We do not anticipate any significant impact on the principles of Sustainable Development as a consequence of these proposals.

**Privacy Impact Test (an MoJ Specific Impact Test)**

4. 15 These proposals will not have an impact on privacy.

**Equality Impact Assessment (EIA)**

4. 16 The EIA has been conducted separately; and is included at Annex C.

# Post Implementation Review (PIR) Plan

**Basis of the review:**

It is intended to review each policy between three and five years after the implementation date.

**Review objective:**

To ascertain whether the proposals have had the requisite impact of making the costs of civil litigation more proportionate.

**Review approach and rationale:**

It is envisaged that the MoJ would conduct an impact evaluation of the Jackson proposals after three to five years of implementation. The objective would be to assess the impact on civil litigation costs of implementing the Jackson proposals. This may require the collation and analysis of quantitative data on the number, type and size of cases, the amount of damages awarded and claimant and defendant costs. The size of the review would be subject to budgetary approval and resources. It may be that the MoJ would need to work in partnership with claimant and defendant representative group for the collection and evaluation of this data.

**Baseline:**

Due to the lack of consistent, routinely collected data covering private funding arrangements, we will rely on the review of civil costs carried out by Lord Justice Jackson, published in 2009, other publicly available data and data provided as a result of the consultation as our baseline.

**Success criteria:**

The main objective of seeking to implement the Jackson proposals is to ensure that parties who need to bring or defend a claim are able to do so, including through the courts where necessary, but at proportionate costs. The policy would be deemed successful if the costs of necessary civil litigation become more proportionate and necessary claims can still be brought.

**Monitoring information arrangements:**

We rely on data provided by stakeholders, as there is no routine collection of data covering the costs of litigation in privately funded cases. However, we will continue working with claimant and defendant representative groups to help collate the relevant data to evaluate the impact of our policy proposals in future.

**Reasons for not planning a PIR:**

n/a

## Annex A: Data Analysis – Policy impacts

1. 1 In this annex we model as far as possible the overall financial impact of the final policy package outlined in this impact assessment on claimants and defendants in personal injury cases, when the claimant is using a Conditional Fee Arrangement (CFA).
1. 2 We use data received over the consultation period, however, as discussed in the impact assessment, there are limitations on what we are able to model given the limited data received and the information gaps. Specific caveats must also be taken into account when considering the figures, and these are outlined below.
1. 3 This annex assesses the impacts of i) removing recoverability of the success fee and After the Event (ATE) insurance premium in CFA cases, ii) a cap on success fees of 25% of general damages (we are unable to model the cap on all damages that do not relate to future care and loss as we do not have the necessary detailed information), and iii) a ten percent increase in general damages (that is damages for non-pecuniary loss such as pain and suffering and loss of amenity) for civil wrongs. We focus only on expected impacts to claimants and defendants, and do not quantitatively assess the impacts on other affected groups, for example claimant lawyers or ATE insurance providers. Our reasons for limiting the analysis to these policies and these groups are outlined in points 1.12 – 1.23 of this annex.
1. 4 Our analysis is based on one of the largest and most comprehensive datasets we have received over the consultation period - a dataset from Jaggards legal costs consultants. Jaggards is a large supplier of legal costs services, negotiating costs claimed between defendants and claimant groups (claimants, their lawyers, ATE insurers).
1. 5 The dataset received from Jaggards includes all cases settled by Jaggards between January 2009 and December 2010 (i.e. two full years worth of data) and includes 30,661 cases in total – 3,594 Public Liability (PL); 5,188 Employer Liability (EL) and 21,879 Road Traffic Accident (RTA). The EL dataset includes EL accident claims only, and excludes EL disease claims.
1. 6 EL disease data was not provided in this dataset as relatively few EL disease cases were recorded, and a broad range of outcomes were seen, meaning that the sample would not necessarily provide representative figures for this type of case.
1. 7 For PL, EL accident and RTA claims, we are confident that a complete dataset has been provided by Jaggards, rather than a subset of cases that could bias our analysis. Further work has not been done to ascertain whether the cases within the sample are representative of all PL, EL accident and RTA cases settled more widely during this time period.
1. 8 However, the dataset includes data from a wide range of sources – approximately 90% from five large companies, and approximately 10% from a large number of smaller companies, utility companies or lawyers using Jaggards on an ad hoc basis. The number of sources in the dataset is likely to make it more representative of the wider claims brought during this time period rather than basing the analysis on data from a single source.
1. 9 Comparing the size of the dataset used to total cases registered to the Compensation Recovery Unit in 2009/10, our dataset represents approximately 4% of PL claims, 7% of EL claims, and 3% of RTA claims. However, as the dataset includes two years worth of data, in reality it represents a smaller proportion of the total claims registered in 09/10 than this.

### Analysis – the theory

1. 10 Ideally, from an analytical point of view we would quantitatively assess all impacts associated with the full policy package. This would allow us to assess the outcomes for all affected groups, and reach a more precise conclusion of the net impact of the policies, especially in areas where different aspects of the policy package work in different directions.

1. 11 In reality, limitations in the data available mean that a full quantitative assessment of the impacts of the policy package is not possible. This is explained, as follows:

Require clients to pay Conditional Fee Agreement (CFA) success fees and the introduction of a cap on success fees

1. 12 We have information on current average success fees in our dataset. Within this, we are able to set out how far average success fees may fall (if at all) if they are capped at 25% of general damages. We are also able to assess how much claimants' general damages may change subject to paying the success fee (and in combination with a 10% increase in general damages).
1. 13 However, the evidence obtained from the consultation does not enable us to quantify accurately how success fees might change in future, aside from the impact of the cap. This would depend upon behavioural considerations such as how clients negotiate CFA fees in future and how the market competes for business.
1. 14 For this reason, we are only able to consider the impact on claimants and defendants, as the impact on CFA providers depends on how success fees change, and upon the volume of cases brought on a CFA or other funding sources. This is a limitation in our analysis of the potential impact on claimants – in reality the impact would be significantly affected by how success fees may change in future.
1. 15 We do not include any impacts on claimants who bring their cases through other funding sources.

Require clients to pay After the Event (ATE) insurance premiums

1. 16 We have information on average ATE insurance premiums in our dataset. This allows us to quantify the potential saving to defendants of no longer having to pay the ATE insurance premium. However, we cannot assess the full impact on claimants as average premiums are likely to be lower in the future, and we do not know what future take-up of ATE insurance may be. The evidence obtained from the consultation does not enable us to quantify accurately enough how the average premium might change. This would depend upon behavioural considerations such as how clients negotiate insurance premiums in future and how the market competes for business.
1. 17 For these reasons, we are not able to quantitatively assess how ATE insurance providers may be affected.

Introduce qualified one way cost shifting (QOCS)

1. 18 This reform would no longer apply if a Part 36 offer was made which was not subsequently beaten. The main impact of the reform might be for parties to make early and reasonable Part 36 offers, as well as reducing the risk claimants will have to pay defendants' costs. The datasets received do not provide information on defendants' costs, or what they recover currently, hence it is not possible to assess the potential direct monetary impact of QOCS, nor the indirect impact through any effects on incentives.

Increase general damages by 10%

1. 19 The data below quantifies the impact of this proposal on average general damages, assuming that cases settle at the same stage, and for the same amount as currently (save the 10% increase).

Allow lawyers to enter Damages Based Agreements (DBAs)

1. 20 The extent to which DBAs would be used instead of CFAs is unclear. The payment rates which are negotiated in future between clients and lawyers in CFAs and in DBAs are also unclear. The evidence obtained from the consultation does not enable us to quantify these impacts on claimant lawyers, or claimants.

## Reforms to Part 36 procedures

1. 21 We do not know when reported costs have been affected by offers made under Part 36, or the impact of Part 36 on the reported costs. The fact that we do have a complete understanding of our baseline means that we cannot accurately assess how the Part 36 reforms may affect incentives and behaviour. This includes the reversal of *Carver vs. BAA*, where we also do not have sufficient information on cases that currently go to trial, or do not go to trial due to the uncertainty around the *Carver vs. BAA* judgment.

## Introduce a new proportionality test

1. 22 We do not have a breakdown of base costs and detailed knowledge of each case necessary to allow meaningful analysis of the impact of the new proportionality test.

## Uplift the litigant in person hourly rate

1. 23 The number of cases with litigants in person is not recorded accurately by court management information systems, nor the sums paid to litigant in persons. We also do not know how many claimants may look to litigate in person as a result of the reforms. Therefore, quantifying the impact of these proposals has not been possible.

## **Modelling the impact of CFA policies and a ten percent increase in general damages**

1. 24 As mentioned above, the analysis in this annex focuses on modelling the financial impact of the CFA policies and a ten percent increase in general damages. Therefore, the following components are modelled below in relation to cases where the claimant is on a CFA:
- i) No recoverability of success fees
  - ii) No recoverability of ATE premiums
  - iii) A cap on success fees of 25% of general damages (we are unable to obtain information about the value of all damages that do not relate to future care and loss)
  - iv) A 10% increase in general damages (assuming all general damages reported in the data set relate to pain, suffering and loss of amenity).
1. 25 Based on the dataset we are using, this analysis is carried out in relation to public liability claims, employer liability accident claims and road traffic accident claims.
1. 26 We compare the position for claimants and defendants after the reforms are implemented to the base case - the current position. The base case is different within different case types as a result of cost controls that currently apply in some cases in relation to recoverable costs and success fees. The table below highlights the current position for different case types:

<b>Case type</b>	<b>Current cost controls</b>
Public liability	No fixed recoverable costs or success fees
Employer liability (accident)	Unless a very high value case (>£500k), fixed success fees 25% if settled before trial; 100% of base costs if settled after trial
Road traffic accident (prior to April 2010)	Fixed recoverable costs linked to value of claim if case settles; unless a very high value (>£500k) fixed success fee – 12.5% of base costs if settled before trial; 100% of base costs if resolved at trial

Road traffic accident (RTA PI process from April 2010 – for claims up to £10,000	Fixed recoverable costs linked to the stage at which the case settles or goes to trial. Fixed success fees at 12.5% of fixed costs if case settles or 100% for stage 3 hearing costs
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1. 27 These different current cost control regimes in CFA cases provide one explanation as to why the impacts calculated are different in relation to different types of case. This is outlined in point 1.32 below. However, under the changes fixed recoverable success fees in RTA and EL claims will no longer apply and success fees in these cases in particular may therefore be higher or lower than presently.
1. 28 More generally, there are a number of caveats in this analysis that should be noted, and reasons that all figures should be interpreted with caution, as follows.
- i) This analysis only includes data from one dataset (although it includes a variety of sources). There could consequently be issues that the figures portrayed are not representative of all cases generally. Using figures from a single cost negotiator may be higher or lower than figures from other costs negotiators or solicitors.
  - ii) We are unable to obtain a complete evidence base as this would involve all solicitors in the market providing data, including data for areas outside of personal injury. Furthermore, not all data received from respondents to the consultation can be used as often the datasets are small, and the accuracy of datasets has to be verified. For example, parties may be selective in the data that they provide, making makes it difficult to draw general conclusions from the dataset e.g. if only claims over a certain value are supplied.
  - iii) We are unable to ascertain which cases, if any, in our dataset were resolved at trial. However, we expect the potential number resolved at trial to be low. Therefore, we assume our conclusions relate to those cases settled outside of court (whether proceedings were issued or not), as this makes up the majority, if not all of the claims analysed. The impact on those cases that go to trial may be very different depending on the nature of costs involved for these cases.
  - iv) Our dataset covers a time period during which the RTA process was implemented. As there were predictable success fees prior to the RTA process (at 12.5%), and this is the same predictable success fee that currently applies, we use this dataset, despite the fact that many of the claims recorded would have fallen under the old regime. As such, there is a risk that behavioural changes and other responses to the RTA process mean that using older data is not directly applicable to current RTA claims, and therefore we are basing our conclusions on an incorrect baseline.
  - v) We are unable to model how components of cost may change after the reforms, for example the ATE insurance premium. There are a number of reasons to expect ATE insurance premiums would change from their current levels. For example, we would expect premiums to be lower due to the fact that i) the premium should now include only a Part 36 defendant cost risk and the claimant disbursement risk, and not the defendant cost risk; ii) competition may drive premiums down; and iii) we would expect premiums to be paid in all cases where ATE insurance is taken out. This includes when the defendant is successful and does not pay out damages, which may not be the case currently. However, fewer claimants may take out ATE insurance, meaning that the overall pool of people taking it could be riskier. We would expect ATE insurance premiums overall to be lower than currently, although we are unable to provide a realistic assessment of how much lower as we cannot value any of these expected impacts. Consequently the figures detailed below could be to some extent misleading.
  - vi) Gaps in the available data mean that we are unable to make the necessary assumptions to model how behaviour by different parties may change as a result of the policies. This also means we are unable to quantitatively assess how different aspects of the policy package

may interact, and how different parties will respond to the behavioural responses of other parties.

vii) Part of the analysis uses average (mean) figures. This may be misleading as extreme data entries may not be representative of the overall picture. Similarly, looking simply at whether claimants would receive more or less general damages than currently could also be misleading as it does not provide any indication of how much their position has changed.

viii) The data reported as general damages may include, in some cases, past and future loss of earning, care and other special damages. This is because, in the case of lower value claims, it is often industry practice to record a global settlement, and therefore it is not possible to obtain more detailed information. We have therefore assumed that all damages reported as general damages refer to damages for pain, suffering and loss of amenity. We have also not addressed any behavioural responses that may arise when damages need to be separated into their specific components.

ix) The gain to defendants may be misleading as we have not been able to include the potential loss associated with QOCS i.e. that there may be some costs that defendants recover currently, but they will not be able to recover these in the future. We are not able to estimate this impact as we do not have any defendant cost information. Similarly, any loss to claimants should be interpreted with caution as we do not know whether claimants will out take ATE insurance or not in the future, and what the premiums may be (as outlined above).

x) Our results do not consider the impacts on claimants or defendants in situations where the claimant is not on a CFA.

xi) There are other caveats associated with specific calculations detailed in the table below. These should be considered in conjunction with the interpretation of the figures provided.

1. 29 Given the above, in our analysis we do not make any assessment as to how the volume of cases could change, nor make any assumptions as to how different components of costs could vary, for example the ATE premium. We also do not make any assessment of how outcomes, quality of service or other non-financial impacts could vary.

1. 30 The table on the following page highlights the analysis we have been able to undertake using the Jaggards dataset. All claims where general damages are less than £1,000, or greater than £100,000, have been excluded as such extreme claim values could potentially skew the analysis, as we are using average figures in some of the calculations. Those cases with general damages of less than £1,000 and special damages of less than £5,000 would also go into the small claims track.

1. 31 These exclusions means the total number of cases included in our analysis are:

- i) EL accident – 5,041
- ii) PL – 3,528
- iii) RTA – 21,089



## Results table

Impact assessment of CFA and general damages proposals in CFA cases	EL - Accident	PL	RTA	Notes and assumptions / caveats
Number of cases analysed	5,041	3,528	21,089	Number of cases analysed in our dataset.
Current average general damages	£10,436	£7,312	£4,348	Average general damages in our dataset.
New average general damages following a 10% increase	£11,479	£8,043	£4,782	10% uplift on the figure above. (Assumes all general damages relate to PSLA)
Average current success fee	£1,004	£1,455	£312	The success fee detailed here <b>excludes</b> VAT. We exclude VAT in the calculations that follow.
Average success fee after the reforms, assuming that future success fees will be the lower of current success fees or 25% of general damages	£880	£1,027	£284	We assume that all success fees will be within the cap after the reforms, and will be the lower of a 25% cap or the current success fee. Our calculations are based on the calculation of the 25% cap on all general damages, as we do not have available data on past loss, or future care and loss. This may understate the available success fee if past losses are excluded. More generally there is uncertainty around future success fees for other reasons, for example if there are any exceptions to the cap, or due to other potential changes e.g. to the mix of cases. As above, our calculation of the cap excludes VAT.
Percentage of cases where success fees would be lower than currently i.e. current success fee is greater than the cap	22%	52%	3%	Again these figures exclude VAT. The figures may give an idea of how the volumes of cases could be affected as success fees (profitability) are one factor which influences whether solicitors will take on a case or not. They should be interpreted with caution as it sensitive to the calculation of new success fees.
What % of cases does a 10% increase in general damages compensate for the success fee being non-recoverable, assuming that the success fee is the lower of the current level or the cap?	34%	15%	71%	Again, the potential issues around the success fee are relevant here.
With non-recoverability of the success fee, what will be the average impact on general damages taken home be compared to now?	-5%	-10%	Average general damages will be on average 1% higher	This calculation calculates the average reduction in general damages as a result of the new assumed success fee being deducted from current general damages plus 10%.
Average ATE premium currently	£594	£540	£303	

1. 32 The above analysis highlights that in PL cases would be most affected once the reforms are implemented whilst RTA claims would be least affected. EL claims are somewhere in the middle.
1. 33 One driver of this is likely to be predictable cost regimes in RTA cases, and to some extent in EL cases. However, other factors such as the average level of damages within our dataset, and the ratio of these damages to success fees and ATE insurance premia also drive our results. There are many factors that would affect the cost ratios between damages and the success fee or ATE premium further to any cost regime. These include factors such as the average risk of cases, or average spend on disbursements. We have not been able to go into this level of detail in our analysis.
1. 34 One necessary consideration, however, is how the conclusions differ with cases of different values. Our dataset includes a wide range of cases with general damages between £1,000 and £100,000 and it is not realistic to assume the approach is the same across the board. Looking at both the distribution of general damages in our dataset, and how much claimants are affected in cases of damages of different values, the following conclusions can be drawn:

Case type	Distribution of general damages	How conclusions change with the level of general damages
1. Employer liability	<p>Approximately 75% of general damages are under £10,000, and a further 10% between £10,000 and £20,000.</p> <p>There is a decreasing percentage of cases in each £10,000 tranche as damages increase.</p>	<p>Looking at the relationship between general damages, and the claimant position if the success fee is paid out of general damages, it appears that in general those claimants with lower general damages are worse off, and those with higher damages gain. This explains why the average figures make it appear that the increase in general damages may cover the success fee, but analysis of individual entries tells us differently. There are not many cases with high general damages where the claimant loses out compared to currently, however, the position for those claimants with lower damages is mixed - some claimants with lower damages lose out, however, many claimants with lower general damages gain. Looking at the loss to general damages from paying the success fee, the maximum loss seen is 15%. However, one difficulty around this analysis is that it is considered that success fees would adjust to the level of the cap if they are currently above the cap. In reality, if there are cases in which the cap bites, it is unclear whether these cases will continue to be taken. One key factor here is likely to be the risk of the case, which we cannot assess. The 25% cap is more likely to bite where costs are high and general damages are low compared to total damages.</p>
2. Public liability	<p>Approximately 85% of general damages are under £10,000, and a further 10% between £10,000 and £20,000.</p> <p>There are fewer higher value cases</p>	<p>There is a similar story to be told as in the case of EL. However, based on lower average general damages than in EL, and higher current success fees (many are above the cap whereas in EL</p>

	than in EL.	they are not); this explains why more claimants may be worse off in PL cases than EL cases. At lower levels the 10% increase in general damages does not compensate for a success fee set at the level of the cap, the level we would expect the success fee to be set at as often success fees are currently above the level of the cap. As above, the maximum loss from paying the success fee is 15% (from current damages). However, there remains the issue around whether cases would continue to be taken with the cap in place, as outlined above. As the cap applies in a greater percentage of PL cases, the issue may be more acute in PL than EL claims.
3. RTA	Approximately 93% of general damages are under £10,000 and very few cases above £20,000. Therefore most cases fall within the RTA process (predictable cost regime).	In RTA claims, 71% claimants will be compensated for paying the success fee through an increase in general damages. As most cases are for general damages under £10,000, there is less of a distributional impact across claims of different values to assess; however, it appears that for those claims with higher levels of general damages (about £10,000), there are few claimants who would lose out.

1. 35 For EL (accident) and PL cases, a further caveat is that in the future the predictable cost regimes will not apply. Whilst we would hope that success fees would not increase in the future, the fact that fixed success fees will no longer be restricted could have an impact on outcomes. The success fee could be lower or higher than currently, however would be limited by 100% of base costs or 25% of general damages, whichever is lower.

### Final conclusions

1. 36 It has not been possible to quantify the costs and benefits of the Jackson package of reforms. This note considers only three of the Jackson proposals, with our results shown in the two tables above. However, even then, the effect of one of the proposals (non recoverability of ATE premiums) probably cannot be quantified sensibly as we anticipate that premiums will change following the proposed reforms hence we cannot assume that current premiums will be paid by claimants in future.
1. 37 The data presented above have been supplied from one (commercial) source. They relate to three types of case only and only to a very small proportion of the total number of cases. Whether the data is representative of wider cases brought has not been verified. Furthermore if future behaviours change then past data would not reflect future impacts.
1. 38 This annex should not be used to draw aggregate conclusions about the impact of the Jackson package. It has highlighted that there are a number of expected effects which we cannot sensibly quantify. In some instances, different impacts may work in opposite directions to one another. A large number of caveats apply to the analysis in this annex, as clarified throughout.

## Annex B: Savings to defendants – NHSLA

1. 1 As highlighted in Annex A, defendants will see savings through no longer paying the success fees or the ATE premiums in cases that the claimant receives damages. These savings will be to some extent offset through a ten percent increase in general damages, as well as no longer recovering costs in cases where these are recovered currently. However, on average we would expect a net gain to defendants.
1. 2 The NHS Litigation Authority (NHSLA), the public sector body which defends clinical negligence cases, is a defendant, and in 2009/10 received 6,652 claims. During this year around £785 million was spent on clinical negligence claims. This figure includes both damages and legal costs for cases received in 09/10, and expenditure arising from cases received in previous years.
1. 3 The breakdown of these spending figures is not available. However, a breakdown is available for cases settled in 2009-10, as shown below. Cases settled is considered a better measure to use for estimating the impact of the proposals, rather than expenditure in a given year, given that any legislative changes will only apply to cases settled after implementation of the policy.

### NHSLA litigation spending breakdown (cases settled 2009/10)

	Value (£)	%
Damages	296,592,000	64%
Claimant legal costs	121,487,000	26%
Defence legal costs	42,233,000	9%
Total	460,312,000	

1. These figures cannot be equated with the figures for total claims expenditure in 2009/10 because they relate only to claims closed during the year

2. The figures do not include claims where damages were not paid to the claimant i.e. when no liability was established

Source: NHSLA annual report 2009/10

1. 4 These figures include cases funded through CFAs as well as other funding types, including BTE insurance; Legal Services Commission (LSC) funded cases; and self-funded cases. In recent years, around 45% of cases have been funded through CFAs. The legal cost implications vary depending on how the case is funded, and typically CFA funding results in higher claimant legal costs than other sources of funding.

### Savings calculation

1. 5 We have received detailed data from the NHSLA relating to success fees and ATE premiums paid out for cases settled each week between February 2010 and January 2011. As such, we have been able to estimate the expected annual savings to the NHSLA as a result of the policy changes.
1. 6 These figures suggest the following breakdown of claimant solicitor costs in CFA cases:

#### Breakdown of claimant solicitor costs

	Success fee	ATE premium
As a proportion of <b>total</b> (claimant solicitor) costs	34%	17%
As a proportion of <b>base</b> (claimant solicitor) costs	71%	35%

Source: derived from NHSLA sample data (2009)

We have derived base costs from these figures based on estimates provided by the NHSLA, as follows:

The NHSLA suggest that a 100% success fee is sought in about 90% of cases, and in less than 10% of cases, 80-90% is sought. However an average reduction of between 10-20% in base costs is also secured. This does not take into account disbursements: typically uplifts are applied to base costs excluding disbursements.

- 1.7 Through figures published in the NHSLA annual report which details total damages paid out, we are also able to identify the potential additional cost of a ten percent increase in general damages. This is based on an assumption provided by the NHSLA of the split between general and special damages, of 10% and 90% respectively. Unfortunately, a split is not routinely recorded, and using a sample of cases is not considered suitable as there are a small number of cases with extremely large damage awards that would be large enough to affect any estimates significantly.
- 1.8 Based on the data and assumptions set out above, we are able to estimate the savings to the NHSLA through success fees and ATE insurance premiums no longer being recoverable, but claimants benefiting from a 10% increase in general damages. We are unable to include the impact of qualified one way cost shifting as we do not know what costs are currently recovered by the NHSLA in cases where damages are not paid out.
- 1.9 The overall figure is that compared to currently, a net saving of **approximately £50m** on cases settled in a given year would be generated, assuming that expenditure on claimant legal costs, defendant legal costs and damages for closed cases in a given year remain at approximately their current levels. If claims received continue to increase each year, annual savings could increase over time. However, as mentioned above these savings do not include the impact of qualified one way cost shifting and therefore may be overstated.
- 1.10 The table below highlights the breakdown of this calculation (annual impact on closed cases, rounded figures), as follows:

Success fees non recoverable	£38 million
ATE insurance premiums non recoverable	£19 million
10% uplift in general damages	-£3 million
One-way cost shifting	Cannot quantify, assume small (-) impact
Part 36	Uncertain
<b>TOTAL ANNUAL IMPACT</b>	<b>£54 million</b>

### Risks to the estimate

- 1.11 There are a number of risks / caveats that must be considered in interpreting the figures above, as follows:
- i) The figures are comparing the current situation to the situation after the reforms to CFAs are implemented, assuming a constant volume of cases and constant costs on cases settled, including the breakdown of these costs. The figures therefore do not include any behavioural responses by claimants or their lawyers, which in reality may be significant. However, there is a lack of available evidence around these potential responses, for example whether claimants would continue to take forward lower value claims..
  - ii) The figures do not consider any impact from other policies that may impact clinical negligence cases brought, and the source of funding under which these are brought. This is especially relevant in the context of the recent legal aid reform consultation, as any potential impact on legal aid in relation to clinical negligence could impact future case funding methods. If the volume of cases brought under CFAs increased, this could increase the annual savings calculated.
  - iii) **Downside risks** (lower savings) include that we have not accounted for the potential loss associated with qualified one way cost shifting. Qualified one way cost shifting could incentivise more cases to be pursued. Assumptions around the proportion of cases brought on a CFA and the relationship between base costs, ATE and success fees could also lead the calculation to overstate savings, as could the assumption around the split between general and special damages.

- iv) **Upside risks** (higher savings) include that proposed reforms to tighten the cost rules could reduce the base costs defendants such as the NHSLA are liable for. Assumptions around the proportion of cases brought on a CFA and the relationship between base costs, ATE and success fees could also lead the calculation to understate savings, as could the assumption around the split between general and special damages.
- v) Uncertainty also exists around the impacts of the changes to Part 36 sanctions, litigant in person hourly rates and damages based agreements.



## Annex C: Equality Impact Assessment

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.

Hannah Beattie, 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

We consulted on implementing a package of Lord Justice Jackson's recommendations. The Government response sets out that we will now seek to 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 in line with inflation since they were set.

## 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 have 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 have 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 have received a number of small datasets and case examples from individual claimant firms and a large dataset from Jaggards (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 does not include information on the identity of the claimants (in terms of gender, age, race, disability or any other protected characteristic) and therefore it cannot 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.





# Ministry of JUSTICE

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 the consultation period will enable us to fully assess the impact of the proposals on different groups of people. We have considered the responses to the relevant questions to inform this 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%, 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.

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. There are no plans to undertake this work, 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 have 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



## Full Equality Impact Assessment

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

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 is making one change to Lord Justice Jackson's key recommendations. As set out at section 13 below, the Government intends 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.

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 have been 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. Whatever the outcome of the consultation on Proposals for Reform of Legal Aid in England and Wales, we recognise that there will be some high cost cases where it may be difficult to secure CFAs, but cases of this type will continue to receive legal aid where necessary for the UK to meet its international and domestic legal obligations via a proposed scheme for excluded cases (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 further explained but is presumably on the basis that these cases involve special procedures which require more work and which solicitors may therefore 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.

## **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, the Government intends to have 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.



# Ministry of JUSTICE

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 already 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.

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.

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.



# Ministry of JUSTICE

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

You should now complete a brief summary (if possible, in less than 50 words) **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.** The summary will be published on the external MoJ website.

Name (must be grade 5 or above):

Department:

Date:

Note: The EIA should be sent **by email to [anthony.shepherd@justice.gsi.gov.uk](mailto:anthony.shepherd@justice.gsi.gov.uk) of the Corporate Equality Division (CED), for publication.**