



**POST-IMPLEMENTATION REVIEW OF PART 2 OF LEGAL AID, SENTENCING AND  
PUNISHMENT OF OFFENDERS (LASPO) ACT 2012:  
INITIAL ASSESSMENT BY MOJ**

The Ministry of Justice is committed to undertaking a Post-Implementation Review (PIR) of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). It is clearly good practice to examine whether the legislation has met its objectives, and whether there are unintended consequences that need addressing. That is what this PIR is intended to deliver. We are publishing a survey to seek stakeholder views: we hope as many people as possible will complete it. Where possible, respondents should read this initial assessment, which provides steers on issues on which we would particularly welcome comment. The Civil Justice Council is holding a stakeholder conference, which will take place while the survey is live and be a focal point of the PIR. Clearly, only a limited number of people will be able to attend the conference so we hope that the survey provides an opportunity for all those with an interest to make representations.

A report will be prepared, by MoJ officials, later in 2018 drawing on views of stakeholders and the available data. It would then be for MoJ ministers to decide what further actions to take. It should be noted that the MoJ has already prepared a Post-Legislative Memorandum (PLM) on the Part 2 Reforms<sup>1</sup>, which stated that 'whilst there has inevitably been comment on points of detail, we are not aware of significant overarching concerns arising from the implementation of Part 2'.<sup>2</sup>

A Post-Legislative Memorandum has also been prepared of the Part 1 (legal aid) reforms.<sup>3</sup> A separate PIR is being undertaken of those reforms.<sup>4</sup>

It is worth taking a step back and revisiting the passage of Part 2 of the LASPO Bill during Parliament, based as they were in Lord Justice Jackson's recommendations<sup>5</sup>, and the public consultation that preceded it. There were, very clearly, two sides to the debate: those who supported the reforms as a necessary control on the costs of civil litigation (and agreed with Sir Rupert Jackson that the reforms would enhance access to justice), and those who opposed them – with some vigour – on the basis that they would reduce access to justice.

The government was careful, not only in the primary legislation itself, but also in the supporting rules and regulations, to make sure that the new system delivered access to justice at proportionate cost on a workable and sustainable basis. Many stakeholders contributed to working groups set up to consider the detail of the new arrangements which came into force in April 2013. MoJ officials have held initial discussions with key stakeholders about the impact of the Part 2 reforms. The views expressed accorded with our initial views: that stakeholders have adapted to the Part 2 reforms, and that they are

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<sup>1</sup> *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum*, [www.gov.uk/government/publications/legal-aid-sentencing-and-punishment-of-offenders-act-2012-post-legislative-memorandum](http://www.gov.uk/government/publications/legal-aid-sentencing-and-punishment-of-offenders-act-2012-post-legislative-memorandum) (October 2017).

<sup>2</sup> *Ibid.* p. 97.

<sup>3</sup> *Ibid.* pp. 5-85.

<sup>4</sup> *Post-implementation review of LASPO*, [www.gov.uk/government/publications/post-implementation-review-of-laspo](http://www.gov.uk/government/publications/post-implementation-review-of-laspo) (March 2018).

<sup>5</sup> *Review of Civil Litigation Costs: Final Report* (December 2009).

generally working well. There are certain areas of continuing concern, but these centre on rules/regulations and practice, rather than on the statutory reforms themselves. We summarise this in relation to the individual reforms below.

### Stakeholder survey

We are seeking views from stakeholders on the impact of the reforms. It would be helpful if responses could be made online using the [online survey](#) by 24 August 2018. We hope that it is helpful to give a steer on the issues on which we would specifically welcome comment, as set out below. This has been drafted in a relatively summarised form in the expectation that most respondents are likely to be familiar with the detail of the reforms. You are free to raise other issues, but it would be helpful in all cases if comments could be supported by data and evidence.

### Objectives

The overall aims of the costs and litigation funding reforms in LASPO Part 2 were: to reduce the costs of civil litigation and to rebalance the costs liabilities between claimants and defendants while ensuring that parties with a valid case can still bring or defend a claim<sup>6</sup>. There was also an ambition to encourage early settlement; and to discourage unmeritorious claims<sup>7</sup>. The Part 2 reforms were based on recommendations made by Sir Rupert Jackson in his *Review of Civil Litigation Costs: Final Report*, published in 2010.

That review was commissioned by the then Master of the Rolls who invited Lord Justice Jackson to conduct 'an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost'<sup>8</sup>. This led Sir Rupert Jackson to propose a package of reforms (commonly known as the Jackson reforms) 'to control costs and promote access to justice'<sup>9</sup>, which were the thrust of LASPO Part 2.

The PLM summarised the Jackson reforms<sup>10</sup> in the following way:

*He (Jackson) recommended a package of measures, including: the abolition of the recoverability of CFA success fees and ATE insurance premiums; a 10% increase in general damages for pain, suffering and loss of amenity; and a ban on referral fees in respect of personal injury litigation; and the introduction of qualified one way costs shifting (QOCS) in personal injury litigation. All of these were implemented for personal injury litigation in Part 2 of LASPO and accompanying measures. He foresaw that, if those measures were implemented, there would be five consequences:*

- *Most personal injury claimants would recover more damages than they did then, although some would recover less;*
- *Claimants would have a financial interest in the level of costs which were being incurred on their behalf;*

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<sup>6</sup> *Post-Legislative Memorandum*, p. 86.

<sup>7</sup> *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, Ministerial Foreword, <http://webarchive.nationalarchives.gov.uk/20110602093544/http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf> (March 2011), pp. 3-4.

<sup>8</sup> *Review of Civil Litigation Costs: Supplemental Report - Fixed Recoverable Costs* (July 2017), p. 19.

<sup>9</sup> *Ibid*, p. 20.

<sup>10</sup> *Post-Legislative Memorandum*, p. 86.

- Claimant solicitors would still be able to make a reasonable profit;
- Costs payable to claimant solicitors by liability insurers would be significantly reduced; and
- Costs would also become more proportionate because defendants would no longer have to pay success fees and ATE insurance premiums.

This last point was important to the government at the time. The Foreword to the Government's Response to consultation<sup>11</sup> contained the following references<sup>12</sup>:

*Yet in recent years, the system has got out of kilter, fuelled to a significant extent by the way that 'no win, no fee' conditional fee agreements (CFAs) now work. They have played an important role in extending access to justice but they also enable claims to be pursued with no real risk to claimants and the threat of excessive costs to defendants. It cannot be right that, regardless of the extreme weakness of a claim, the sensible thing for the defendant to do is to settle, and get out before the legal costs start running up. This is precisely what has happened and it is one of the worst instances of this country's compensation culture.*

...

*Under our proposals, meritorious claims will be resolved at more proportionate cost, while unnecessary or avoidable claims will be deterred from progressing to court. This is sound common sense. It will help businesses and other defendants who have to spend too much time and money dealing with avoidable litigation, actual or threatened. Substantial unnecessary costs will be removed from the system, leading to significant savings to defendants.*

The intention, then, was for meritorious claims to be allowed to proceed at more proportionate cost, whilst discouraging unmeritorious claims. As Sir Rupert Jackson put it rather more pithily: 'access to justice at proportionate cost'.

## Data

The most significant area affected by the Part 2 reforms by volume is personal injury (PI), and within that low value (under £25k) road traffic accident (RTA) claims, the largest sub-category of which is whiplash. We have access to reasonable data on PI claims, but less so in other areas.

Most of the publicly available MoJ data provide volumetric and process related information: number of claims issued, their progression and timeliness, and some basic detail about court outcomes. Since PI has only been collected as a specific category by MoJ since 2012, it is necessary to use unspecified money claims – of which PI accounts for around 90% - to look at pre and post Part 2 changes.

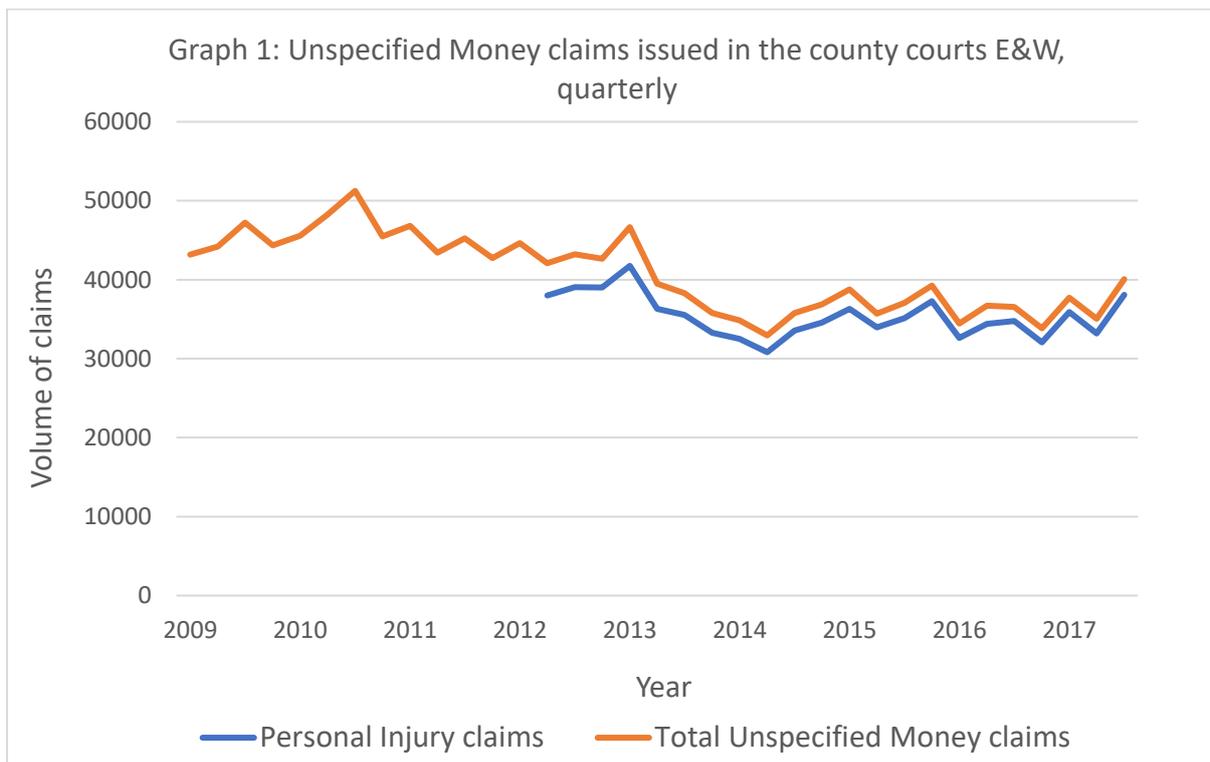
While this is useful to indicate major impacts, for example dramatic shifts in claimant or market behaviour, it does not fully reveal the underlying drivers of change and masks the more complex set of balances and counterbalances put in place. Since several other major policies may also have been impacting at the same time it is difficult to isolate these from LASPO Part 2.

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<sup>11</sup> *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response* (March 2011).

<sup>12</sup> *Ibid.* pp. 3-4.

Nevertheless, we can see (Chart 1 below) that PI claim workload volumes decreased from 158K in the year pre LASPO<sup>13</sup> to 137K at four years post LASPO<sup>14</sup>. This is a reduction of 13% (averaging 5K fewer claims per quarter, or 21K fewer per year). There is a noticeable upward spike in Q1 2013 at 42K claims, probably due to firms rushing to issue claims before the new regulations were introduced. In purely volumetric terms the current position seems reasonable if the reforms are working as expected: the theory of change being that some unmeritorious claims would be discouraged without a significant drop that could indicate serious access to justice implications.



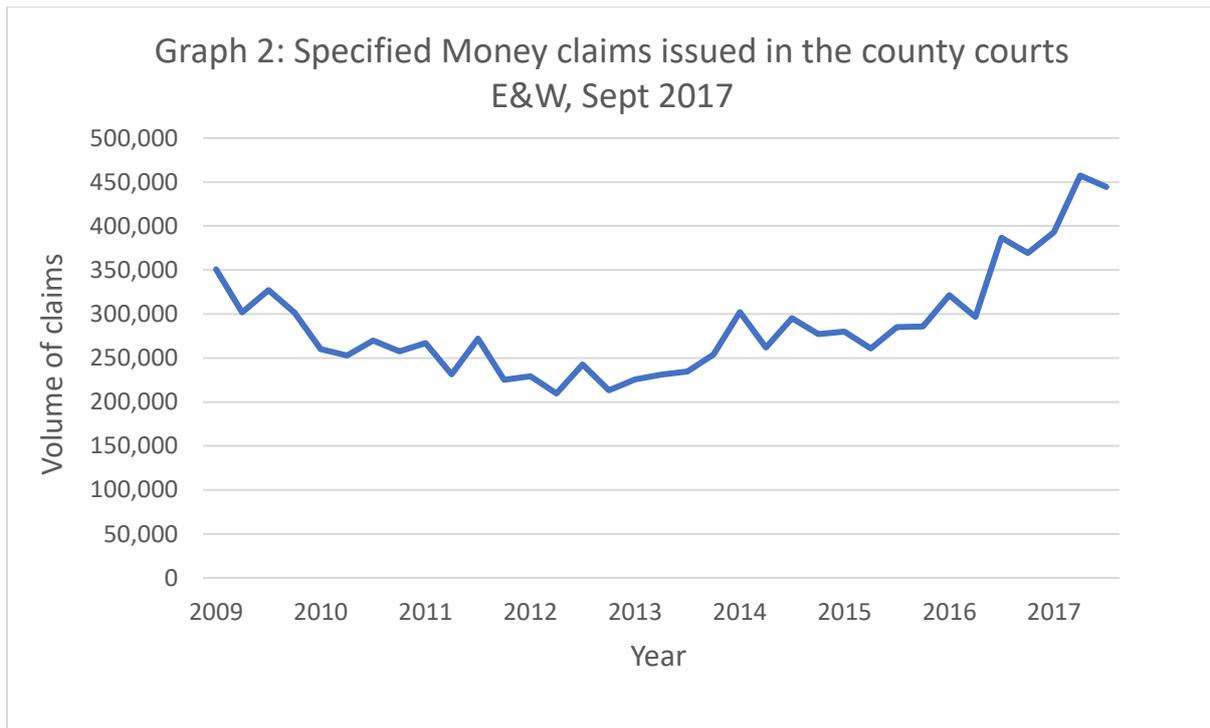
In contrast, Chart 2 shows that specified money claims (which account for over 90% of money claims overall) have been increasing, from around 1 million claims in the year pre-LASPO<sup>15</sup>, to 1.4 million claims four years post-LASPO<sup>16</sup>, likely due to introduction of an online Secure Data Transfer system by HMCTS in July 2014, enabling bulk customers to issue money claims digitally.

<sup>13</sup> Q2 2012 to Q1 2013

<sup>14</sup> Q2 2016 to Q1 2017

<sup>15</sup> Q2 2012 to Q1 2013

<sup>16</sup> Q2 2016 to Q1 2017



We are continuing to examine the quality of claims data held by MoJ/HMCTS and will make a fuller assessment of trends in the final review. We will also refer to other publicly available sources such as Claims Portal and DWP Compensation Recovery Unit (CRU) data, which provide further information on pre- court claims and settlements.

We are interested in receiving further data and evidence that will help to indicate impacts for the final review. In particular, we have very limited access to data on the costs of litigation as this is typically held by private firms. A [survey is available](#) to collect evidence about practitioner experiences of the reforms and please contact David.Smeeton@justice.gov.uk if you wish to discuss sharing any data you hold.

### The scope of the PIR

The PIR is considering the impact of the five statutory reforms in Part 2<sup>17</sup>. They were part of a wider package of measures implemented following Sir Rupert's review (such as costs budgeting and case management) which do not formally form part of this review. Neither do the changes to fixed recoverable costs for low value PI cases (RTA, PL and EL(A)) which were implemented in April to July 2013, which were only partially derived from Sir Rupert's recommendations.

The PIR is not considering the areas of law where the Part 2 reforms have not been implemented: defamation/privacy and mesothelioma.

### The five statutory reforms

#### **(i) Non-recoverability of success fees – section 44**

CFA success fees are no longer recoverable from losing opponents (generally, but not exclusively, defendants). CFAs are the dominant, if not almost exclusive, form of funding in

<sup>17</sup> (i) Non-recoverability of CFA success fees; (ii) non-recoverability of ATE premiums, (iii) the introduction of Damages-Based Agreements, (iv) section 55 changes to Part 36 offers, (v) banning referral fees in personal injury cases.

PI claims. At first sight, it seems that costs have been reduced (by the structural changes) while claims continue to be brought, albeit with a slight reduction overall.

Lawyers acting on CFAs can charge their clients a success fee if the claim succeeds. Success fees allow lawyers to cover the costs of cases they take on which do not succeed. The success fee that may be claimed is restrained in order to protect the claimant's damages in personal injury claims: it can be no more than 25% of general damages for pain, suffering and loss of amenity and past loss. There was some debate during the passage of the LASPO Bill about the right level of success fees, and whether competition would drive them down (in order to protect the claimant's damages).

The LASPO Part 2 reforms returned to the original concept of success fees introduced by Lord Mackay, in 1990, where no additional liabilities were paid by defendants. During the passage of the LASPO Bill<sup>18</sup>, Lord Mackay spoke about the principle of setting a success fee:

*“My understanding of this system is that you do not subsidise other cases: the success fee is dependent on the chances of success in your case. It is a factor which is dependent on a probability of success that works into the success fee. It is not dependent on other cases; it is dependent on the precise potential for winning that exists in the case that you have in hand.”*

There is, however, anecdotal evidence that the maximum success fee is routinely charged without an assessment of the risk in individual cases.

**QUESTIONS: In particular, when completing the survey in respect of this section, it would assist us if you could consider (i) whether you are aware of categories of cases where the numbers of meritorious cases have increased or decreased as a result of the non-recoverability of the success fee; (ii) the level of success fees now being charged in different categories of case; (iii) the degree of competition in the market (for different types of claim, and how more could be introduced), and how much information is given to the client about the level of success fee charged, the ability to challenge the success fee or to find a more favourable rate elsewhere.**

#### **(ii) Non-recoverability of after the event (ATE) insurance premiums – section 46**

ATE insurance developed as a form of costs protection, to limit exposure to adverse costs, and to fund disbursements such as expert reports, so that claims could be brought. It has been difficult to challenge the level of premiums in individual cases (whether recoverable or not) because of the way they are set (commercially in confidence, based on insurance principles). The impact was always likely to be different as between personal injury cases, given the introduction of qualified one-way costs shifting (QOCS) for these cases, and all other cases. Sir Rupert Jackson recommended that that extension be considered in certain cases on the grounds of social policy where ‘the parties are in an asymmetric relationship’.<sup>19</sup> The government has not yet extended QOCS beyond PI.

#### Personal injury cases

Recoverable ATE has been replaced in personal injury with QOCS. Based upon the feedback we have received from stakeholders so far and limited, there is nothing to suggest

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<sup>18</sup> Lord Mackay, House of Lords, *Report: LASPO Bill 4<sup>th</sup> Sitting* (14 March 2012 6.30 - 6.45 pm), [publications.parliament.uk/pa/ld201212/ldhansrd/text/120314-0002.htm](http://publications.parliament.uk/pa/ld201212/ldhansrd/text/120314-0002.htm)

<sup>19</sup> *Review of Civil Litigation Costs: Final Report*, p. 89.

QOCS is not working as anticipated. Following the Insurance Fraud Taskforce's recommendations in January 2016 on the application of QOCS, the recent whiplash consultation asked about modifying the QOCS rule in relation to the late withdrawal of a claim.<sup>20</sup>

**QUESTION: Are there concerns about the operation of QOCS in PI?**

There is a specific LASPO provision (section 46, sub-section 2)<sup>21</sup> that allows for the continued recoverability of ATE insurance premiums in respect of expert reports in clinical negligence cases.

**QUESTIONS: What are the impacts of this provision? Given the stated aims of this and our reforms in general, is there a case for amendment?**

Non-personal injury cases

QOCS does not exist outside personal injury claims. There is still an ATE market (which operates, as pre-LASPO, on a deferred contingent basis) and parties can take out ATE insurance, paying the premium if the case is successful. Costs protection has been developed in environmental claims under the Aarhus Convention: the Environmental Costs Protection Regime differs from QOCS in that it consists of variable costs caps for claimants and defendants.

**QUESTIONS: What is the impact of the non-recoverability of ATE insurance premiums outside PI? It would be helpful to know whether you are aware of any categories of cases where the number of meritorious cases have increased or decreased as a result of the non-recoverability of ATE insurance premiums, changes to the success fee because of the absence of recoverable ATE, or an alternative form of costs protection. Evidence should be supported by data and case studies demonstrating the inability to bring claims.**

**(iii) Damages-Based Agreements (DBAs) – section 45**

DBAs were proposed as an additional form of funding by Sir Rupert Jackson to increase funding options without driving up costs<sup>22</sup>. DBAs were not raised much as an issue during the discussions and debates on the LASPO Bill. This may be because of the similarities between DBAs and CFAs: they are both forms of no win no fee agreements: with DBAs a successful lawyer's fee is relative to the damages, with CFAs to the base costs. The DBA Regulations 2013 incorporated the recommendations of a Civil Justice Council (CJC) working group. There has since been some criticism of the current DBA regulatory regime: (i) that it does not work on its own terms, and (ii) that the policy should be changed, e.g. to allow hybrid DBAs (which would allow DBAs with concurrent private funding arrangements). The government commissioned the CJC to consider the operation of the DBA Regulations to see if they could be improved within the existing policy framework. The CJC published its report in September 2015.<sup>23</sup> Phase 1 of the report addresses drafting issues; Phase 2

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<sup>20</sup> *Reforming the Soft Tissue Injury ('whiplash') Claims Process: A consultation on arrangements concerning personal injury claims in England and Wales* (November 2016), p. 33.

[assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/581387/reforming-soft-tissue-injury-claims-process.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/581387/reforming-soft-tissue-injury-claims-process.pdf)

<sup>21</sup> *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Section 46

[www.legislation.gov.uk/ukpga/2012/10/section/46/enacted](http://www.legislation.gov.uk/ukpga/2012/10/section/46/enacted)

<sup>22</sup> Jackson, *Fixed Recoverable Costs*, p. 22.

<sup>23</sup> *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (published September 2015), [www.judiciary.gov.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf)

considered policy issues such as hybrid DBAs. The government will consider the next steps on that report in the context of the findings of this PIR.

It is worth emphasising that the government has sought to tread carefully in implementing reforms: the Access to Justice Act 1999 regime resulted in substantial and costly unintended consequences. As such introducing a new form of funding, particularly one that may be best suited to very high value claims, deserves caution.

It is worth emphasising that DBAs were intended as an additional form of funding in appropriate cases, not an alternative form of funding in every case. DBAs may therefore be more suited to niche areas, where damages are high relative to the costs, or where costs are not recoverable. For this reason, and given the prevalence of CFAs, it was unlikely that DBAs would be suitable for, say, fast-track or multi-track PI claims. However, this distinction highlights one of the risks with DBAs as an alternative to CFAs – which arrangement is better (in financial terms) for the lawyer or the client may not be apparent until the end of the case. What seemed preferable for the client at the start of a case with uncertain prospects, may result in a substantial early windfall for the lawyer, at the client's expense.

A further risk with hybrid DBAs is that they may be particularly attractive for lawyers in very high value, speculative litigation. It is questioned what the potential consequences of allowing hybrid DBAs for these cases would be, particularly when CFAs can be arranged for these cases.

**QUESTIONS: Should the DBA Regulations be revised in line with Part 1 of the CJC Report<sup>24</sup>? What are the advantages, disadvantages and risks in changing the policy (e.g. allowing hybrid DBAs)? What could be done to mitigate any risks? Does the guidance etc to lawyers on funding arrangements need amendment?**

#### **(iv) Changes to Part 36 (offers to settle) – section 55**

Part 36 of the Civil Procedure Rules was introduced to incentivise and encourage the making and acceptance of reasonable settlement offers. This procedure is supported by a scheme of penalties and rewards to ensure all parties have an interest in agreeing to early settlement.

The statutory change introduced by LASPO Part 2 was that where a defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%. This was accompanied with a rule change to reverse the effect of *Carver v BAA*.<sup>25</sup> These measures were taken both to promote early settlement and assist claimants who go to trial and had to fund their own success fee.<sup>26</sup>

It seems that Part 36 works well, and we are only aware of calls for limited, technical changes to the statutory regime.<sup>27</sup>

**QUESTIONS: It would be helpful to know (i) to what extent early settlement has improved since LASPO and (ii) how it could be further improved.**

#### **(v) Banning referral fees in personal injury cases – sections 56-60**

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<sup>24</sup> Ibid.

<sup>25</sup> [2008] EWCA Civ 412; [2009] 1 WLR 113

<sup>26</sup> Jackson, *Fixed Recoverable Costs*, p. 23.

<sup>27</sup> The case of *Broadhurst v Tan*, see Jackson, *Review of Civil Litigation Costs – Fixed Recoverable Costs*, p. 80.

The Act prohibited the payment of referral fees in personal injury cases. This followed a 2004 change to the Solicitors Conduct rules which permitted the payment of referral fees. This led to a situation where solicitors 'had to compete with colleagues who were paying ever higher referral fees'.<sup>28</sup>

Kenneth Clarke QC MP (then Lord Chancellor and Secretary of State for Justice) argued that referral fees had:

*'increased very rapidly and have contributed to an unwelcome increase in personal injury cases in our courts. They have tended to encourage the introduction of speculative claims and have certainly raised the cost of contesting litigation'.<sup>29</sup>*

There has been some concern about the effectiveness of the ban of referral fees in personal injury cases and its level of enforcement. It is sometimes claimed that the current situation has not fully stopped referral fees for personal injury cases as referral fees continue in all but name under different guises such as marketing fees. The line has to be drawn somewhere between what is a lawful referral and what is not, and it is inevitable that activity will move to what is lawful. If there is evidence that the current arrangements are not working effectively, we would be open to representations as to how the statutory wording of the ban could be improved or how its operation could be made more effective.

**QUESTIONS: It would be helpful to know if the current ban on referral fees in personal injury cases is effective. If not, how could the legislation be amended to prevent referral fees in PI cases? What other steps could be taken to make the ban more effective?**

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<sup>28</sup> *Review of Civil Litigation Costs: Final Report*, p. 196.

<sup>29</sup> Kenneth Clarke QC MP then Lord Chancellor and Secretary of State for Justice, House of Commons, *Report: LASPO Bill 1<sup>st</sup> Sitting* (31 October 2011 4.19 pm), [publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/debtext/111031-0001.htm#1110315000003](http://publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/debtext/111031-0001.htm#1110315000003)