



Ministry
of Justice

Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Civil litigation funding and costs

February 2019

CP 38



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

February 2019



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Executive Summary

1. Part 2 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) implemented the recommendations in Sir Rupert Jackson's 2010 *Review of Civil Litigation Costs* with the aim of reducing the costs of civil litigation while maintaining 'access to justice at proportionate cost'.¹ This Post Implementation Review (PIR) assesses the impact of the five statutory reforms:
 - i. non-recoverability of conditional fee agreement (CFA) success fees;
 - ii. non-recoverability of after the event insurance (ATE) premiums;
 - iii. the introduction of Damages-Based Agreements (DBAs);
 - iv. section 55 changes to Part 36 offers; and
 - v. banning referral fees in personal injury (PI) cases.
2. The statutory reforms in Part 2 of LASPO were implemented on 1 April 2013. The reforms were not implemented at the same time for the following categories of case, which are therefore excluded from this review: claims for mesothelioma; insolvency proceedings; and defamation and privacy cases.²
3. Stakeholders had a range of opportunities to contribute to this PIR. Stakeholder engagement included a seminar hosted by the Civil Justice Council on 29 June 2018, meetings MoJ officials held with stakeholders from summer 2017 to November 2018 and an online survey which led to 155 responses. In general terms, the responses were anecdotal and limited evidence was provided. Nevertheless, claimant representatives were generally consistent in their views, as were defendant representatives, although there were large areas of disagreement between the two groups. An initial assessment was published³ which sought to give stakeholders a preliminary assessment of the reforms and a steer as to the issues on which the Ministry of Justice (MoJ) particularly welcomed comment.
4. The Part 2 reforms had five objectives:
 - i. Reducing the costs of civil litigation (**Objective 1**)
 - ii. Rebalancing costs liabilities between claimants and defendants (**Objective 2**)
 - iii. Promoting access to justice at proportionate cost (**Objective 3**)
 - iv. Encouraging early settlement (**Objective 4**)
 - v. Reducing unmeritorious claims (**Objective 5**)

¹ Sir Rupert Jackson, 'Review of Civil Litigation Costs: Final Report', <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> (December 2009), p. 2.

² See section 1.2 for further details.

³ See Annex A.

Stakeholder feedback on the five statutory reforms

Reform 1: Non-recoverability of CFA success fees (section 44⁴)

5. Success fees for CFAs were made non-recoverable generally, and capped in PI cases. The majority of respondents, including claimants, accepted that this change had reduced costs (**Objective 1**) although there were a handful of calls to repeal the primary legislation.
6. Claimant lawyers expressed concern that success fees were deducted from damages reducing net damages. It was said that this had led to a need to adapt PI services (when considered along with the introduction of fixed recoverable costs for low-value PI claims), while defendants said that this reform had reduced and rebalanced the costs of litigation (**Objectives 1 and 2**). There was anecdotal evidence that claimant lawyers and barristers now looked for higher prospects of success than prior to LASPO when assessing a case contributing towards **Objective 5**.

Reform 2: Non-recoverability of ATE insurance premiums (sections 46 and 47⁵)

7. ATE insurance was considered an expensive form of costs protection and was made non-recoverable⁶, but there is an exception for the recoverability of ATE premiums for clinical negligence expert reports, which relate to causation and liability.
8. Claimant lawyers argued that the costs of ATE premiums can be prohibitive to bringing a case particularly in areas where damages are relatively low. There were mixed views about the impact of non-recoverability of ATE insurance. One ATE insurer said the ATE market continues to operate well and had never been so competitive while another said they had noted changes in claimant behaviour which included cases being insured at a later stage. It was suggested that similar volumes of ATE insurance are being purchased as prior to LASPO, especially to cover the 'Part 36 risk' (under Part 36 of the Civil Procedure Rules (CPR) and the cost of disbursements.
9. In relation to the continued recovery of ATE insurance premiums for clinical negligence claims, claimant lawyers argued that this was necessary to assess the merits of these cases and that expert reports were a pre-requisite and would be prohibitively expensive without this recoverability. On the other hand, defendants stated that clinical negligence ATE premiums were poor value for money and that there was a lack of transparency about their pricing.
10. Qualified One-Way Costs Shifting (QOCS) was introduced for PI cases at the same time as the Part 2 reforms. QOCS is a form of costs protection which means that normally an unsuccessful claimant does not have to pay a defendant's costs. Stakeholders generally stated that QOCS was working well, but there were issues around the use of 'fundamental dishonesty' by defendants and the late withdrawal of claims by claimants. There were calls for the extension of QOCS to a wider range of cases including professional negligence, actions against the police, housing disrepair, discrimination, private nuisance and judicial reviews to improve access to justice.

⁴ <http://www.legislation.gov.uk/ukpga/2012/10/section/44/enacted>

⁵ <http://www.legislation.gov.uk/ukpga/2012/10/section/46/enacted>;
<http://www.legislation.gov.uk/ukpga/2012/10/section/47/enacted>)

⁶ Section 46 does not apply in claims for mesothelioma or privacy and defamation cases.

Defendants argued that an extension of QOCS was not necessary or desirable and risked an increase in unmeritorious claims.

Reform 3: Introducing Damages Based Agreements (DBAs) as a funding method (section 45⁷)

11. DBAs were introduced as a funding method for civil litigation to increase funding options. This makes DBAs an alternative ‘no win, no fee’ agreement to CFAs, which are well used in damages claims. Under a standard DBA lawyers are not paid if a case is lost but the lawyer may take a percentage of the damages awarded to their client as their fee if the case is successful. There was a consensus amongst all stakeholders that DBAs are rarely used and the regulations needed improvement to increase clarity and confidence in the use of DBAs as a funding method.
12. Commercial lawyers particularly strongly argued for the use of ‘hybrid DBAs’ which would allow DBAs to be combined with another form of funding agreement so that the lawyer can be paid a fee even if the case is unsuccessful; it was argued that these would be particularly useful in high-value complex claims. Some commercial lawyers argued that hybrid DBAs could address a lack of flexible funding options, which was putting England and Wales at a competitive disadvantage as an international centre for dispute resolution although no evidence was provided to support this, and contrary views were expressed.

Reform 4: Changes to Part 36 offers (section 55⁸)

13. Stakeholders were generally supportive of Part 36 but had mixed views about the effectiveness of Part 36 offers. Claimant lawyers welcomed the additional 10%⁹ uplift on damages where a defendant fails to beat a claimant’s offer, but it was argued that this should be increased or should be extended to apply where an offer is accepted late. However, many stakeholders also agreed that no further substantive changes should be made to the Part 36 regime for some time to allow it to settle properly.

Reform 5: Banning referral fees in PI cases (sections 56-60¹⁰)

14. Stakeholders were supportive of the principle of the referral fee ban for PI cases. However, there was some concern about the effectiveness of the ban and its enforcement as there were suggestions that similar behaviour continues under different guises such as marketing fees. However, stakeholders did not offer any suggestions on how this could be addressed.

Data Analysis

15. The PIR sought to use evidence and data wherever possible. Recently published independent analysis by Professors Fenn and Rickman has been very helpful in assessing the impacts of the Part 2 reforms (summarised in Chapter 10: Data

⁷ <http://www.legislation.gov.uk/ukpga/2012/10/section/45/enacted>

⁸ <http://www.legislation.gov.uk/ukpga/2012/10/section/55/enacted>

⁹ The 10% uplift is set out in the Civil Procedure Rules at CPR 36.17(4)(a) - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36#36.17>

¹⁰ <http://www.legislation.gov.uk/ukpga/2012/10/part/2/crossheading/referral-fees/enacted>

Analysis).¹¹ Fenn and Rickman analysed substantial samples of PI (excluding clinical negligence) claims over £25k and clinical negligence claims under £250k which concluded within two years both pre- and post-LASPO. Their analysis indicates lower base costs and damages, and reductions in the length of legal proceedings.

16. Although a wide variety of data were assessed for the review there were limitations in terms of quality and level of detail available. Factors such as changes in court recording mechanisms, the time taken for post LASPO cases to settle, and the potential impacts of other policies all affect ability to quantify impacts with certainty. Nevertheless, the MoJ took a proactive stance in using Government data, published data and invited the submission of evidence along with survey responses to provide insights. The Government's sources, approach to data and the limitations of the available data are explained in greater detail in Chapter 10: Data Analysis.
17. The high level available data on the volumes of court claims suggest that the number of claims has reduced slightly and in a manner consistent with the Government's objective of reducing unmeritorious claims (**Objective 5**), and not to an extent that would indicate a negative effect on access to justice (**Objective 3**).

Conclusion

18. Based on the evidence received as part of the PIR, the Government considers the Part 2 reforms to have been successful in achieving the principal aim of reducing the costs of civil litigation (**Objective 1**). The evidence shows that, in a range of personal injury claims (including clinical negligence claims), costs have reduced significantly (c. 8-10%) and early settlement has also improved (**Objective 4**). A definitive judgement on the impact on unmeritorious claims cannot be made at this time but the claims volumes data, the changes in financial incentives to CFAs, the test of fundamental dishonesty for QOCS and anecdotal stakeholder feedback suggest there has been an overall decline in unmeritorious claims (**Objective 5**). The Government considers that, on balance, the evidence suggests the Part 2 reforms have successfully met their objectives. The Government does not therefore propose any amendments to the primary legislation.
19. Two main areas of concern have been identified in the feedback from stakeholders. The first is that the DBA regulations would benefit from additional clarity and certainty. The Government accepts this argument. It will give careful consideration to the way forward in the light of the outcome of the independent review of the drafting of the regulations, which is being undertaken by Professor Rachael Mulheron and Nicholas Bacon QC. Their report is expected later in 2019.
20. The second area of concern is that QOCS (or some other form of costs protection) should be extended beyond PI. There are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection that some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to defendants, an overall increase in costs and the potential for prolonging rather than settling litigation. The

¹¹ Paul Fenn and Neil Rickman, 'The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012' (January 31, 2019). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326665

Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further.

21. Other suggestions for change were proposed to the rules and regulations, as set out in this report. The Government will keep them under review, as it will all aspects of the reforms more generally. While it is not proposing to make immediate changes, it may be that some of these issues are revisited at a later stage.

1: Introduction

22. This post-implementation review (PIR) considers the impact of the costs and litigation funding reforms in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and assesses the effectiveness of the legislation against its objectives.
23. The PIR follows the Post-Legislative Memorandum (PLM) of the LASPO Act, published on 30 October 2017.¹² That memorandum set out the background to Part 2 in further detail including the principal role of Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report*.¹³ This PIR builds on the consultative initial assessment document (set out at Annex A) that was published on 28 June 2018 on the gov.uk website.¹⁴ The initial assessment set out the MoJ's preliminary assessment as to the impact of the Part 2 reforms and sought to give stakeholders a steer as to the issues on which comment was particularly welcomed. It also served to give stakeholders an overview of the PIR process. The initial assessment, which was published in conjunction with a Civil Justice Council seminar on 29 June 2018, was accompanied by the publication of an online survey which gave all stakeholders an opportunity to express their views on the impact of each of the five reforms and on the overall impact of Part 2. The survey closed on 24 August 2018.
24. This paper summarises and analyses the evidence, data and views that have been provided on the impact of the Part 2 reforms against their objectives.
25. Civil litigation funding and costs are not necessarily the simplest issues to understand for those not closely involved. It is a field littered with acronyms, and seemingly simple phrases such as 'no win no fee' are more nuanced than might at first appear. Chapter 2 seeks to explain some of the concepts to the non-expert reader, explaining how the reforms changed the funding and costs landscape.

1.1 Objectives of the Part 2 Reforms

26. The overall objectives of the Part 2 reforms 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 could still bring or defend a claim.¹⁵ In his

¹² 'Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum (PLM)', <https://www.gov.uk/government/publications/legal-aid-sentencing-and-punishment-of-offenders-act-2012-post-legislative-memorandum>

¹³ Sir Rupert Jackson, 'Review of Civil Litigation Costs: Final Report', <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf> (December 2009).

¹⁴ 'Post-implementation review of Part 2 of LASPO Act: initial assessment', <https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo-act-initial-assessment> and Annex A of this paper.

¹⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum (PLM), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/655971/LASPO-Act-2012-post-legislative-memorandum.pdf (30 October 2017), p. 86.

Review, Sir Rupert referred to this as ‘access to justice at proportionate cost’.¹⁶ There was also an ambition to encourage early settlement.¹⁷

27. In taking forward Sir Rupert’s recommendations through the Part 2 reforms, the Government had an additional objective of discouraging unmeritorious cases, so that: ‘meritorious claims will be resolved at more proportionate cost, while unnecessary or avoidable claims will be deterred from progressing to court’.¹⁸
28. The Part 2 objectives can therefore be summarised as:
 - i. Reducing the costs of civil litigation (**Objective 1**)
 - ii. Rebalancing costs liabilities between claimants and defendants (**Objective 2**)
 - iii. Promoting access to justice at proportionate cost (**Objective 3**)
 - iv. Encouraging early settlement (**Objective 4**)
 - v. Reducing unmeritorious claims (**Objective 5**)
29. This review seeks to assess the Part 2 reforms against those objectives.

1.2 Scope of the Review

30. The PIR is limited to the five statutory reforms in Part 2 of LASPO as set out in the initial assessment. These can be summarised as:
 - i. non-recoverability of CFA success fees (section 44);
 - ii. non-recoverability of ATE premiums (sections 46 and 47),
 - iii. the introduction of Damages-Based Agreements (DBAs) (section 45),
 - iv. changes to Part 36 offers (section 55),
 - v. banning referral fees in PI cases (sections 56-60)

Exceptions

31. This PIR does not assess the three initial exceptions to the reforms in Part 2; namely mesothelioma, insolvency and defamation/privacy.
32. The LASPO CFA and ATE reforms do not apply to mesothelioma cases.
33. The reforms do now apply to insolvency cases but have only done so since April 2016. Although we received 14 survey responses from insolvency practitioners, all parties agree that it is too early to assess fully the impact of the reforms on insolvency proceedings at this stage.

¹⁶ Sir Rupert Jackson, ‘Final Report’, p. xvi.

¹⁷ Sir Rupert Jackson, ‘Review of Civil Litigation Costs: Supplemental Report’, p. 21, <https://www.judiciary.uk/publications/review-of-civil-litigation-costs-supplemental-report-fixed-recoverable-costs/> (July 2017).

¹⁸ ‘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), p. 4.

34. In relation to defamation/privacy, the Government announced on 29 November 2018¹⁹ that it has commenced section 44 of the LASPO for defamation and privacy cases, so that the success fee is no longer recoverable from a losing party. This will apply to new cases from 6 April 2019. This will further control the costs of these cases and will also give effect to our legal obligations under the *MGN v UK* judgment of the European Court of Human Rights in 2011.²⁰ In addition, the Government has announced that it has decided to keep in place, at least for the time being, the existing costs protection regime so that ATE insurance premiums will remain recoverable for these cases.²¹

Other civil justice reforms

35. The Part 2 reforms were part of a wider programme of measures implemented following Sir Rupert's review (including procedural reforms such as costs budgeting and case management) along with a strengthened emphasis on cases being dealt with proportionately in terms of value, complexity and importance of the claim.
36. These measures included: the extension of fixed recoverable costs (FRC) in fast track PI cases (to cover road traffic accident, employer liability and public liability cases up to £25k damages) by changes to the CPR in 2013.
37. In addition, further developments specifically aimed at whiplash cases were announced between October 2014 and June 2016:
- an increase in the small claims track limit in PI cases, from £1k to £5k for road traffic accident cases, and to £2k for all other PI cases. This reform will be implemented through changes to the CPR to come into effect alongside the provisions in the Civil Liability Act in April 2020.²²
 - a tariff of fixed compensation for pain, suffering and loss of amenity for whiplash cases with a duration of up to two years, and a ban on the making or requesting of offers to settle whiplash claims without medical evidence.
38. Further, on 31 July 2017, Sir Rupert Jackson published his report on extending FRC more widely in civil litigation emphasising that there was still 'unfinished business' in relation to FRC and that FRC could be extended.²³ The Government will consult on any proposals before implementation.
39. These other reforms - actual or prospective - will have had some impact on cases which are already affected by the Part 2 reforms. As is clear from the above, and

¹⁹ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-11-29/HCWS1125/>

²⁰ In that case, the court concluded that the obligation for the defendant (MGN Ltd) to pay a 100% 'success fee' (that is, the uplift that a successful claimant under a 'no win no fee' CFA can recover from the losing party) to the claimant was disproportionate, and that the CFA regime was therefore in breach of the defendant's rights under Article 10 (freedom of expression) of the European Convention on Human Rights.

²¹ 'Costs protection in defamation and privacy claims: the Government's proposals', <https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/>

²² <https://services.parliament.uk/bills/2017-19/civilliability.html>

²³ Sir Rupert Jackson, 'Supplemental Report', p. 20.

was set out in the PLM, ‘the control of civil litigation costs is an ongoing process’.²⁴ All of this makes for a complicated landscape in which it is difficult (if not impossible) to isolate the impact of an individual reform. That complexity is compounded by limited firm or reliable data (see below). It is inevitable, therefore, that the review has a rather anecdotal and impressionistic flavour.

1.3 Data

40. Alongside the publication of the online survey and the initial assessment we also asked stakeholders for data and other evidence of impacts. We received a variety of helpful responses although there were quality issues with much of the quantitative data provided meaning it needed to be treated as indicative rather than conclusive. In addition, we received case studies and examples from specific areas of litigation, from both claimant and defendant representatives, which were used to support the arguments they made regarding access to justice and the levels of costs for certain claims, respectively.
41. We have strived to use data where possible to inform the review and our basic approach to data was set out at the Civil Justice Council seminar held in June 2018. Sources used include courts data on volumes, published data on pre-court settlements, external research and data sources, the stakeholder survey and the independent analysis by Professors Fenn and Rickman²⁵ of the impacts of Part 2 of LASPO including litigation costs. However, it is acknowledged that there are limitations to the data available. The data are comparatively blunt and cannot readily measure what is quite a complex picture with separate components. We have therefore been clear about the need to avoid making spurious inferences about causality.
42. The independent analysis by Professors Fenn and Rickman is worth highlighting here. Fenn and Rickman analysed substantial samples of PI (excluding clinical negligence) claims over £25k and clinical negligence claims under £250k which concluded within two years both pre- and post-LASPO. For more details about their methodology, please see the ‘Analysis by Professor Paul Fenn and Neil Rickman’ in Chapter 10: Data Analysis. Their analysis indicates lower base costs, lower damages, and reductions in the length of legal proceedings.

1.4 Stakeholder engagement

43. The Government wanted to involve stakeholders in the review process at all stages and gave them the opportunity to participate, engage with and inform the PIR of Part 2 through a variety of methods. These opportunities included a seminar hosted by the Civil Justice Council, an open online survey which accompanied the publication of the initial assessment, as well as meetings held by MoJ officials with a broad range of stakeholders representing different areas of civil litigation.

²⁴ PLM, p. 96.

²⁵ Paul Fenn and Neil Rickman, ‘*The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (January 31, 2019)*’. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326665.

1.5 Civil Justice Council Seminar

44. The set piece consultative element of the review was a seminar hosted by the Civil Justice Council on 29 June 2018. The seminar was chaired by Sir Robin Knowles and approximately 100 delegates attended. This event featured: an introduction by the Master of the Rolls; a speech by MoJ Parliamentary Under-Secretary of State Lucy Frazer QC MP on the Government's approach to the Part 2 PIR; a speech by Sir Rupert Jackson, the architect of the reforms; and panel sessions with experts covering each of the five statutory reforms as well as costs budgeting. We are very grateful to everyone involved in this event, who helped make it a successful and productive day.
45. In addition to the seminar, all stakeholders were given the opportunity to submit their views via an open online survey which accompanied the publication of the initial assessment paper. The questionnaire asked practitioners to provide evidence of how the reforms have impacted their areas of work. The survey results are set out below.

1.6 Survey Results

46. As previously stated, an online survey invited stakeholders to submit substantiated views about the impact of the Part 2 reforms. This was open for eight weeks until 24 August 2018. In total, 159 responses were received to the survey but four responses were duplicates.
47. The list of respondents is set out at Annex B. We are grateful to everyone who took the time to respond to the survey.

1.7 Meetings

48. MoJ officials also had discussions with a variety of stakeholders from summer 2017 to November 2018. This included professional bodies, lawyers and their representatives (acting for both claimants and defendants) and insurers to get a range of perspectives on the impact of the Part 2 reforms. Again, we are grateful for everyone who took the time to meet us.

2: Summary of the Part 2 Reforms

49. This chapter seeks to explain the reforms in Part 2 of LASPO as simply as possible. This includes a before and after section to explain each of the five statutory reforms. There is also an explanatory box at the start of the following chapters. However, as previously stated civil litigation funding and costs is a rather technical area by its nature.

2.1 Background

50. Sir Rupert Jackson (then Lord Justice Jackson and a senior judge in the Court of Appeal) was asked by the then Master of the Rolls to conduct an independent review to consider how to reduce the costs of civil cases. He undertook a year-long investigation and his final report was published in January 2010. His 550-page report made 109 recommendations.
51. He recommended a package of measures, including but not limited to: 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 PI cases; and the introduction of qualified one-way costs shifting (QOCS) in PI litigation. All of these were implemented for PI litigation in Part 2 of LASPO and accompanying measures.²⁶
52. The reforms in Part 2 came into effect generally on 1 April 2013.

2.2 Key Changes

53. The provisions in Part 2 of the LASPO Act fundamentally reformed the way in which CFAs work. CFA claimants regained an interest in the costs which are incurred on their behalf and the way their case is conducted, as they became liable for their own lawyer's success fee. It remains open for claimants to take out ATE insurance if they wish, but they are responsible for paying their own premiums, which again encourages them to take responsibility for the costs of their case. The LASPO reforms were intended to encourage defendants to defend cases where they are in the right, rather than settle them for fear of the costs should the claim succeed.
54. Claimants' damages were supported by a number of measures which were implemented alongside the LASPO reforms, including:
- a. a 10% increase in damages for pain, suffering and loss of amenity; and;
 - b. in PI cases:
 - i. the introduction of qualified one-way costs shifting (QOCS), to protect the claimant's liability for adverse costs in losing cases; and
 - ii. a cap on the amount the lawyer can charge as a success fee.

²⁶ PLM, pp. 86-87.

55. Part 2 also banned referral fees in PI cases. This helped to tackle the perception of a compensation culture, as lawyers and claims management companies are no longer able to pay for details of potential claimants.

2.3 Before and After Part 2 of LASPO

56. The following section seeks to explain the effect of the reforms by comparing the positions before and after the Part 2 reforms were implemented.

CFA Success Fees

57. **Before** the implementation of the LASPO reforms, the success fee that might be charged (and recovered from the losing side) under a CFA was capped at a maximum of 100% of base costs, although the cap was fixed at a lower level in certain types of PI cases that settle before going to trial. The success fee was payable by the losing defendant, in addition to the base costs.
58. **After** the implementation of the LASPO reforms, in consequence of amendments made by section 44 of the Act to section 58 and 58A of the Courts and Legal Services Act (CLSA) 1990, the success fee (if one is charged) will be payable by the successful claimant. This means that claimants pay their lawyer's success fee out of the damages awarded to them. The success fee remains capped at 100% of base costs. There is a further protection for claimants' damages in PI cases as the maximum amount that a lawyer can charge is 25% of non-pecuniary damages, such as those awarded for pain, suffering and loss of amenity, and past loss. Damages awarded for future care and loss are protected. The 25% cap is inclusive of VAT.

ATE insurance

59. **Before:** the ATE insurance premium was payable by the losing defendant. The premium was not usually charged to the claimant who lost their case, which meant that premiums were higher because an element of self-insurance was built into the premium price – premiums charged on successful cases must be high enough to cover the costs that were paid in unsuccessful cases where a premium was not charged.
60. **After:** in consequence of amendments made by section 46 to the Access to Justice Act 1999 and CLSA 1990, any ATE insurance premium would be payable by the successful claimant. Premiums are likely to be charged, but also to be lower because the element of self-insurance is no longer present. Qualified one-way costs shifting (QOCS) has been introduced in the CPR for PI cases which means that claimants will generally not have to pay the defendant's costs if the claim fails, and the need for ATE insurance in such cases is reduced or removed.
61. There is also a limited exception, for clinical negligence cases only, where ATE insurance premiums covering the cost of expert reports which relate to causation and liability are still recoverable. This means that claimants do not have to pay upfront for the costs of reports relating to causation and liability.

DBAs

62. **Before:** lawyers were not permitted to act under DBAs in civil litigation. However, solicitors were permitted to act under DBAs in 'non-contentious' business, including

cases before tribunals. The use of DBAs developed in tribunals over time and they became commonly used in Employment Tribunals in particular, and also in Tax Tribunal cases. The use of DBAs in Employment Tribunals were subject to the Damages-Based Agreements Regulations 2010 made under the CLSA 1990 (as amended) which specifically regulated the use of DBAs in employment cases. Section 45 of LASPO amends that legislation so that DBAs can be used and regulated in civil litigation.

63. **After:** the amendments made by section 45 to section 58AA of the CLSA allow solicitors and barristers to use DBAs in civil litigation. The amount that lawyers can take from the damages in PI cases is capped at 25% of non-pecuniary damages, such as those awarded for pain, suffering and loss of amenity, and past loss. As with CFAs, damages awarded for future care and loss are protected and cannot be used towards the lawyer's fee. Successful claimants on DBAs will recover their base costs from defendants in the usual way and the claimant will pay any shortfall between the costs recovered and the DBA fee agreed with the lawyer.

Changes to Part 36 offers to settle

64. The policy intention was to encourage further the early settlement of claims. Part 36 of the CPR sets out a process of sanctions and rewards for the making and acceptance of offers to settle; this process is used particularly in PI damages cases. Lord Justice Jackson recommended an additional amount (10% of damages) to be paid by a defendant who does not accept a claimant's offer to settle where the court gives judgment for the claimant that is at least as advantageous as the claimant's offer. Section 55 provides for rules to be made to achieve this. These provisions are intended to encourage claimants to make, and defendants to accept, early reasonable offers. This is intended to reduce the time taken for cases to settle and consequently help to lower overall costs.

Ban on referral fees in PI

65. **Before:** referral fees could be paid by solicitors and others (although barristers are prohibited from using referral fees by their professional rules) who may have interest in a case, to parties who pass on details of possible claims (subject to data protection laws) or who might be instructed in connection with a claim (for example a medical expert instructed by a solicitor). There were no legislative controls on referral fees, which were estimated to be around £600–800 per case.
66. **After:** the payment of referral fees is banned in PI cases. It is for regulators (for example, the Solicitors Regulation Authority, the Bar Standards Board, the Claims Management Regulator, and the Financial Services Authority for insurers) to enforce the ban. The prohibition can, by regulations made by the Lord Chancellor, be extended to other types of claim and legal services providers.

Accompanying measures (not in the LASPO Act)

67. These statutory reforms were accompanied by a large number of other reforms, such as case and costs management reforms that were taken forward by the judiciary, involving significant reforms to the CPR. A significant change to the CPR was the introduction of **QOCS (qualified one-way cost shifting)**, which has so far been implemented in PI cases (including clinical negligence) only. QOCS means that claimants are protected from paying the other side's costs if the case is lost. This

general protection is subject to the claimant's behaviour (the protection is lost if the claim is 'fundamentally dishonest'), and their acceptance of appropriate offers to settle. There is no means test for QOCS in PI cases as a matter of practicality, but it has been accepted that any extension of QOCS to other types of litigations may involve means testing.

68. **A 10% increase in general damages for pain, suffering and loss of amenity.** This applies to all tort cases, however funded, to which the LASPO reforms apply. Aside from a general increase in damages, it helps claimants finance a success fee or ATE insurance premium, if necessary. This was implemented by the Court of Appeal in the case of *Simmonds v Castle No 1 and No 2*.
69. **Proportionality** – Sir Rupert's proposed rule on proportionality has been implemented in the CPR. The test is intended to control the costs of activity that is clearly disproportionate to the value, complexity and importance of the claim.

2.4 Scope of the reforms

70. The Part 2 reforms apply in all areas of civil litigation (with the very limited exceptions listed at 1.2 in this paper) and so all civil cases have been affected at least to some degree by the Part 2 reforms; some, including PI, will have been affected substantially.
71. Inevitably, there will have been different experiences for different practitioners: what has happened in one solicitors' firm will not have been replicated in another. It was always going to be the case that there would be a need to adjust business model and practices to the reforms. In the Government's response to Sir Rupert Jackson's recommendations it was stated that: 'while some claimant solicitors will lose out on their current business models based on the substantial additional recoverable success fees, it does not follow that claimant solicitors cannot and will not adapt and continue to be profitable in future'. The changes to the recoverability of CFA success fees and ATE insurance premiums principally affect damages cases such as PI cases.
72. The changes to DBAs will have affected relatively few cases as DBAs remain a niche alternative to CFAs (aside from concerns about the regulations as set out in chapter 5, below). DBAs were not expected to be used as an alternative funding method in areas like PI where CFAs are well established so their impact was always expected to be limited.
73. The changes to Part 36 offers potentially affect all civil cases but are also most likely to impact on damages cases. Nevertheless, this was quite a limited change so its impact will be limited.
74. The ban on referral fees for PI only affects the PI market.
75. There are a significant number of PI claims each year, and this is the area that has been most affected by the Part 2 reforms. PI cases have also been affected by other linked changes such as fixed recoverable costs. The PI market has shown its resilience in adapting to a wide range of reforms.

3: Non-recoverability of CFA success fees

Conditional fee agreements (CFAs): CFAs are often referred to as ‘no win, no fee’ agreements as a lawyer is only paid a fee for their services in the event of success. If they lose, they will not be paid for their work.

CFA success fees: success fees are an additional fee that can be charged by a solicitor if their client’s case is successful and was funded using a conditional fee agreement. The level of success fee is meant to be determined by the level of risk involved in a case and its chances of success.

Prior to LASPO, the success fee was recoverable from (ie payable by) a losing opponent.

Section 44 of LASPO made the success fee no longer recoverable. If charged, it is now paid by the lawyer’s client.

Success fees are capped at 100% of base costs but in PI cases they are limited to 25% of general damages for pain, suffering and loss of amenity and past loss.

76. The majority of respondents, including claimant lawyers, accept that this reform has reduced the costs of civil litigation meeting the principal objective of the Part 2 reforms (**Objective 1**) as well as rebalancing the costs liabilities between claimants and defendants (**Objective 2**). Given the passage of time since non-recoverability of the CFA success fee was introduced, it is inevitable that all claimant law firms have generally adapted to this change and adjusted their business practice accordingly. However, there were a handful of calls by claimant lawyers to overturn Section 44, particularly for diseases such as asbestosis, and to re-introduce recoverability for success fees to protect the claimant’s damages.

Claimant views

77. Concern was expressed by some claimant lawyers that non-recoverable success fees have broken the principle of restoration for tort law i.e. the claimant should be restored to the same position as before the event. Although it was a clear intention of LASPO that the success fee should become payable out of damages received, it was argued that deductions from client damages contradict the full compensation principle, with the result that claimants have received less compensation than they should be entitled to.
78. In addition, it has been suggested that another consequence of this reform has been that some claimant lawyers now look for and require higher prospects of success before taking a case. Prior to LASPO this threshold has been estimated at approximately 40-50% prospects of success. Anecdotally, it has been suggested that more established and experienced firms might now look for higher prospects of success. This suggests that law firms are taking a greater interest in the merits of a case and the risks associated with providing legal representation on a CFA, which may filter out less meritorious cases from being pursued. However, there was a view that other, perhaps less established, firms have filled the gap for cases which more experienced firms may have taken prior to LAPSPO, suggesting that some weaker cases are still being pursued. The data we have on claims volumes also supports the latter argument, indicating a slight drop in claims volume.

79. Claimant lawyers were generally of the view that the combined effect of the Part 2 reforms and the introduction of fixed recoverable costs in low-value PI claims, has been contraction and consolidation of firms in the PI market. This has led to a need to adjust business models due to lower fees including sometimes using less experienced staff. It seems some firms have adjusted while others have moved onto other areas, perhaps in anticipation of the reforms, rather than as a result of experience. It was suggested by one defendant firm that there could be a significant increase in the number of PI claims arising out of cavity wall insulation giving rise to damp and related issues; we would be interested to hear further details of this and any areas where there appears to be a significant growth in claims.
80. The absence of fixed recoverable costs in clinical negligence²⁷ and gastric illness²⁸ claims may have resulted in a movement of firms to those areas and an increase in claims. Clinical negligence claims were also affected by the withdrawal of legal aid by Part 1 of LASPO (leading to non-legal aid firms entering the market). The Government has taken action in respect of both areas: (i) by commissioning the Civil Justice Council - to develop new processes and FRC for clinical negligence claims under £25,000 damages - it is expected to report in spring 2019; and (ii) extending FRC to gastric illness claims from 7 May 2018.²⁹ The impact of the Part 1 legal aid reforms, including for clinical negligence claims, has been considered in a separate review, which can be found here.³⁰
81. One claimant lawyer firm noted that in CPR (Practice Direction 3E2(b)) claimants with '*a limited or severely impaired life expectation of 5 years or less*' were treated differently for costs budgeting purposes and suggested that an exemption for the same category of the claimants with regard to the recoverability of success fees and ATE premiums would benefit claimants with serious disease claims such as asbestosis.
82. A survey response from a leading claimant firm suggested that, based on a sample of 85 of their multi-track cases (predominantly clinical negligence and serious injury) funded under post LASPO CFAs, the now non-recoverable ATE premium and success fee were estimated at 12% of the overall costs in these cases on average. However, they noted that 'an overarching view' of the savings to a defendant were likely to be between 20-30%. The reasons given for this higher overall level of savings were stated as ATE premiums post-LASPO being 'considerably lower' than pre-LASPO due to the introduction of QOCS, capped success fees which meant that success fees are now lower, in addition to not being recoverable and because counsel's success fees are generally no longer paid (see below).

Barristers' views

83. Some barristers said that they are more reluctant to take on claimant work in contrast to working for defendants as barristers very rarely receive any share of a CFA

²⁷ The number of new NHSR clinical negligence claims reported increased from 10,129 in 2012/13 to a peak of 11,945 in 2013/14 before declining steadily to 10,673 in 2017/18.

²⁸ <https://www.gov.uk/government/consultations/personal-injury-claims-arising-from-package-holidays-call-for-evidence>

²⁹ Ibid.

³⁰ Post-Implementation Review of Part 1 of LASPO - <https://www.gov.uk/government/publications/post-implementation-review-of-laspo>

success fee post-LASPO. A barrister stated they would now look to 70%+ prospects of success in a PI claim, before agreeing to provide representation on a CFA and suggested they looked for a minimum of 50%+ prospects of success prior to LASPO.

Defendant views

84. Defendants welcomed the impact of the non-recoverability of the success fee as it has reduced the costs of civil litigation and argued that recoverable success fees had led to disproportionate costs.
85. There was some concern that, post-LASPO, claimant lawyers routinely charged the maximum success fee (100% but capped at 25% of general damages for PI)³¹ without carrying out an appropriate risk assessment. As in other areas, it seems that the 'cap' might have become the default amount. It is alleged that there is a lack of competition around the level of success fees being charged to clients and/or that credible risk assessments are not being used to determine the appropriate level of success fee.³² The setting of success fees is perhaps a more contentious issue for cases on behalf of children such as in straightforward road traffic accident (RTA) cases where there is a very low level of risk. Lack of competition around success fees is also perhaps an issue where claimants are assigned a lawyer from a panel by their insurer, rather than necessarily having to shop around for one.
86. There also appears to be a greater level of consideration and process around the decisions of what is an appropriate success fee for higher value cases, particularly in complex clinical negligence cases which includes the use of staged success fees, in certain circumstances.
87. Claimants are said sometimes to 'beauty parade' high value clinical negligence cases which means that law firms compete to take on a valuable case. This indicates that there is an element of competition and awareness on the client side that firms can charge various levels of success fee under CFAs and that will affect the damages received, particularly for clinical negligence claims. Linked to this is the emergence of a new market in satellite litigation challenging success fee deductions. An experienced costs judge cited that this had led to a spate of applications for disclosure of solicitors' files. This is also an issue which will be considered by the Court of Appeal in Spring 2019 in *Herbert v HH Law* in which a claimant challenged the 100% success fee her solicitors claimed for handling a routine RTA claim.³³ The case will consider the importance of carrying out an individual risk assessment for determining the appropriate success fee.

³¹ See box at the start of this chapter.

³² <https://www.lawgazette.co.uk/comment-and-opinion/success-fees-a-word-of-warning/5050634.article>

³³ <https://www.bailii.org/ew/cases/EWHC/QB/2018/580.html>

4: Non-recoverability of ATE insurance and the introduction of QOCS for PI cases

ATE Insurance: After the event insurance is a form of insurance that can be taken out after an incident to provide costs protection to protect from adverse costs as well as help fund disbursements (expenditure on behalf of the client such as expert reports, court fees etc.).

Prior to LASPO, the ATE insurance premium was recoverable from (i.e. payable by) a losing opponent.

Section 46 of LASPO made ATE insurance premiums non-recoverable. ATE premiums are now paid by the lawyer's client, typically out of their damages.

QOCS: Qualified One-Way Costs Shifting is a form of costs protection for personal injury cases which means an unsuccessful claimant does not have to pay a defendant's costs. That means defendants will generally pay the costs of successful claimants but will not recover their own costs if they successfully defend the claim. This costs protection is subject to certain exceptions such as 'fundamental dishonesty' and where proceedings are struck out for no reasonable grounds, the proceedings are an abuse of court process or conduct obstructs the 'just disposal of proceedings'.

Currently, QOCS applies to personal injury proceedings only.

88. Sir Rupert considered ATE insurance to be an expensive method of costs protection.³⁴ Section 46 of the LASPO Act 2012 made ATE insurance premiums non-recoverable in all categories of civil litigation with the view that this would reduce costs. S. 46(2) provides an exception for the recoverability of ATE premiums for clinical negligence expert reports, which relate to causation and liability. There were limited calls by some claimant lawyers to overturn section 46 and reintroduce recoverability for ATE premiums.
89. The Government introduced qualified one-way costs shifting ('QOCS'), a form of costs protection, for PI cases in April 2013 in line with the objective of 'access to justice at proportionate cost' (**Objective 3**). This means that, subject to certain exceptions (or qualifications), most notably 'fundamental dishonesty', an unsuccessful claimant does not have to pay the defendant's costs. However, the defendant will have to pay the claimant's costs, if the claim is successful (hence, 'one way'). The view from both claimant and defendant representatives was that generally QOCS is working well for personal injury cases and has enabled claims to be pursued. However, claimants argued that there should be costs sanctions for defendants who allege fundamental dishonesty, which is later not proved. In contrast, defendants argued that there should be costs sanctions for claimants for the late withdrawal of claims. However, no evidence was provided by either claimants or defendants to advance the extent of either of these issues.

³⁴ Sir Rupert Jackson, 'Final Report', pp. 325 – 326.

Claimant views

90. A claimant PI representative group said that QOCS 'is working well' and generally claimants were pleased with the introduction of QOCS for PI cases. Nevertheless, some specific points were raised where claimants felt QOCS could be further improved and they often argued QOCS should be extended to other areas (see 4.1 in this chapter).
91. A large majority of claimant lawyer respondents asserted that fundamental dishonesty (FD) is being alluded to in a high percentage of cases and sometimes as part of the standard claims process. This was supported by other categories of respondents such as barristers and judges. According to some, the apparent increase in allegations and/or insinuations of FD is because this is the main way for defendants to recover their costs under QOCS. However, FD remains an important qualifier to discourage unmeritorious claims under QOCS. It has been suggested that there should be costs sanctions for falsely alleging fundamental dishonesty and one barrister suggested that these claims should be automatically taken out of the fixed costs regime when a FD allegation is made to level the playing field and allow allegations of FD to be responded to properly.
92. There were mixed views on the necessity of taking out ATE insurance for PI claims post-LASPO because of the introduction of QOCS. However, many claimant lawyers said ATE remained necessary or was recommended to clients to cover the costs of disbursements and the risks of not accepting a Part 36 offer which is later not beaten at trial. Others said that they leave the choice of whether to take out ATE insurance up to their clients as it depends on a claimant's appetite for risk as well as their means (that is, if they are of limited means arguably they have little to lose and practically it would be difficult to recover a costs order against them). On the other hand, one claimant lawyer said that due to QOCS the risks are 'negligible' for the majority of PI cases so ATE insurance should not normally be required for PI cases.
93. It was suggested by some claimant lawyers that, for claims that do not benefit from QOCS, the availability and perceived high cost of ATE insurance premiums could deter some claims, as the ATE premium would be deducted from the award of damages if successful. They argued that this acted as a deterrent to pursuing cases as it may make litigation seem less worthwhile.
94. Several claimant lawyer respondents referred to the case of *Cartwright v Venduct Engineering*³⁵ which relates to the entitlement of a successful defendant to enforce an adverse costs order against damages recovered by a claimant from another unsuccessful co-defendant. Concern was expressed that QOCS protection could potentially be lost in multi-defendant cases in which could have a particular impact in divisible disease cases such as asbestosis.

Defendant views

95. Many defendants cited concerns about the late withdrawal of claims. There were mixed views on any potential changes to discourage the late withdrawal of claims as recommended by the Insurance Fraud Taskforce (IFT).³⁶ The IFT Personal Injury

³⁵ <http://www.bailii.org/ew/cases/EWCA/Civ/2018/1654.html>

³⁶ <https://www.gov.uk/government/groups/insurance-fraud-taskforce>

sub-committee recommended that the courts' power to prevent claimants adopting this tactic would be strengthened by a requirement that a claimant discontinuing within 14 or 28 days of trial should be obliged to seek permission from the court. While some respondents felt this was a sensible measure to prevent unmeritorious cases from progressing and then dropping out just before trial (with defendants not being able to recover their costs), others argued there are legitimate reasons for late withdrawal and that any moves to combat this would just add another layer of complexity, increase costs and put pressure on the court system. However, there was some debate, even amongst defendants, about the effectiveness of the IFT solution and some proposed other options to address the late withdrawal of claims. Some defendant groups and insurers also argued that QOCS encourages unmeritorious cases and leads to weaker cases running on for longer periods of time due to lower adverse costs risk, but they did not provide any evidence to support their assertions. However, others acknowledged that the introduction of QOCS for PI cases went hand in hand with the non-recoverability of CFA success fees and ATE insurance premiums. Indeed, Sir Rupert Jackson said: '*one way costs shifting would be a less expensive method of achieving the same objective [protecting claimants against adverse costs orders]*'.³⁷

96. As previously stated, defendants have concerns about the extension of QOCS beyond PI (see 4.1) and believe it will lead to an increase in unmeritorious cases and potentially drive an increase in claims. Concern was also expressed about QOCS potentially being used for detailed assessment hearings for arguments about costs rather than the case itself. It was said that such disputes could be construed to be more about the claimant's lawyer than the claimant who will not be involved, which defendants argue is not the intention of QOCS. Defendants state that QOCS should not apply to such matters.

ATE insurer views

97. ATE insurers emphasised that they play the role of positive gatekeepers by vetting claims, when considering ATE insurance policies meaning claims without merit do not proceed.
98. ATE insurance is seemingly still being taken out at similar volumes to prior to LASPO and demand remains for ATE products to cover risks. Prior to LASPO, many ATE insurers expressed concern that, if non-recoverability of ATE insurance premiums was introduced, it would result in some ATE insurers to exit the ATE insurance market.³⁸ While some ATE insurers have exited the market post-LASPO, the evidence suggests that the market remains buoyant and these predictions were somewhat pessimistic.
99. ATE insurers had differing views on the impact of the Part 2 reforms on the ATE market. For example, a leading ATE insurer said that despite 'great reservations' prior to LASPO the ATE market continues to operate well. They stated that the volume of ATE insurance purchased had actually increased for PI claims, despite the benefit of QOCS protection for PI claims, to cover Part 36 risks and disbursements.

³⁷ Sir Rupert Jackson, 'Final Report', p. 184.

³⁸ 'Government Offers Limited LASPO Concessions as ATE Insurers go on the Attack', *Legal Futures* <https://www.legalfutures.co.uk/latest-news/government-offers-limited-laspo-concessions-as-ate-insurers-go-on-the-attack> (1 March 2012).

This insurer also said that there were new entrants in the ATE market, that ATE had never been so competitive and that there had been significant growth in disbursement funding providers. This slightly contrasts with another ATE insurer who stated that the reforms have driven changes in behaviour which has resulted in claims being insured at a later stage, which has increased the risk profile of a large group of cases, referred to as a 'basket of cases'. They suggested that approximately 90% of cases now have ATE insurance, as opposed to 98% prior to LASPO. An insurance broker said they had noted a decline in the volume of ATE insurance purchased for smaller commercial cases (up to £500,000), but did not substantiate that with any evidence.

100. There was no clear consensus on changes to the prices of ATE insurance pre- and post-LASPO. It has been suggested by some ATE insurers and claimant lawyers that there has been some reduction in the price of ATE premiums while others disputed this. There was particular concern, raised by defendants, about the cost of ATE premiums for clinical negligence cases (see below). We have not been provided with any evidence or data to make an appropriate assessment of the extent to which prices of ATE insurance for most cases have changed.
101. We also received some evidence which appears to document the overcharging of PI clients for ATE premiums by PI solicitors for straightforward RTA cases, at prices significantly higher than the cost and/or the market rate. Examples were given of policies being incepted on behalf of clients without a fair market analysis such that the client is charged a premium that is substantially higher than it would have been had the client purchased it directly from the insurance provider or from another cheaper insurer. If true, this suggests that some PI clients are being overcharged for ATE premiums or, at a minimum, are not always being recommended the most competitively priced premiums for their needs. It was suggested that the difference between the 'true cost' of the ATE premium and the amount deducted from a client's damages should be fully disclosed as a form of commission; directly or indirectly.

4.1 Extension of QOCS beyond PI

102. Claimant lawyers often argued that QOCS should be extended to a range of claims outside of personal injury in order to increase access to justice especially where there is an 'asymmetric relationship between the parties' (to use Sir Rupert's term).³⁹ These areas include: actions against the police and other public authorities, discrimination cases under the Equality Act 2010, human rights cases, housing disrepair, professional negligence claims (particularly those arising from negligence from a PI claim where the original claim had QOCS), judicial reviews and private nuisance claims amongst others. Defendants, however, argued against the need to extend QOCS as the number of claims has remained relatively stable and at a reasonable level. They argued that the extension of QOCS to areas beyond PI would lead to an increase in unmeritorious claims and state that any extension is neither required nor desirable.
103. Claimant lawyers acting in many of the areas where an extension of QOCS was sought, provided case studies and limited data to illustrate their claims about the difficulties of bringing some cases. For example, lawyers representing claimants in actions against the police expressed concern that following the Part 2 non-

³⁹ Sir Rupert Jackson, 'Final Report', p. 90.

recoverability changes there has been a serious impact on access to justice as they believe some meritorious cases cannot be brought. They argued that extending QOCS to these claims would remedy this. However, they did state that personally they have a similar caseload post-LASPO as they did prior to LASPO.

104. However, defendant police lawyers refuted the suggestion that QOCS should be made available in actions against the police and argued these cases had high costs to damages ratios, that legal aid was still available⁴⁰ and indeed was used inappropriately. They also argued there was little budgeting control pre-action. Defendants also suggested that there was an independent complaints procedure, the Independent Office for Police Conduct, although claimant lawyers argued this process was flawed, often unsatisfactory and not an alternative to litigation.
105. Housing disrepair cases was another area where it was argued by some claimant lawyers that it was difficult to bring claims post LASPO, leading to an access to justice issue. However, defendants argued that legal aid also remained in this area (where this is a serious risk to health and safety, and subject to means tests).⁴¹ There was also the Housing Ombudsman Service available for some residents although housing disrepair claimant lawyers stated this was not normally a viable alternative to litigation and does not award compensation.⁴²
106. A professional negligence claimant lawyers' representative group argued that there was a lack of evidence and flaws behind Sir Rupert's methodology in his original report regarding professional negligence, and that the "one size fits all" approach of LASPO should not apply to these claims. They argued for the extension of QOCS to these claims and provided some data, which suggested that claims volumes had dropped post LASPO indicating, they suggested, an access to justice problem. Defendants generally disputed this, arguing that professional negligence claims did not feature an 'asymmetric relationship' and that there were often professional body complaints procedures and ombudsmen for many of the relevant professions. The representative body for professional negligence lawyers would also like greater awareness of the professional negligence adjudication scheme. This is a voluntary process which seeks to resolve disputes in a faster and more efficient manner than litigation, modelled on the adjudication process for construction disputes.⁴³
107. It has been argued that QOCS should be extended to discrimination claims under the Equality Act 2010 due to concerns about access to justice and ensuring discrimination and human rights could be enforced. Claimant lawyers provided case

⁴⁰ The legal help category of legal aid shows an increase in actions against the police spending of 31% against a projected reduction of 44% in spending. Spending on civil representation legal aid for actions against the police has decreased by 26% against a projected decrease of 59%. The volume of cases has decreased by 36% (legal help) and 21% (civil representation), considerably less than projected in the impact assessment. Source:
<https://www.gov.uk/government/statistics/legal-aid-statistics-july-to-september-2018>

⁴¹ The scope of legal aid for housing disrepair is now for housing disrepair 'that risks serious harm to individual and his/her family'. There is no individual breakdown that separates housing disrepair from other housing claims, however there has been a significant decline in both the volume and spend on legal aid for housing as whole for both legal help and civil representation.

⁴² Housing Ombudsman, <https://www.housing-ombudsman.org.uk/>

⁴³ 'Adjudication Scheme Trial for Professional Negligence Claims', <https://pnba.co.uk/wp-content/uploads/2016/05/Professional-Negligence-Adjudication-Pilot-Pack-Launch-date-25-May-2016.pdf>; <http://www.pnla.org.uk/pnla-news-detail.asp?newsID=85>

studies to highlight the difficulties in bringing such claims post-LASPO. They stated that the ATE insurance premium could often exceed the level of damages awarded in these cases, which would act as deterrent in claimants' willingness to bring claims. They also stated that claimants' compensation was not a driving factor in bringing discrimination claims, rather it was primarily about asserting and enforcing their rights.

108. It was also argued by some, including those dealing with actions against the police (and other authorities), that the rules around QOCS for 'mixed claims' (claims which include PI alongside other areas of law) should be clarified to allow mixed claims to benefit from QOCS.

4.2 Recoverability of ATE insurance premiums for clinical negligence expert reports

109. Claimant lawyers supported the continued partial recoverability of ATE insurance premiums to cover expert reports in clinical negligence cases arguing it was a prerequisite to assessing the merits of these cases. They stated that expert evidence is expensive and some respondents suggested that premiums need to reflect the cost of the approximately 50% of clinical negligence cases that fail. Claimant lawyers assert that ATE insurance would be prohibitively expensive without this recoverability. They also said that if there is concern about the costs of these ATE premiums trusts should be transparent to reduce the amount of investigation required. An ATE insurer in this area made similar arguments in favour of keeping this exception saying it was necessary to maintain access to justice due to the high level of disbursements needed for clinical negligence claims, in terms of both the amount and quality of evidence required and the costs of obtaining that evidence from experts.
110. On the other hand, a defendant clinical negligence organisation, expressed concerns that the cost of these premiums often seemed to far exceed the actual cost of the medical reports. They argue these premiums are poor value for money because there is a lack of transparency in the pricing of the product and that partial recovery should be removed. NHS Resolution have suggested from analysis of their own data that around £63M was paid for post-LASPO ATE premiums in 2016/17 and 2017/18, an average of £31.6M per annum.⁴⁴ Furthermore, an insurer outside of this market stated that this market (the expert report section subject to recoverability) did not appear to be operating effectively and suggested the lack of transparency around how premiums were set, particularly in relation to the part of the premium which is recoverable, was concerning.
111. The High Court and Court of Appeal have considered cases about the costs of ATE premiums. Paying parties have historically found it difficult to challenge ATE premiums due to the Court of Appeal's decision in *Rogers vs Merthyr Tydfil*.⁴⁵ However, the implementation of the new proportionality rule has provided some redress if ATE premiums are considered excessive with premiums being disallowed and or reduced in some recent cases⁴⁶, for example.

⁴⁴ NHS Resolution data was provided to the MoJ as part of the data gathering for the PIR.

⁴⁵ <https://www.bailii.org/ew/cases/EWCA/Civ/2006/1134.html>

⁴⁶ <https://www.litigationfutures.com/news/nhs-la-targets-ate-costs-proportionality-test-makes-mark>

112. The Court of Appeal will be hearing a case in summer 2019⁴⁷ that should determine some of the questions and issues concerned with challenging and/or reducing the cost of post LASPO ATE premiums taken out in clinical negligence claims.

113. The Government is developing a cross-government strategy to address the rising costs of clinical negligence. As part of this work the Government is looking at whether there are further measures which might reduce the legal costs of claims.

⁴⁷ The Court of Appeal will hear the conjoined cases of *Demouilpied v Stockport NHS Foundation Trust* and *West v Stockport NHS Foundation Trust* in summer 2019.

5: The introduction of Damages Based Agreements (DBAs) for funding civil cases

Damages-based agreements (DBA): under a DBA lawyers are not paid if they lose a case but may take a percentage of the damages awarded to their client as their fee if the case is successful. DBAs are similar to CFAs in that they are each ‘no win no fee’ agreements, but in a DBA the lawyer’s payment is linked to the damages awarded, whereas in a CFA it is linked to the costs recovered. This means that DBAs are actually a simpler and clearer concept for most clients as it means if they win their lawyer will simply take a percentage of their damages as their fee versus the base fees and success fees used for CFAs.

Prior to LASPO, DBAs were only used to fund employment tribunals.

Section 45 of LASPO introduced DBAs as a funding method for all civil cases.

Hybrid DBAs are a form of funding arrangement, which some commercial lawyers supported, that would allow DBAs to be combined with another form of funding so that it is not a true ‘no win no fee’ agreement. Typically, hybrid DBAs are sought to be used in higher value commercial litigation, where the lawyer would receive a proportion of the damages if successful but would nevertheless receive some payment from the client if unsuccessful.

114. DBAs were proposed by Sir Rupert Jackson as an alternative funding method for civil cases, outside of employment tribunals, to increase funding options thereby meeting the aim of promoting access to justice at proportionate cost (**Objective 3**).⁴⁸
115. However, as stated in the initial assessment, DBAs were ‘intended as an additional form of funding in appropriate cases, not an alternative form of funding in every case’.⁴⁹ It was the Government’s view at the time that DBAs were not designed to be an alternative to CFAs for mainstream fast and multi-track PI cases, for example.
116. Almost all respondents, across the spectrum, agreed that DBAs are rarely used and that the current DBA regulations are not effective. There was unanimous support amongst respondents that the regulations would benefit from reform and redrafting to ensure DBAs are a more viable funding method for a greater number of cases. Where respondents and stakeholders elaborated on specific concerns they cited issues including: the lack of payment of a reasonable sum for work done on termination⁵⁰; uncertainty around early termination and the indemnity principle; uncertainty around whether the ‘sequential’ hybrid DBAs are allowed under the current Regulations; and the payment of counsel’s fees amongst others that needed addressing before they are seen as being more attractive. As such, most respondents on DBAs endorsed the conclusions and recommendations of the Civil

⁴⁸ Sir Rupert Jackson, ‘Final Report’, p. 131.

⁴⁹ Initial Assessment (Annex A).

⁵⁰ ‘Quantum meruit’.

Justice Council's (CJC's) Working Group on DBAs, chaired by Professor Rachael Mulheron, which produced a detailed report on these issues in 2015.⁵¹

117. A claimant personal injury group advocated the use of a tapered approach to the percentage cap for DBAs, as proposed by Sheriff Principal Taylor in Scotland.⁵²
118. In addition, we received a number of representations from commercial litigators and their representatives specifically relating to the use of hybrid DBAs for commercial litigation. Some argued that there was no reason to ban the use of hybrid DBAs, since its effects are already being replicated by third-party litigation funders who can provide hybrid DBAs to lawyers, which is an additional deduction from the client's damages. Many commercial lawyers stated that it was unfair that third-party litigation funders could offer hybrid DBAs, but lawyers were precluded from entering into such an arrangement with their clients. In addition, commercial litigators also cited that a hybrid DBA, which is suitable in high-value complex commercial litigation, would enable the law firm to receive some income on an ongoing basis, since most of these cases took several years to conclude. As such, hybrid DBAs would provide a potential solution to easing cash flow problems in such cases.
119. Other reasons in favour of hybrid DBAs included the risk sharing appetite of commercial clients, including international clients. They stated that international clients, who preferred to settle their disputes in this jurisdiction, were left feeling frustrated that they were unable to negotiate flexible funding arrangements with their lawyers, which they could do in other jurisdictions. According to some, this was putting England and Wales at a competitive disadvantage as an international centre for dispute resolution.
120. This general view of allowing hybrid DBAs was also supported by Sir Rupert Jackson at the CJC seminar.
121. However, some commercial lawyers also cautioned against allowing hybrid DBAs and stated that this type of funding arrangement was in the lawyer's interest and not the clients. It was argued that lawyers could structure a CFA in a similar way to a hybrid DBA, which would arguably compensate law firms sufficiently well for their risk. For example, a representative of claimant lawyers who undertake complex injury cases said: '*a number of CFAs will be staged with a 100% success fee should the matter prove sufficiently contentious to proceed to trial, but with materially lower or even zero success fee for cases that settle early or are subject to early binding admission*'. In addition, it was argued that a vibrant, sophisticated third-party litigation funding market has developed in this jurisdiction which provides direct funding to both clients and lawyers and, as such, there was no need to introduce hybrid DBAs.
122. It is worth noting that Professor Rachael Mulheron, a former member of the CJC and chair of its DBA Working Group, and Nicholas Bacon QC, have jointly commenced an

⁵¹ Civil Justice Council, 'The Damages-Based Agreements Reform Project', <https://www.judiciary.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf> (August 2015).

⁵² Sheriff Principal James A. Taylor, 'Taylor Review: Review of Expenses and Funding of Civil Litigation in Scotland' (September 2013), <https://www2.gov.scot/Publications/2013/10/8023/downloads#res438205>

independent review of the drafting of the DBA Regulations and are expected to publish draft revisions later in 2019.

6: Changes to Part 36 Offers to Settle

Part 36 of the Civil Procedure Rules (CPR) was introduced to encourage early settlement through a 'carrot and stick' approach to ensure all parties have an interest in agreeing to early settlement.

Section 55 of the LASPO Act made relatively minor statutory changes including provision for recovery of an additional sum by a claimant where a defendant fails to beat the claimant's offer. This was accompanied with a rule change to reverse the effect of *Carver v BAA* to clarify that 'most advantageous' meant by any amount, no matter how small.

123. The changes introduced by section 55 to Part 36 and the 10% uplift specified in the CPR, were intended to meet the objectives of increasing early settlement (**Objective 4**) and assisting claimants who go to trial and have to fund their own success fee. It is preferable for parties to be able to resolve their disputes in a reasonable, efficient and effective manner rather than continuing to trial. This ties into the objective of encouraging early settlement which was one of the aims of the Part 2 reforms.
124. Almost all survey respondents were supportive of the principle of Part 36, but had mixed views about its effectiveness. The majority stated that the changes in Part 2 would not usually be a significant factor in their decisions whether to make or accept reasonable offers to settle at an early stage. Nevertheless, some claimant lawyers said they were more likely to make effective Part 36 offers post-LASPO as they now have more 'clout'.
125. There was, however, a view that no further substantive changes should be made to the Part 36 regime for some time to allow it to settle properly.

Claimant views

126. Claimant lawyers suggested that because the enhancement only occurs if a case makes it to trial, it rarely applies and that potentially this uplift should be extended to include the late acceptance of an offer. Similarly, it was suggested that the 10% enhancement is not sufficiently high to make a meaningful difference or be a decisive factor in determining whether to settle. The additional costs of a trial could exceed this enhancement, limiting any uplift's impact. Some respondents suggested that the uplift should be increased to 20%, if it is to be a more decisive factor in encouraging earlier settlement. In addition, some also said that the maximum uplift cap of £75,000 should be increased which would make Part 36 offers more effective for higher value cases such as very serious clinical negligence cases, for example.
127. One respondent said that Tomlin Orders⁵³ were more effective than Part 36 offers in terms of encouraging earlier settlement.

⁵³ A Tomlin Order is a court order under which a court action is stayed, on terms which have been agreed in advance. The terms of the order can be enforced without the need for new proceedings to enforce it.

128. More broadly (and outside the scope of this review) there was concern about the effects of *Hislop v Perde*⁵⁴ regarding the perceived lack of sanctions for a defendant's late acceptance of a Part 36 offer.

Defendant views

129. A defendant in clinical negligence claims welcomed the making of Part 36 offers in clinical negligence claims, but suggested that the lack of fixed recoverable costs for these claims may result in Part 36 offers being made less frequently than in other litigation areas the longer the case goes on, the higher the potential legal costs.

General liability insurer view

130. Insurers said that they have always sought to settle cases with reasonable offers so these amendments do not materially change their overall approach to settlement. Nevertheless, insurers generally welcomed the broad Part 36 regime. An insolvency funding specialist said that the use of Part 36 to settle cases is very effective.

131. Some insurers said that claimants often have over-optimistic assessments of their cases which can prevent early settlement although this was unsubstantiated.

⁵⁴ [2018] EWCA Civ 1726

7: Ban on Referral Fees for PI cases

A ban on referral fees for personal injury cases was introduced via LASPO. The ban is a regulatory matter meaning that it is policed and enforced by regulatory bodies such as the Solicitors Regulation Authority (SRA), Claims Management Company (CMC) Regulator, Chartered Institute of Legal Executives (CILEX) and Financial Conduct Authority (FCA).

Prior to LASPO, referral fees could be paid in all cases. This followed a 2004 change to the Solicitors Conduct rules which permitted the payment of referral fees.

Sections 56-60 of LASPO prohibited the payment of referral fees for personal injury cases.

132. Referral fees were banned for PI cases as they had *'increased very rapidly and ... contributed to an unwelcome increase in personal injury cases in our courts. They [referral fees] have tended to encourage the introduction of speculative claims and have certainly raised the cost of contesting litigation'*.⁵⁵
133. The ban on referral fees for PI tied into the objectives of reducing costs (**Objective 1**) and reducing unmeritorious claims (**Objective 5**).
134. Despite concerns about the effectiveness of the ban, a high proportion of survey respondents and stakeholders at the CJC seminar and in meetings expressed support for the principle of the ban, including those who worked in the PI market. Some professional bodies were in favour of extending the ban on referral fees to all areas of civil litigation. Many respondents also stated that as PI is not their field this was not applicable to them.
135. Many claimant lawyers in the PI sector were also supportive of the ban on referral fees arguing that such behaviour causes reputational damage to the sector and/or that they do not need to pay referral fees. For example, a claimant lawyer said that he believes that PI firms provide a valuable service, helping injured victims get compensation, yet are portrayed in a very negative light, partially attributing this to referral fees and similar behaviour which damages their reputation.
136. The majority that answered this question also believed that similar behaviours to referral fees continue, albeit under different guises such as marketing, subscription, 'legal services' and recommendation fees, which many consider to be circumventing the ban on referral fees. Some also argued the ban should be extended to include more conspicuous marketing methods by claims management companies (CMCs) such as cold calling. In this regard, the Government recently strengthened the rules on cold calling changing to an 'opt-in system' rather than an 'opt-out system' via an amendment to the Privacy and Electronic Communications Regulations with potential

⁵⁵ Kenneth Clarke QC MP, then Lord Chancellor and Secretary of State for Justice, House of Commons, *Report: LASPO Bill 1st Sitting* (31 October 2011 4.19 pm), <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/debtext/111031-0001.htm#1110315000003>

finest of up to £500,000 for breaches and banned cold calls relating to claims management services through the Financial Claims and Guidance Act 2018.⁵⁶

137. It was suggested that an unintended consequence of this reform has been an increase in commission paid in other areas, such as for rehabilitation, expert reports, translation services and hire cars amongst other services.
138. Nevertheless, information⁵⁷ obtained from the Claims Management Regulator shows that the proportion of the CMC audits they conduct where a warning has been issued in connection with a breach of the LASPO referral fee rules has dropped from 7.3% in 2015/16 to 2.4% in 2017/18. However, there is concern that any statistics on the effectiveness of the ban are not very reliable as similar behaviour may continue under different guises.
139. The initial assessment explained that there were two potential approaches to make the referral fee ban more effective: a) revise the drafting of the legislation or b) enforce the current ban more effectively.
140. As to a), no detailed, specific proposals of how the legislation could be improved was provided. We also note the regulators view that a line must be drawn somewhere, with legitimate activity taking place on the 'right side' of the line.
141. As to b), the regulators view was that the ban is enforced, that they work with firms to help them become compliant and that a line must be drawn.
142. The SRA said the following:
- 'Overwhelmingly, firms who have remained in the personal injury market have adapted their mechanisms for attracting clients so as to be compliant with the requirements of LASPO. This has required the establishment of new working practices and commercial arrangements and has been possible because the provisions of LASPO prohibit relatively specific activities; and working, commercially viable arrangements, such as marketing schemes, can be established which do not breach the LASPO prohibitions. Nevertheless, ensuring compliance with LASPO in this market remains a priority risk for the SRA.'*
143. No detailed proposals about how the current ban could be enforced more effectively were provided although a significant number of stakeholders suggested that the current approach by regulators was not robust enough.

⁵⁶ 'Tough new measures to end the blight of nuisance calls', <https://www.gov.uk/government/news/tough-new-measures-to-end-the-blight-of-nuisance-calls>.

⁵⁷ Figures provided by the Claims Management Regulation Unit in response to a direct request, October 2018

8: Other issues outside the scope of the PIR

8.1 Costs Budgeting

144. Despite being outside of the scope of the PIR we received a significant number of representations about costs budgeting⁵⁸ citing concerns with the process. This was also a topic at the CJC seminar despite not being in the scope of the PIR.
145. One of the main recurring concerns was that costs budgeting is inconsistent (although some noticed there had been progress in this regard) between different courts and that different members of the judiciary had quite different approaches to costs budgeting. Claimant lawyers also said that the process can be quite prescriptive and fixed at the start of the case where many variables about the future course of litigation are unknown making it very difficult to estimate costs.
146. Furthermore, lawyers in some areas suggested that costs budgeting could even be increasing costs through the additional process itself including for clinical negligence and low value damages cases. It was also said that costs budgeting can increase the length of claims significantly.
147. There was some concern on the defendant side that costs budgeting does not deal with incurred costs sometimes leading to 'frontloaded costs'. It was also said that once budgets are declared the budget becomes the cost or a target to reach rather than the maximum cost.
148. It is clear from the number of comments received that there are relatively strong views about costs budgeting with practitioners believing that the process could be improved.

⁵⁸ Costs budgeting was introduced simultaneously with many of the other Jackson reforms including the Part 2 reforms on 1 April 2013. Costs budgeting aims to control the costs of civil litigation by predicting and estimating the necessary work and costs for a case, near the start of the process. Once a budget is approved by the court, recoverable costs are limited to the budget unless there is a good reason to depart from the established budget.

9: Conclusion

149. To consider the effectiveness and success of the reforms in Part 2 of LASPO it is important to measure the outcomes and feedback against the objectives which the Government had in mind at the time of legislating:

- i. Reducing the costs of civil litigation (**Objective 1**)
- ii. Rebalancing costs liabilities between claimants and defendants (**Objective 2**)
- iii. Promoting access to justice at proportionate cost (**Objective 3**)
- iv. Encouraging early settlement (**Objective 4**)
- v. Reducing unmeritorious claims (**Objective 5**)

9.1 Measuring Part 2 of LASPO against its objectives

Objective 1: Reducing the costs of civil litigation

150. The Government considers that the Part 2 reforms have met the principal objective of reducing the costs of civil litigation. Feedback from stakeholders across the spectrum is that costs have reduced. The NHS Resolution annual report for 2017/18⁵⁹, for example, acknowledged that claimant legal costs in post-LASPO clinical negligence cases had fallen.

151. The independent analysis by Professors Fenn and Rickman shows that base costs have reduced by approximately 8-10% in real terms for PI (non-clinical negligence) and clinical negligence cases respectively. This is a significant reduction in costs. The feedback provided also suggests that generally costs in other categories of law have also fallen (see 10.3) although there is not sufficient data available to make a quantitative judgement outside of PI and clinical negligence cases.

Objective 2: Rebalancing the costs liabilities between claimants and defendants

152. The Government considers that the Part 2 reforms have met the objective of rebalancing the costs liabilities between claimants and defendants, since stakeholders from across the spectrum agree that the disparity in legal costs between claimants and defendants has generally reduced.

Objective 3: Promoting access to justice at proportionate cost

153. The Government considers that, overall, the objective of promoting access to justice at proportionate cost has been met and emphasises that lower costs, by their very nature, increase access to justice. However, the Government also recognises that many claimant lawyers feel that it has become more difficult and challenging to bring some claims, in part due to the Part 2 reforms. Although general concern was expressed about the consistency of the court's approach to proportionality, most

⁵⁹ 'NHS Resolution Annual Report and Accounts 2017/18', <https://resolution.nhs.uk/wp-content/uploads/2018/08/NHS-Resolution-Annual-Report-2017-2018.pdf> (12 July 2018), p. 10.

respondents agreed that the proportionality test⁶⁰ was an effective way of ensuring that costs and damages were aligned. That said, concern among some correspondents remains in some areas of litigation where costs to damages ratio are high, although claimant representatives in these areas argue that relatively high costs are necessary to maintain access to justice due to the complexity of these cases, the amount and quality of evidence required and the holistic value of a case beyond the monetary damages themselves.

Objective 4: Encouraging early settlement

154. The Government considers that, on balance, the objective of encouraging early settlement has been met. The analysis by Professors Fenn and Rickman indicates a 9% improvement in early settlement for PI and clinical negligence cases. Stakeholder feedback was generally supportive of the reforms to Part 36 and some stakeholders felt that the additional 10% uplift gave claimant Part 36 offers additional 'clout'. There was also a view expressed by several at the CJC seminar and in the survey responses that it would be preferable not to amend Part 36 further, at this time, in order to allow the reforms, case law and practitioner experience to bed in. It is noted that Part 36 is a finely balanced set of rules and so caution would be needed when considering any further amendments.

Objective 5: Reducing unmeritorious claims

155. The Government considers that the combined effects of the Part 2 reforms have had an impact on reducing the number of unmeritorious cases, which may have been pursued pre-LASPO. While there are concerns from liability insurers and defendants that QOCS may encourage more (and weaker) claims, we have not been presented with any reliable or conclusive evidence that supports that theory. There are stronger measures in place to deter unmeritorious claims such as the qualification of fundamental dishonesty for QOCS, the ban on referral fees for PI and there is also anecdotal evidence of claimant lawyers looking for higher prospects of success before taking on a case. The volumes of claims⁶¹ also supports this view – generally the volumes of claims indicate a slight decrease.

9.2 The Way Forward

156. The Government considers that, on balance, the evidence suggests that the Part 2 reforms have been successful against their objectives. The evidence available and the views expressed by stakeholders indicate that costs have been reduced, that fewer unmeritorious cases are being taken forward and that access to justice at proportionate cost is generally being achieved. There are also signs that early

⁶⁰ The Jackson proportionality test aimed to strengthen the rules on proportionality and act as a safeguard to ensure costs are reasonable and proportionate. For cases commenced on or after 1 April 2013 there is a revised test of proportionality, which provides that costs incurred by a party are proportionate if they bear a reasonable relationship to: the sums in issue in the proceedings; the value of any non-monetary relief in issue in the proceedings; the complexity of the litigation; any additional work generated by the conduct of the paying party; and any wider factors involved in the proceedings, such as reputation or public importance. The rule states that costs which are disproportionate may be disallowed or reduced, even if they were reasonably or necessarily incurred. See CPR 44.3(5) - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#rule44.3>

⁶¹ See the volume section in Annex B: Data Analysis

settlement has been encouraged because of the Part 2 reforms. The reforms, as a package, have therefore met their objectives, and we are not proposing any amendments to LASPO.

157. We have listened to stakeholders throughout the PIR process and have noted their views and suggestions for improvement. It is also fair to say that, at the Civil Justice Council seminar, there was a clear desire from many practitioners for a period of relative stability.
158. The feedback from stakeholders identifies two main areas of concern which are DBAs and any potential extension of costs protection to other categories of case beyond PI.
159. As set out in the Executive Summary, in relation to DBAs, some stakeholders believe there may be uncertainty about the existing regulations, but the Government also needs to exercise caution to avoid creating unintended consequences. While it may be an advantage for lawyers to have different funding options available, there may also be disadvantages in having to advise their clients between different options, especially where – as with CFAs and DBAs – the better option financially for the client will be the worse for the lawyer, and vice versa. The Government accepts that the DBA regulations would benefit from additional clarity and certainty. We will give careful consideration to the way forward in the light of the outcome of the independent review of the drafting of the regulations, which is being undertaken by Professor Rachael Mulheron and Nicholas Bacon QC. Their report is expected later in 2019.
160. In relation to costs protection, stakeholders generally stated that QOCS was currently working well. Some highlighted issues with the use of ‘fundamental dishonesty’ allegations or insinuations by defendants, and others highlighted issues with the late withdrawal of claims by claimants. In terms of any potential extension of costs protection there are clear attractions for claimants and their lawyers in being able to litigate at no or reduced costs risk. However, there is also a clear risk that by extending costs protection some of the benefits of the Part 2 reforms would be undermined: the shifting of costs back to defendants, an overall increase in costs and the potential for prolonging rather than settling litigation. The Government would wish to be satisfied that these risks have been addressed before considering the case for extending costs protection further.
161. As has been stated, the control of civil litigation costs (and funding) is an ongoing process so the issues raised in this process have been noted and will be kept under review.
162. Other suggestions for change were proposed by stakeholders and some technical issues were also raised. The Government will keep those under review, as it will all aspects of the reforms more generally.

10: Data Analysis

10.1 Introduction

163. As stated at 1.3, the review has sought to incorporate quantitative data wherever possible. Although a wide variety of data were considered and assessed for the review there were limitations both in terms of quality and the level of detail available. Factors such as changes in court recording mechanisms, the time taken for post-LASPO cases to settle, and the potential impacts of other policies all affect the ability to quantify impacts with certainty. Nevertheless, the data sources made available were used to provide insights alongside responses to the online survey and other resources. Sources of data used include:

- The independent analysis by Professor Paul Fenn and Professor Neil Rickman of impacts on litigation costs and settlement amounts.⁶²
- External data produced by different stakeholders, for example, the SRA.
- Published data on pre-court settlements.
- Court and Claims Portal data on claims volumes.
- Data and practitioner insights submitted in response to the online survey to support the review. The initial assessment also invited the submission of data stating that the MoJ was 'interested in receiving further data and evidence that will help to indicate impacts for the final review'.⁶³

164. This data analysis starts by considering the significant role of the independent academic analysis by Professors Paul Fenn and Neil Rickman. This covers the sources of data used in their analysis, the methodology behind their work and what their research suggests. This data analysis then moves on to explaining the available data on the impact of the Part 2 reforms on costs, damages and early settlement before suggesting what this indicates about the impact of the Part 2 reforms.

10.2 Analysis by Professor Paul Fenn and Professor Neil Rickman

165. A central rationale behind the reforms was to reduce litigation costs without having unfair impacts on the parties. Detailed costs data has been challenging to obtain because it is generally held by private firms and not widely shared for commercial reasons. However, to inform the review but written and published independently, new research has been carried out by leading academics Professors Paul Fenn and Neil Rickman who have analysed datasets made available to them which contain information about litigation costs and settlement amounts for PI and clinical negligence cases.⁶⁴

⁶² Paul Fenn and Neil Rickman, *The Impact of Legislation on the Outcomes of Civil Litigation: An Empirical Analysis of the Legal Aid Sentencing and Punishment of Offenders Act 2012* (January 31, 2019). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3326665.

⁶³ Initial Assessment, Annex A, p. 59.

⁶⁴ Fenn and Rickman, 'An Empirical Analysis of LASPO'.

Data used

166. There are complications in assessing the impacts of Part 2 on costs and damages in PI claims. These include the extension of the Claims Portal in 2013, and the implementation of fixed recoverable costs (FRC) regimes meaning that most PI claims under £25k are now subject to FRC and therefore needed to be excluded from the analysis. This limited the sample of cases to claims which were not subject to FRC pre- or post-LASPO and where data could be obtained from third parties.

167. Two key data sources were used to underpin the analysis:

- A dataset from NHS Resolution which is the principal defendant in clinical negligence claims in England. Clinical negligence claims have never been subject to FRC and some are negotiated by the legal costs firm Acumension, which provided a case-level database recording the outcomes of these negotiations covering financial years 2012/3 to 2017/8.
- A dataset covering PI claims over £25k other than clinical negligence provided by *Taylor Rose TTKW* which offer costs and advocacy services to insurers and compensators. The dataset provides pre- and post-LASPO information on settlement amounts for damages and recovered costs, and also the stage of settlement for different PI categories – mainly road traffic accident, employer’s liability (EL) and public liability (PL).

Methodology

168. To observe any comparable pre- and post-LASPO effects, Fenn and Rickman also needed to control for the time lag between claims being issued and being settled. Simply comparing claims settled pre- and post-LASPO would have been flawed because many claims settled after implementation were started under pre-LASPO rules. Further, comparing all settled claims which were *issued* before and after LASPO respectively would also be inappropriate, because case mixes would be very different between the two groups (the pre-LASPO group would have had longer to settle and contain more complex and expensive cases). To address this issue, the samples were restricted to claims issued pre- and post-LASPO which have been settled *within two years*. This provides reasonable coverage of claims within the available data and allows comparison of claims of similar average complexity, with common prices, but run under different rules.

169. To assess these differences more rigorously, Fenn and Rickman used statistical regression to control for other factors which could impact on costs and damages, including case length and a ‘strength of case’ indicator based on whether liability was admitted early (within the 120-day protocol period).

Headline results⁶⁵

170. Using an initial basic analysis (without applying regressions), Fenn and Rickman conclude there has been a change in claimant behaviour since LASPO for both clinical negligence and PI.

- For PI claims over £25k, the switch from recoverable to non-recoverable success fees was immediately apparent in the months after LASPO, indicating that, within

⁶⁵ Note that further specific findings are discussed in more detail later in this section.

a short time after LASPO, the great majority of all CFA-funded claims were of the new type.

- For clinical negligence, by contrast, the majority of new CFA claims in the first year after LASPO remained those with recoverable success fees.
- Nevertheless, by the end of the observation window, claims of both types made in 2015/6 which settled within two years were mostly funded by new-style CFAs or other forms of funding without recoverable success fees.
- Inspection of the graphs in the report⁶⁶ indicates a reduction in real recovered costs, damages and the litigation rate for post-LASPO claims with non-recoverable success fees by comparison with all others.

Recoverable costs

171. For both clinical negligence and PI claims, real recovered costs were shown to be strongly related to agreed damages, case length, early admission of liability, and whether the claim was litigated (i.e. where proceedings had been issued before settlement). Having controlled for all of these “covariates”, recoverable costs were shown to have reduced for claims issued post-LASPO by approximately £1,420 (just under 10%) for clinical negligence claims, and approximately £688 (just under 8%) lower for PI claims over £25k.

Real agreed damages (which includes all damages – general and special)

172. For PI claims there was a weaker statistical relationship between damages agreed and other covariates, but the impact of LASPO is clearly significant: damages post-LASPO were just under £12,900 (approximately 17%) lower than pre-LASPO.

173. The results for clinical negligence were more precise given the bigger sample sizes across all claim values. When the other related factors were controlled for (case length, whether the case was litigated, early liability admission), damages post-LASPO were over £8,400 (approximately 22%) lower. Fenn and Rickman point out that these reductions have occurred in spite of the 10% uplift in general damages.

Litigation rate (proportion of claims that progressed to litigation before settlement)

174. After controlling for variations in case length, case strength, and case value, the post LASPO effect on the litigation rate for both the clinical negligence and PI cases was a drop in the likelihood of litigation by approximately 9%.

Conclusions can be summarised broadly as:

175. A variety of reforms were introduced simultaneously by LASPO and alongside it via other means. An important part of Fenn and Rickman’s work is identifying data which are suitable for evaluating LASPO impacts and a suitable methodology.

176. There are some limitations with the approach in that the results only apply to the specific claim categories analysed which are each derived from a sole data set, claims that take more than 2 years to settle are excluded, and – as with all regression

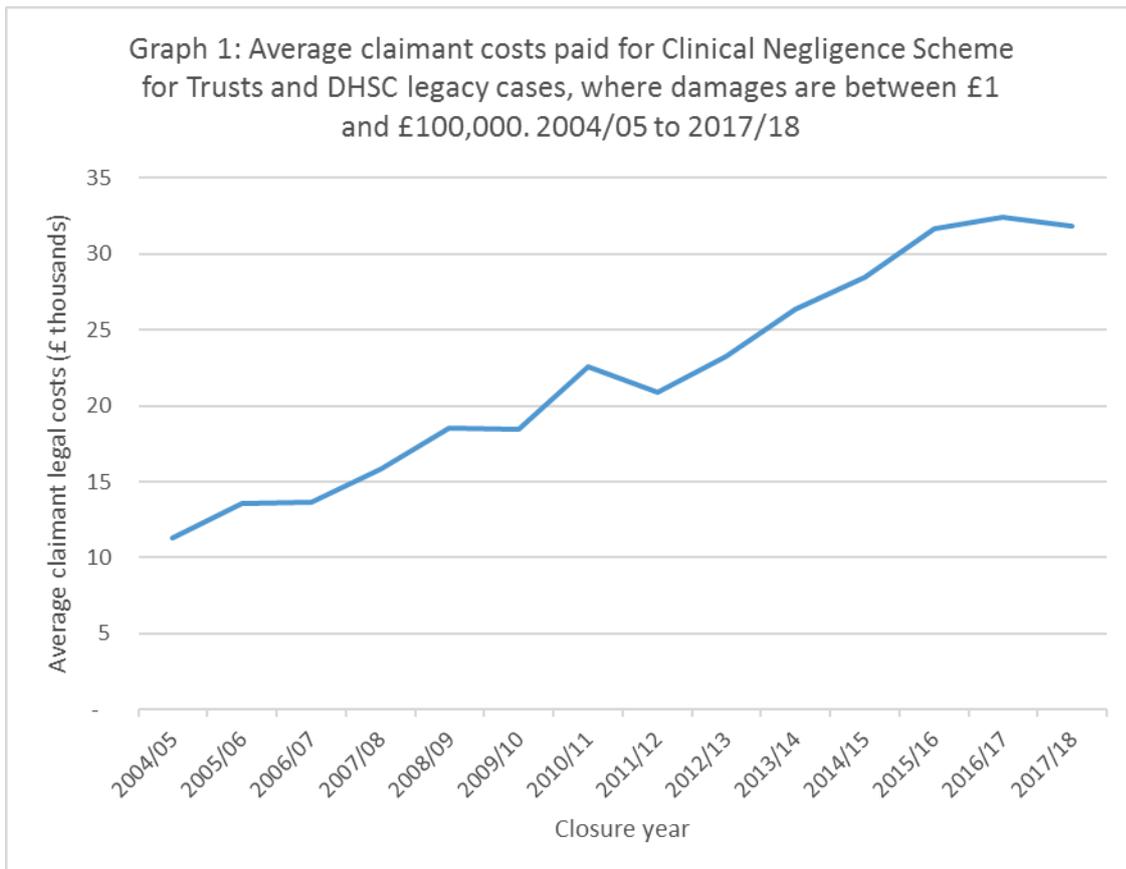
⁶⁶ Fenn and Rickman, ‘An Empirical Analysis of LASPO’, pp. 6-11.

analysis – there could be other factors explaining the differences between pre- and post-LASPO effects than the variables statistically controlled for.

177. Despite the limitations explained above, the research provides the most reliable evidence of post-LASPO impacts on settlement behaviour and on the overall costs of litigation, for PI claims above £25k and clinical negligence cases. The analysis indicates lower base costs and damages, and reductions in the length of legal proceedings.
178. While Fenn and Rickman are able to speculate to some extent about what may have caused the behavioural shifts observed, they are clear that there may be other interpretations and they do not draw conclusions about whether the effects are positive or negative for parties or the market.
179. Looking ahead, Fenn and Rickman note that further work on more detailed data, once more time has elapsed, would help interpret their results and the precise contribution of different elements of LASPO Part 2. They urge that evaluations of future aspects of reform in this area would be assisted by better collection of baseline data, minimising the simultaneous introduction of reforms, and a choice of implementation date that can be linked to available data.

10.3: Costs

180. The most comprehensive data source for the changes in costs pre-and post-LASPO is the independent analysis by Fenn and Rickman. Their data show real recovered base costs have reduced by just under 8% for PI cases and just under 10% for clinical negligence cases. The methodology behind their analysis, which compares cohorts of claims that settled within 2 years is explained above. Although there are limitations, as discussed above, with how far the results can be generalised and to what extent this applies to cases outside of PI and clinical negligence, their data is the best available indicator of the impact of the Part 2 reforms on costs.
181. Other data provided by NHS Resolution (NHSR) suggests the LASPO effect took around four years to come through for clinical negligence cases, although this is not surprising given the complex and lengthy nature of many clinical negligence disputes. NHSR figures (Graph 1) show that average outlay on claimant costs, per clinical negligence claim increased from 2011/12 to 2016/17, and has started to diminish in 2017/18. This indicates that the Part 2 reforms are now starting to reduce costs for this area of law.



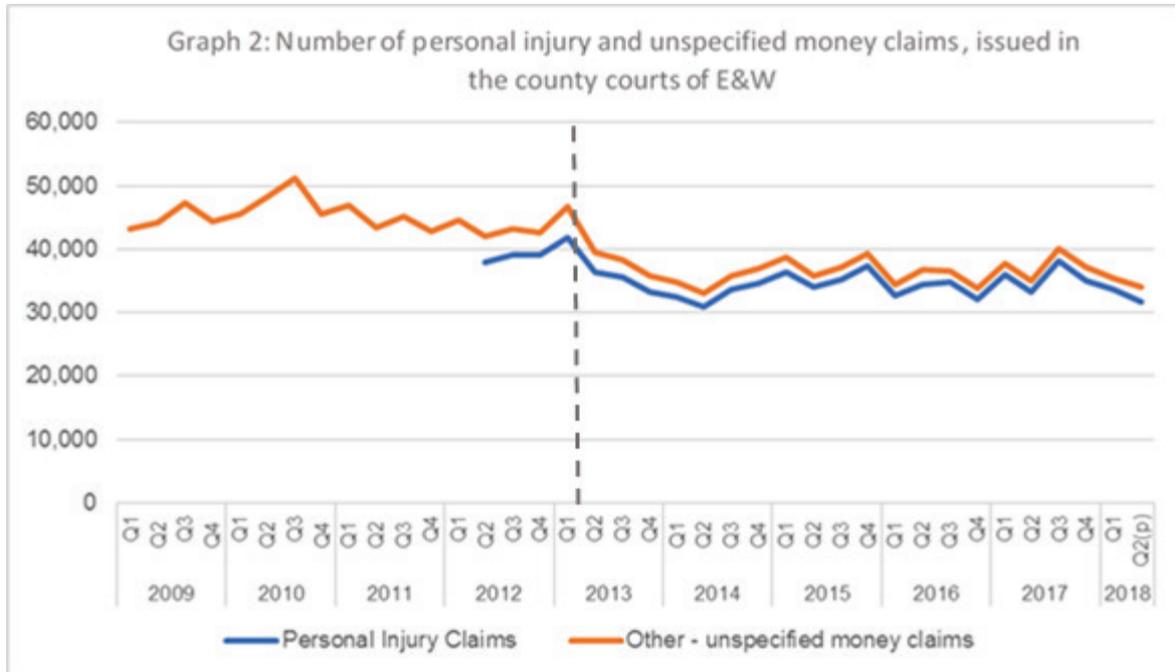
Source: NHS Resolution

182. It is, of course, challenging to determine the exact contribution of individual reforms in terms of their impact on reducing civil litigation costs. Other reforms such as the introduction of FRC for low value Road Traffic Accidents, Employer’s Liability and Public Liability claims will have also played a significant role.

183. In addition to the above sources, some data was received from defendant stakeholders for certain areas such as housing disrepair and actions against the police claims, and was used to argue that the costs to damages ratio remains disproportionately high in these areas of law. As with the data provided by claimant lawyers, it was not possible to generalise this data and there were counter arguments put forward from the claimant perspective that many of their clients do not seek a significant financial remedy (damages) but are primarily after other redress such as vindication, an apology, and assurance that the same thing will not happen to other people. Case studies were used to illustrate examples of high litigation costs relative to damages while several case studies were also given to illustrate the relatively low value damages that can be awarded for important matters about rights where public authorities are held to account.

10.4 Volumes of claims

County Court Data



Source: [MoJ Civil Justice Statistics Quarterly](#)

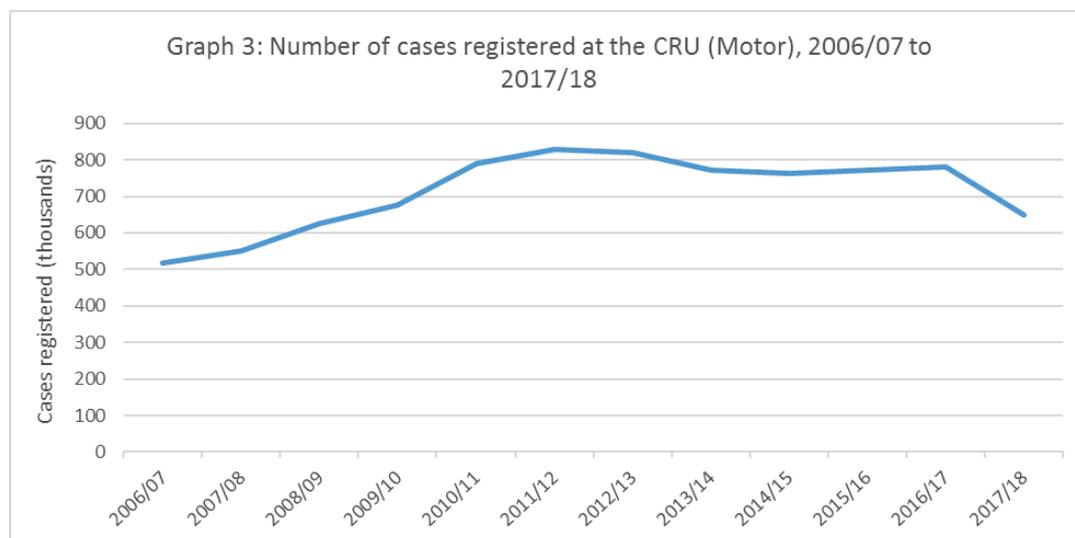
184. While MoJ county court data is limited in detail and only covers claims which progress to court, they provide a useful overview and a big picture perspective in terms of the overall numbers of unspecified money and all PI claims. County court statistics indicate that there has been a reduction in the number of PI claims since LASPO was introduced which is a continuation of the downward trend since 2010. We cannot quantify the impact of LASPO specifically from this high-level data, but claims clearly spiked before the reforms were introduced, fell off immediately afterwards and have remained reasonably stable since, taking some quarterly variation into consideration.
185. As shown in Graph 2, PI has only been recorded as a separate category since Q2 2012, but it accounts for over 90% of the unspecified money claims issued in the county courts, with an increasing proportion since Q2 2012. PI claim volumes decreased from 158K in the year pre LASPO to 137K at four quarters post-LASPO (which came into force on April 2013). This is a reduction of 13% (averaging 5K fewer claims per quarter). There is a noticeable upward spike in Q1 2013 at 42K claims, most likely due to firms rushing to issue claims before the Part 2 reforms were introduced.
186. In purely volumetric terms, the current position seems reasonable if the reforms are working as expected: some unmeritorious claims would be discouraged without a severe drop that could indicate serious access to justice implications.
187. However, the data at this level can easily mask variation for specific groups or claim types. Similarly, other policies such as changes to legal aid, process changes (e.g. introduction/extension of the Claims Portal) as well as changes in claimant and market behaviour may have had an impact on the number of claims. The introduction

of the Claims Portal, a web based system for settling low value claims efficiently and quickly, is particularly significant. This is likely to have contributed to the reduction in volume as more PI claims are now in scope for early resolution through the Portal meaning fewer should now go to court.

Compensation Recovery Unit (CRU) Data

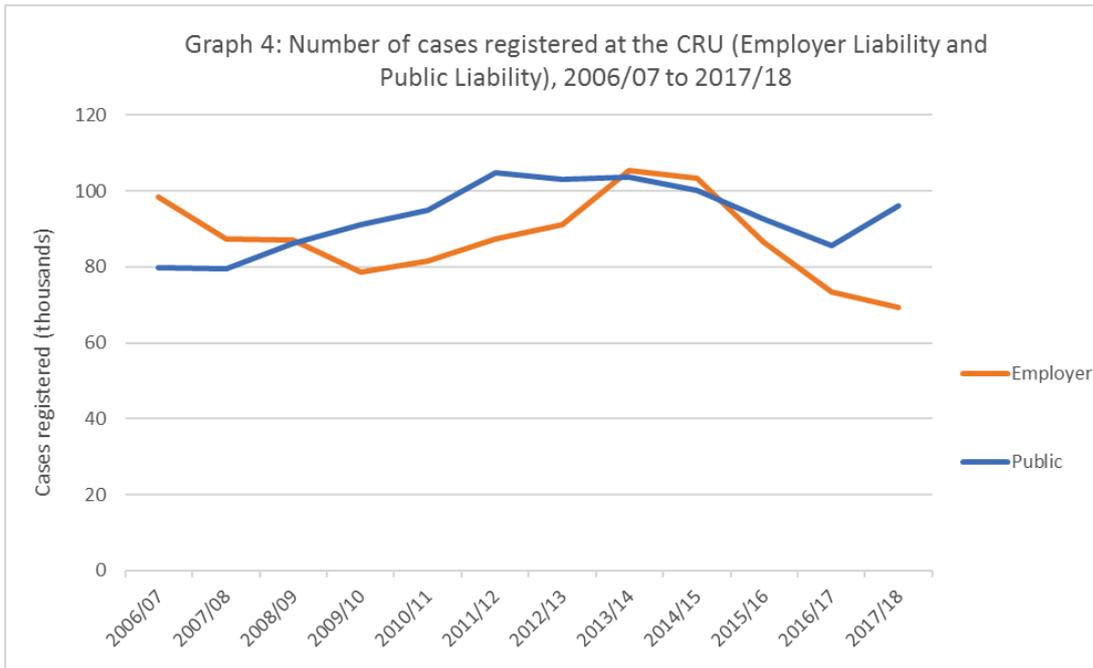
188. Compensation Recovery Unit (CRU) data provides the most comprehensive insight into total claims volumes pre- and post-LASPO covering Road Traffic Accidents (RTA), Employer Liability (EL), Public Liability (PL) and Clinical Negligence. The purpose of the CRU is to (1) recover any social security benefits a claimant receives as a result of their injury (the Compensation Recovery Scheme) and (2) recover costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and PI claims (Recovery of NHS Charges). Recovery is typically made from the compensator before damages are paid. Compensators who receive a claim must send form CRU1 to the CRU within 14 days to register the claim. This allows CRU to check if the claimant is in receipt of benefits.

189. The largest volumes of CRU recorded data are for RTA claims and although there has been some decline in volumes recently there has not been a notable post-LASPO impact following 2013 (see Graph 3). It is worth noting that the shorter-term trend pre- and post LASPO is in contrast to the longer-term picture which show that the number of RTA related PI claims in the UK was still high at 650,000 in 2017/18, nearly 200,000 more than in 2005/06 – which is a rise of over 40%.



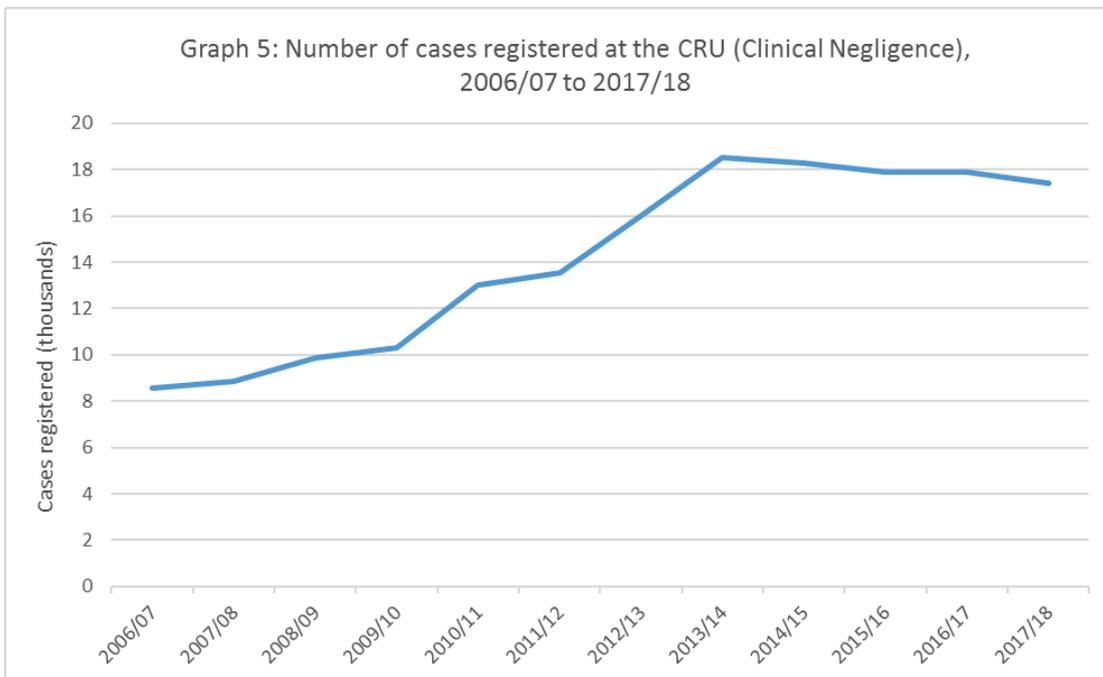
Source: [Compensation Recovery Unit \(CRU\)](#)

190. For Employer Liability and Public Liability (Graph 4) claims there has been a fall in volume of claims notified since 2013. This has been a gradual decline rather than a steep immediate drop off, and the historic variation in the data makes it difficult to conclude that this is a lasting trend. However, the data follow a similar pattern to court claims where the fall in volumes has also been gradual.



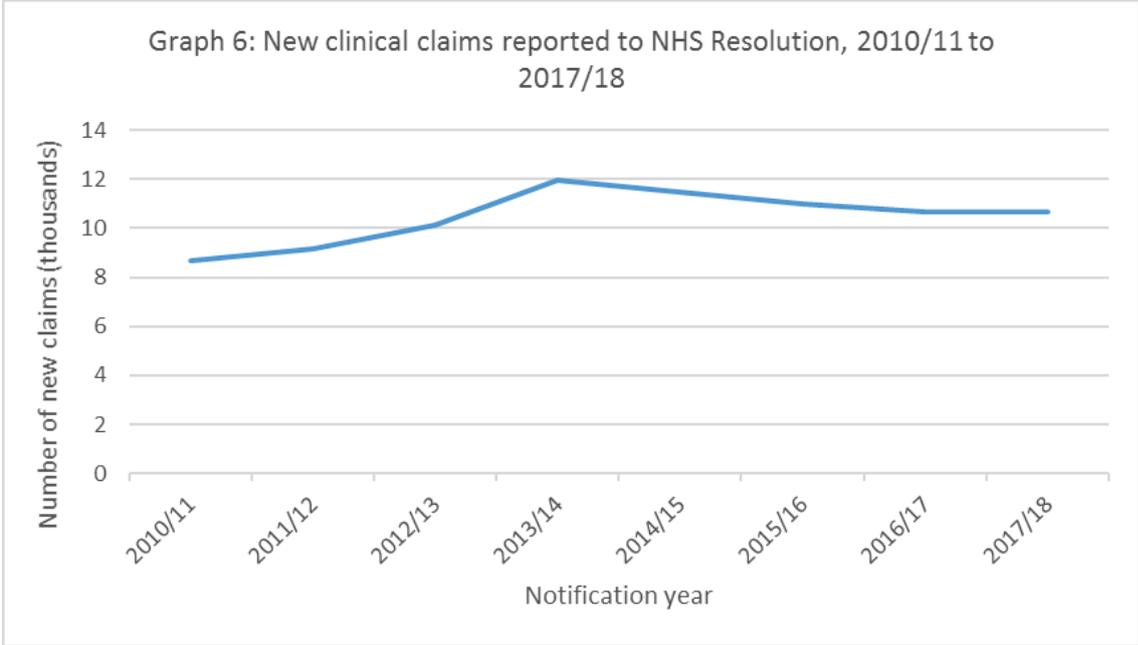
Source: [Compensation Recovery Unit \(CRU\)](#)

191. For clinical negligence claims (Graph 5) there has been a relatively clear levelling off in volume of notifications since LASPO, which follows a steady increase since 2006.



Source: [Compensation Recovery Unit \(CRU\)](#)

192. NHS Resolution data (Graph 6) reveals a similar trend for clinical negligence claims, showing an upward trajectory until LASPO, after which notifications levelled off and are now on a shallow downwards trajectory.



Source: NHS Resolution

High Court Data

193. Making reliable assessments from the available data for the High Court is more problematic due to breaks in the series caused by changes to counting rules, changes in how claims are dealt with (such as the introduction of a triage policy whereby lower value claims are automatically passed to the county courts) and a change of database the management information is extracted from. The implementation of enhanced court fees in March 2015 has also had a significant impact on claim volumes.

194. High Court data show a decrease in the number of low value claims (less than £50k) although this cannot be directly attributed to LASPO. Conversely, the increase in higher value claims may be due to improved recording mechanisms where claims value was previously 'unspecified'. Given the data quality issues quoting figures from the High Court data available would be unreliable and potentially misleading.

Stakeholder data on volumes

195. Stakeholders representing claimants in various areas of law sent in, cited, or directed us to data that showed falling volumes of claims, which they contend, have illustrated difficulties in bringing claims on the claimant side (such as disputes involving professional negligence and actions against the police). This is explained in further detail at 4.1 above, 'Extension of QOCS beyond PI'.

196. While this data is useful and does indicate some reduction in volumes in their respective claims, the data are not generalisable due to quality issues and does appear to show that claims are still being brought, albeit at slightly reduced volumes.

Solicitors Regulation Authority (SRA) Market Data

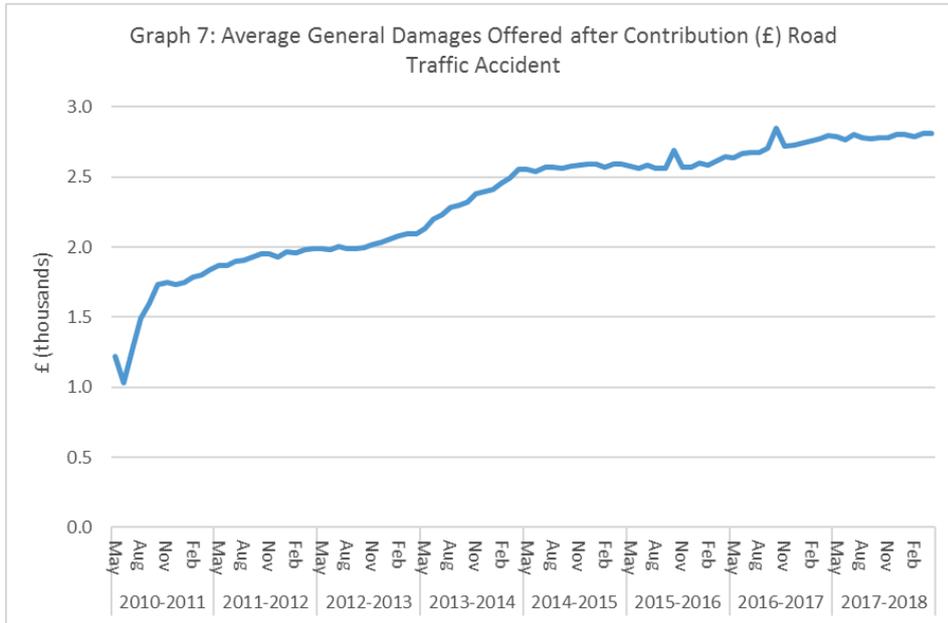
197. The SRA shared their authorised firm renewal data⁶⁷ to help inform the PIR. This does not specifically measure the impact of Part 2 of LASPO but provides contextual information on the number of law firms in the market. There is a significant caveat because the data does not account for mergers and acquisitions which could clearly have a significant impact on the number of separate law firms recorded without a corresponding reduction in work. Neither does the data measure the number of staff working in an area or the size of the law firms operating. Nevertheless, this SRA data is helpful in indicating some wider market trends since Part 2's introduction.
198. The SRA data show that between October 2013 and October 2018 the number of 'recognised law firms' had fallen by 317, a decrease of just under 3%.
199. In 2018, 7% (782) of the 10,400 firms the SRA regulates specialised in PI work, which is categorised as PI claims representing over 50% of their annual turnover. This compares to 2013 where 8% of (868) firms specialised in PI work.
200. 17% of the firms that are an alternative business structure (ABS) specialise in PI work, which is more than in other areas of work. This has increased by 6 percentage points in the last 18 months implying an increase in ABS firms specialising in PI work.
201. Although these figures show an absolute decrease of 86 in the number of PI firms (the area of law where Part 2 of LASPO is likely to have had the biggest impact), this is unlikely to be solely attributable to Part 2 of LASPO, due to the impact of other policies, changing market conditions, consolidations and other factors.

10.5 Damages

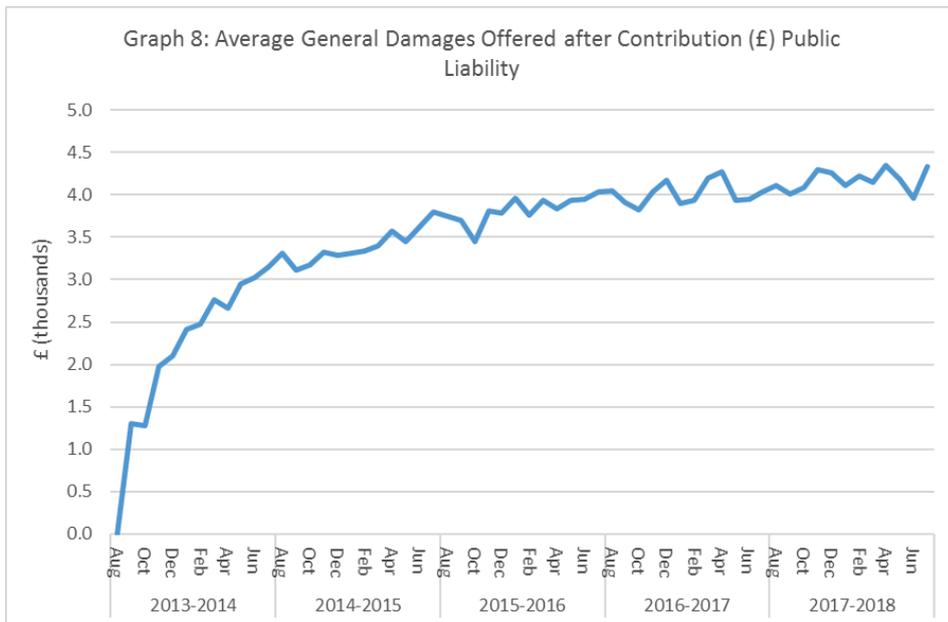
202. Fenn and Rickman's analysis suggests real agreed damages have decreased since LASPO, estimating a 17-22% reduction in damages (when adjusted for inflation) based on the PI claims above £25k in value, and the clinical negligence data they used for their analysis (as explained in more detail above).
203. The reasons for this are not immediately obvious and it should be noted that there are some limitations with the analysis that was feasible, meaning it is not possible to generalise the findings fully. Various potential explanations can be theorised (such as changes in solicitor behaviour) but are not supported or contradicted by quantitative evidence. Interestingly, there was also no explicit mention of a reduction in the damages received in the feedback provided by stakeholders so it would be helpful to have a greater understanding of this issue. It is not clear, for example, whether this reduction affects all claims equally, or whether the experience varies depending on the legal representative.
204. Conversely, Claims Portal data, which cover a much higher volume of lower value claims show how damages have been increasing for most claim types (see Graphs 7 – 10). Again, there are potential explanations for what the data show, for example the 10% uplift in general damages (damages for pain, suffering and loss of amenity) plus uplifts from the Judicial Guidelines and the extension of the claims portal to cover cases up to £25k in value in 2013.

⁶⁷ This is annual data the SRA collects on the number of authorised firms.

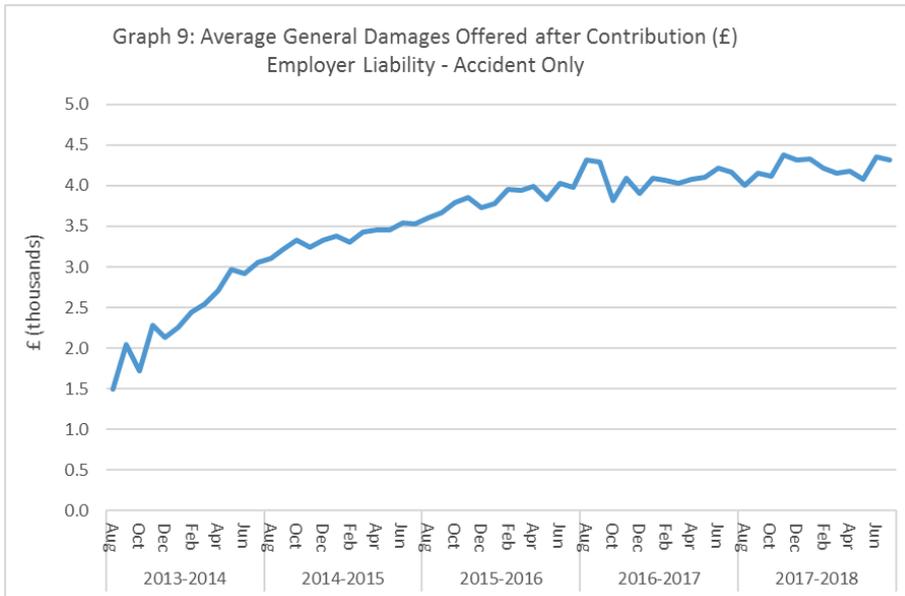
205. That said, the data are inconclusive and the differing results potentially indicate that Part 2 of LASPO may have had differing impacts in different categories of law.



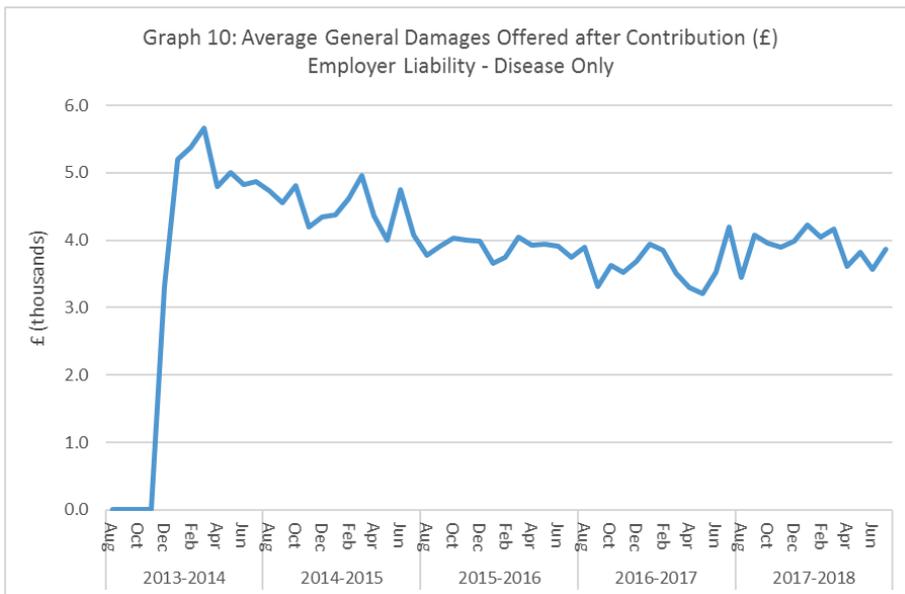
Source: Claims Portal management information



Source: Claims Portal management information



Source: Claims Portal management information



Source: Claims Portal management information

10.6 Early Settlement

206. Encouraging early settlement was one of the aims of the Part 2 reforms. The analysis by Professors Fenn and Rickman shows a reduction in the litigation rate, which is the proportion of claims that progressed to litigation before settlement. After controlling for variations in case length and case value, the post-LASPO effect on litigation rate for both Clinical Negligence and for PI was a drop in the likelihood of litigation by approximately 9%.

207. Fenn and Rickman’s research is the most reliable quantitative data to show an improvement in early settlement. This supports the feedback received from the survey results and in consultative meetings that early settlement has improved. The

SRA thematic report, which was published in December 2017 to increase understanding of the PI sector, was based on a small sample of PI firms and states that a significant majority of PI firms settle 95% of PI matters.⁶⁸ This also suggests that firms seek to settle earlier post-LASPO than pre-LASPO.

208. County court data on timeliness show that the median number of days between issue and hearing date has remained relatively stable but although recent years show reductions in the median this is likely to be due to the lag between claims being issued and settling. As longer and more complex cases work their way through the system and are settled, this median is likely to increase. More time is therefore needed to build up a stable time series.
209. Collating the available evidence and data indicates an improvement in early settlement post-LASPO and accords with stakeholder feedback. The 9% improvement figure estimated by Fenn and Rickman is the most reliable indicator available of the extent to which early settlement has increased.

⁶⁸ Personal injury: The quality of legal services in the personal injury sector, <https://www.sra.org.uk/sra/how-we-work/reports/personal-injury-thematic-review.page>



Annex A: Initial Assessment

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 Reforms⁶⁹, 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’.⁷⁰

A Post-Legislative Memorandum has also been prepared of the Part 1 (legal aid) reforms.⁷¹ A separate PIR is being undertaken of those reforms.⁷²

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 recommendations⁷³, 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 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

⁶⁹ *Legal Aid, Sentencing and Punishment of Offenders Act 2012: Post-Legislative Memorandum*, <https://www.gov.uk/government/publications/legal-aid-sentencing-and-punishment-of-offenders-act-2012-post-legislative-memorandum> (October 2017).

⁷⁰ *Ibid.* p. 97.

⁷¹ *Ibid.* pp. 5-85.

⁷² *Post-implementation review of LASPO*, <https://www.gov.uk/government/publications/post-implementation-review-of-laspo> (March 2018).

⁷³ *Review of Civil Litigation Costs: Final Report* (December 2009).

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 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 claim⁷⁴. There was also an ambition to encourage early settlement; and to discourage unmeritorious claims⁷⁵. 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’⁷⁶. 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’⁷⁷, which were the thrust of LASPO Part 2.

The PLM summarised the Jackson reforms⁷⁸ 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

⁷⁴ *Post-Legislative Memorandum*, p. 86.

⁷⁵ *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.

⁷⁶ *Review of Civil Litigation Costs: Supplemental Report - Fixed Recoverable Costs* (July 2017), p. 19.

⁷⁷ *Ibid*, p. 20.

⁷⁸ *Post-Legislative Memorandum*, p. 86.

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;
- 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 consultation⁷⁹ contained the following references⁸⁰:

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

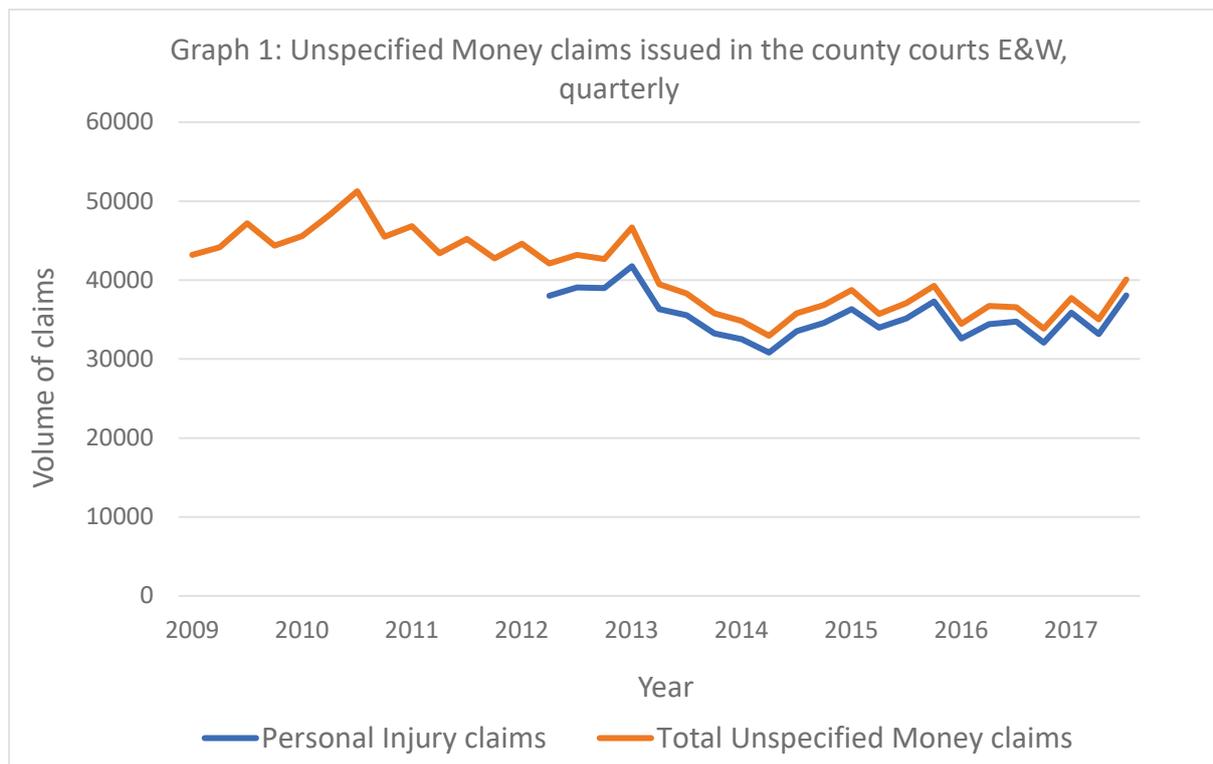
⁷⁹ *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response* (March 2011).

⁸⁰ *Ibid.* pp. 3-4.

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.

Nevertheless, we can see (Chart 1 below) that PI claim workload volumes decreased from 158K in the year pre LASPO⁸¹ to 137K at four years post LASPO⁸². 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-LASPO⁸³, to 1.4 million claims four years post-LASPO⁸⁴, likely due to introduction of an

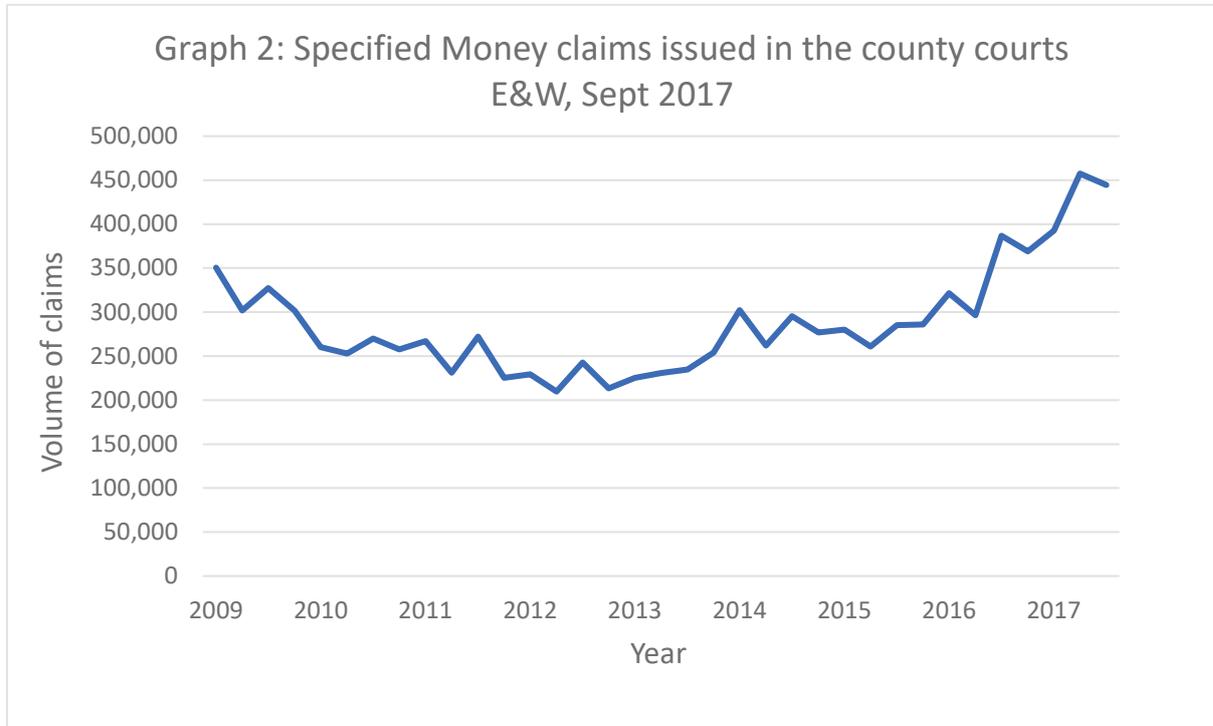
⁸¹ Q2 2012 to Q1 2013

⁸² Q2 2016 to Q1 2017

⁸³ Q2 2012 to Q1 2013

⁸⁴ Q2 2016 to Q1 2017

online Secure Data Transfer system by HMCTS in July 2014, enabling bulk customers to issue money claims digitally.



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 2⁸⁵. 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.

⁸⁵ (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.

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 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 Bill⁸⁶, 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

⁸⁶ Lord Mackay, House of Lords, *Report: LASPO Bill 4th Sitting* (14 March 2012 6.30 - 6.45 pm), <https://publications.parliament.uk/pa/ld201212/ldhansrd/text/120314-0002.htm>

parties are in an asymmetric relationship'.⁸⁷ 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 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.⁸⁸

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

There is a specific LASPO provision (section 46, sub-section 2)⁸⁹ 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 costs⁹⁰. DBAs were not raised much as an issue during the discussions and debates on the LASPO Bill. This may be because of the similarities

⁸⁷ *Review of Civil Litigation Costs: Final Report*, p. 89.

⁸⁸ *Reforming the Soft Tissue Injury ('whiplash') Claims Process: A consultation on arrangements concerning personal injury claims in England and Wales* (November 2016), p. 33.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/581387/reforming-soft-tissue-injury-claims-process.pdf

⁸⁹ *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Section 46
<http://www.legislation.gov.uk/ukpga/2012/10/section/46/enacted>

⁹⁰ Jackson, *Fixed Recoverable Costs*, p. 22.

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 2015.⁹¹ Phase 1 of the report addresses drafting issues; Phase 2 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 Report⁹²? 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.

⁹¹ *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (published September 2015), <https://www.judiciary.gov.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf>

⁹² *Ibid.*

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*.⁹³ These measures were taken both to promote early settlement and assist claimants who go to trial and had to fund their own success fee.⁹⁴

It seems that Part 36 works well, and we are only aware of calls for limited, technical changes to the statutory regime.⁹⁵

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

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'.⁹⁶

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'.⁹⁷

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?

⁹³ [2008] EWCA Civ 412; [2009] 1 WLR 113

⁹⁴ Jackson, *Fixed Recoverable Costs*, p. 23.

⁹⁵ The case of *Broadhurst v Tan*, see Jackson, *Review of Civil Litigation Costs – Fixed Recoverable Costs*, p. 80.

⁹⁶ *Review of Civil Litigation Costs: Final Report*, p. 196.

⁹⁷ Kenneth Clarke QC MP then Lord Chancellor and Secretary of State for Justice, House of Commons, *Report: LASPO Bill 1st Sitting* (31 October 2011 4.19 pm), <https://publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/debtext/111031-0001.htm#1110315000003>

Annex B: List of respondents

Categorised by company

1. Pic Legal
2. Paramount legal costs
3. John Ivory (costs lawyer)
4. JG Solicitors
5. TM Law
6. Oliver & Co.
7. Peter Causton (judge)
8. Dean Wilson
9. Seth Lovis
10. Birnberg Pierce
11. Matthew Gold (2 individual responses)
12. Matthew Gold
13. Hickman and Rose
14. Watson Woodhouse (2 individual responses)
15. Watson Woodhouse
16. DPG Law
17. Clifford Chance
18. GT Stewart
19. Murria
20. JMW Solicitors
21. Irwin Mitchell (1 firm and 2 individual responses)
22. Irwin Mitchell
23. Irwin Mitchell
24. GC Law
25. Bhatt Murphy
26. Association of Business Recovery Professionals (R3) (2 responses – one from Local Centre)
27. R3 in the South
28. Griffins
29. Insolvency lawyer
30. GSD Law
31. Cohen Cramer
32. Walker Morris
33. NJ Goodman
34. Peter Hurst (judge)
35. Beecham Peacock
36. HHJ Allan Gore QC
37. Farrars Building (2 individual responses)
38. Farrars Building
39. Waldrons

40. RSM UK
41. TUC
42. Trethowans
43. Moon Beever (4 individual responses)
44. Moon Beever
45. Moon Beever
46. Moon Beever
47. Williamsons Solicitors
48. JRB Legal
49. McTear Williams & Wood
50. Begbies Traynor (2 individual responses)
51. Begbies Traynor
52. Claimant Lawyer
53. Travis Perkins
54. Medical Defence Organisation
55. UNISON Legal Services
56. Kings Cost
57. Tuckers Solicitors
58. Kenworthys Barristers
59. Exchange Chambers
60. 39 Essex Chambers (2 individual responses)
61. 39 Essex Chambers
62. Lamb Chambers
63. Claimant lawyer
64. Marsons
65. Claimant lawyer
66. 7 Harrington Street Chambers
67. Civitas Law
68. 12 KBW
69. 7BR
70. First group
71. Defendant lawyer
72. Crown Office Chambers
73. Unity Street Chambers
74. HCC Solicitors
75. Council of Circuit Judges
76. Express Solicitors
77. Bartletts Law
78. TG Chambers
79. Barrister
80. Park Square Barristers
81. Kings Chambers
82. Cloisters
83. Barrister
84. 9 Gough Square

85. 3 PB
86. Liberty
87. Penningtons
88. Stagecoach
89. Acasta Insurance
90. Parklane Plowden
91. EAD solicitors
92. Arriva
93. Temple Legal
94. The Judge Global
95. Claimant lawyer
96. ARAG Plc (2 individual responses)
97. ARAG Plc
98. Rowley Dickinson
99. Union of Shop, Distributive and Allied Workers (USDAW)
100. Curtis Law
101. Burstalls Solicitors
102. Geoffrey Leaver
103. Total Legal Solutions
104. NA Helpline
105. Cleggs Solicitors
106. Manolete
107. Addleshaw Goddard
108. First Choice Homes Oldham
109. McGuireWoods London LLP
110. Carpenters Law
111. Horwich Farrelly
112. Thompsons Law
113. BLM Law
114. Claimant lawyer
115. AXA Insurer
116. Zurich Insurance
117. Minster Law
118. Herbert Smith Freehills
119. Forum of Complex Injuries Solicitors (FOCIS)
120. Stewarts Law
121. Mayer Brown
122. Medical & Dental Defence Union of Scotland (MDDUS)
123. BC Legal (2 individual responses)
124. BC Legal
125. Saunders
126. Slater Gordon
127. Weightmans (2 responses)
128. Weightmans
129. Met Police

130. Claimant lawyer
131. The Bar Council
132. Hausfeld & Co.
133. Law Abroad
134. Kennedys
135. Association of British Insurers (ABI)
136. Bryan Cave Leighton Paisner
137. Public Law Project
138. Civil Justice Council
139. DWF LLP
140. Forum of Insurance Lawyers (FOIL)
141. Layperson in support of the RNIB's submission
142. Leigh Day (1 firm response and 1 individual response)
143. Leigh Day
144. NHS Resolution
145. City of London Law Society
146. Royal National Institute of Blind People (RNIB)
147. Asbestos Victims Support Groups' Forum UK
148. Graysons
149. The Law Society
150. Fry Law
151. Equality and Human Rights Commission (EHRC)
152. Professional Negligence Lawyers Association (PNLA)
153. Young Legal Aid Lawyers
154. Police Action Lawyers Group (PALG)
155. Association of Personal Injury Lawyers (APIL)

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