



Ministry of
JUSTICE

Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations

The Government Response

March 2011



Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response

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

March 2011

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Contents

Ministerial Foreword	3
Introduction and Contact Details	5
The Way Forward	6
Background	9
Conclusions	15
Summary of Consultation Responses	17
Responses to Specific Questions	19
Annex A: List of respondents	64

Ministerial Foreword

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

An effective system of civil justice is one of the cornerstones of a civilised society. Without it businesses could not trade, individuals could not enforce their civil liberties and government could not be held to account. But access to justice for all parties depends on costs being proportionate and unnecessary cases being deterred. It is in no one's interest for cases to be taken to law aggressively or speculatively and for costs to be out of proportion with the issues to be resolved.

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.

The Government's consultation paper, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, published on 15th November 2010, set out a number of proposals to tackle this problem. They made the case for implementing recommendations put forward by a very experienced judge, Sir Rupert Jackson. The aim is to restore a much needed sense of proportion and fairness to the current regime – not by denying access to justice, but by returning fair balance to the system.

Sir Rupert's proposals aimed to reduce the entirely disproportionate cost which defendants to CFA actions are faced with, whilst also encouraging claimants to take a much closer financial interest in the way their case is conducted. His ideas included abolition of recoverability of both CFA success fees and after the event (ATE) insurance premiums, which were introduced by the Access to Justice Act 1999.

These proposals were taken up and strongly endorsed by Lord Young of Graffham in his report on tackling the compensation culture, *Common Sense, Common Safety*. We hope that this response to the views we received will deliver on the solid principles and proposals contained in that report. We are seeking to reduce the unfair costs suffered by the many businesses, individuals and other organisations (including the NHS) that have been faced with CFA actions. We aim to restore greater proportionality to the costs of civil cases, as demanded in the recent European Court of Human Rights case of *MGN v UK*.

In the light of careful consideration of all the responses to the consultation, the Government believes that the right way forward is to abolish the recoverability of CFA success fees and ATE insurance premiums. In implementing the primary recommendations of Sir Rupert's report set out in the consultation paper, the Government agrees that these proposals should be taken forward as a package, and that the connected constituent parts should be implemented together.

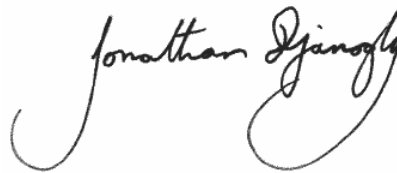
We benefited greatly from constructive meetings with many interested parties during the consultation period, and have carefully considered the responses that were submitted to the consultation paper. We look forward to continuing to work constructively with stakeholders on the details of how the proposals will be implemented in due course.

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.

Taken together, our proposals complement the Ministry of Justice's wider programme of reform to civil justice on which we are consulting separately. They will move us towards a justice system which protects access to justice, encourages earlier and more efficient solving of civil disputes, and reduces cost and disproportionate risk.



Kenneth Clarke
Lord Chancellor and
Secretary of State for Justice



Jonathan Djanogly
Justice Minister

Introduction and Contact Details

1. This is the Government response to the consultation paper, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations*¹. The Government’s principal conclusions are set out below.

The consultation

2. The Government consulted between 15 November 2010 and 14 February 2011. The Justice Minister, Jonathan Djanogly MP, held several meetings with stakeholders, and Ministry of Justice officials held many more. Over 600 formal responses were received. In general, defendant representatives supported the primary proposals, while claimant representatives and after the event insurers opposed them. Significantly, however, a large proportion of those who opposed the primary proposals recognised that change was inevitable and did not argue for the status quo to be maintained.
3. An updated impact assessment has been published alongside this response, and is available at:
<http://www.justice.gov.uk/consultations/jackson-review-151110.htm>
4. Further copies of this response and the consultation paper can be obtained by contacting **Rebecca Fowler** at: Ministry of Justice, Postpoint 4.18, 102 Petty France, London, SW1A 9AJ, email: privatefundingbranch@justice.gsi.gov.uk

¹ Cm 7947, Ministry of Justice Consultation Paper 13/10; published 15 November 2010

The Way Forward

Reform of ‘no win no fee’ conditional fee agreements

5. The Government intends to implement the reforms to no win no fee conditional fee agreements (CFAs), proposed as a package of measures by Lord Justice Jackson.

The Government intends to:

- **Abolish the general recoverability of the CFA success fee from the losing side.** In future any CFA success fee will be paid by the CFA funded party, rather than the other side. Crucially, this would give individual CFA claimants a financial interest in controlling the costs incurred on their behalf. It returns the position to when CFAs were first allowed in civil litigation in England and Wales in the 1990s.
- **Abolish the general recoverability of after the event (ATE) insurance premiums.** In future any ATE insurance premium will be paid by the party taking out the insurance, rather than the other side. Again, this returns the position to that which existed in the 1990s.
- **Introduce the package of associated measures set out by Lord Justice Jackson (and as set out below).**

Refinement to the proposals for public policy reasons

6. The Government is aware of specific concerns in relation to the funding of expert reports in clinical negligence cases. These expert reports can be expensive and we need to provide a means of funding them to ensure that meritorious claims can be brought by those who cannot afford to pay for these reports upfront. To address this, the Government is making one change to Lord Justice Jackson’s key recommendations. The Government intends to have a tightly drawn power to allow recoverability of the ATE insurance premiums to cover the cost of expert reports only in clinical negligence cases. The details would be set out in regulations. The Government will continue to engage with claimant and defendant representatives and general liability insurers, to ensure that joint expert reports can be commissioned wherever possible so that ATE insurance is not necessary.

The associated measures in the package

7. **There will be an increase of 10% in non-pecuniary general damages such as pain, suffering and loss of amenity in tort cases, for all claimants.** This proposal is supported by most insurers, amongst others, as part of the package of reforms.
8. The Government believes that claimants who have been compensated for personal injury should have their damages protected from having too much deducted by their lawyer as a success fee. **In personal injury**

cases, there will be a cap on the amount of damages that may be taken as a success fee. The cap will be set at 25% of the damages other than those for future care and loss. This will help protect claimant's damages generally, and will specifically protect those relating to future care and loss. Special damages for future care and loss, which can run into many millions of pounds in the most catastrophic injury cases will be protected.

9. **The maximum success fee that a lawyer may agree with a client under a CFA will remain at 100% of base costs. However, in personal injury cases this would be subject to the 25% cap on damages (other than those for future care and loss) as described above.**
10. **The recoverability of the self-insurance element by membership organisations, equivalent to the ATE insurance premium, will also be abolished.** Some trade unions and other membership organisations self-insure in this way.
11. **A regime of Qualified One Way Costs Shifting ('QOCS') will be introduced for personal injury cases, including clinical negligence.** This was proposed by Lord Justice Jackson and means that an individual claimant is not at risk of paying the defendant's costs should the claim fail (except in limited prescribed circumstances), but that the defendant – which typically in personal injury cases is a relatively well-resourced body – would have to pay the individual claimant's costs should the claim succeed. The exceptions will be: (i) on behaviour grounds - where the claimant has acted fraudulently, frivolously or unreasonably in pursuing proceedings - so a reasonable claimant will not be at risk of paying the other side's costs on behaviour grounds; and (ii) on financial means grounds - only the very wealthy would be at risk of paying any costs. The Government will continue to discuss with stakeholders how the rules should be drafted, including whether any minimum payment to a successful defendant's costs should be payable by the losing claimant in order to prevent speculative claims. QOCS will not be extended beyond personal injury at this stage, so the normal costs shifting rules will continue to apply in other cases.
12. **Part 36 of the Civil Procedure Rules (offers to settle) will be amended to equalise the incentives between claimants and defendants to make and accept reasonable offers.** This will apply to all civil cases, and the Government will discuss the details with stakeholders in due course. In particular, it will be made clear that where a money offer is beaten at trial, by however small a margin, the costs sanctions applicable under Part 36 will apply. An additional sanction (equivalent to 10% of the value of the claim) will be introduced to be paid by defendants who do not accept a claimant's reasonable offer that is not beaten at trial. The Government is minded to explore an alternative sanction (linked to costs rather than damages) for claims where a remedy other than damages is sought, to avoid satellite litigation around the court's valuation of such claims.

13. **Damages-based agreements (DBAs/contingency fees) will be allowed to be used in civil litigation.** DBAs are another type of 'no win no fee' agreement, but the lawyer's fee is related to the damages awarded, rather than the work done by the lawyer. The Government will lift the restriction on their use in civil litigation. DBAs will provide a useful additional form of funding for claimants, for example in commercial claims. Successful claimants will recover their base costs (the lawyer's hourly rate fee and disbursements) from defendants as for claims, whether funded under a CFA or otherwise, but in the case of a DBA, the costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the claimant to any shortfall between the costs recovered and the DBA fee. DBAs will be subject to similar requirements for parties to the agreement as for CFAs. For example, the amount of the payment that lawyers can take from the damages in personal injury cases will be capped (at 25% of damages excluding for future care and loss). However, the Government is not persuaded that there should be a requirement for a claimant to obtain independent legal advice in respect of a DBA.
14. **A new test of proportionality in costs assessment will be introduced.** This will mean that only reasonable and proportionate costs may be recovered from the losing party. This would act as a long stop to control the costs of activity that is clearly disproportionate to the value, complexity and importance of the claim.
15. **The prescribed rates which successful litigants in person may recover from losing opponents will increase in line with inflation since they were set.** These rates have not been increased since the mid-1990s. Business representatives in particular have supported this change, for those cases in which business people represent themselves in court.

Background

16. The high costs of civil litigation are of general concern, and led to the then Master of the Rolls commissioning a major review from Lord Justice Jackson, a judge of the Court of Appeal. Sir Rupert's review lasted for a year and his report was published in January 2010. For reasons set out at length by Sir Rupert in his *Review of Civil Litigation Costs: Final Report*², and in the Government's consultation paper, the changes to the original conditional fee agreement (CFA) regime introduced by the Access to Justice Act 1999, while having been used to promote access to justice for claimants, have come at substantial additional costs overall. These additional costs have to be paid by someone in the end, whether it is the customer (for claims against businesses – from supermarkets to the media), the insured (for claims against insured defendants) or the taxpayer (for claims against central and local government).

Conditional Fee Agreements (CFAs)

17. CFAs are the most common type of 'no win no fee' agreement under which lawyers are not paid if they lose a case, but can charge an uplift on top of their base costs - otherwise known as a 'success fee' - if they win. The success fee can be up to 100% of the base costs. Success fees allow lawyers to cover the costs of cases they take on which do not succeed. After the Event (ATE) insurance can be taken out by parties to a CFA funded case to protect them against having to pay their opponent's costs should the claim fail. CFAs were first allowed in England and Wales by the Conservative Government in the 1990s. The principal reason for allowing them was to increase access to justice for those, in particular, who were above the financial eligibility limits for legal aid. This development was regarded by claimant representatives as positive³. CFAs were and are still particularly used in personal injury claims, including clinical negligence⁴.
18. However, the last Government made substantial changes to the way in which CFAs operate. Changes in the Access to Justice Act 1999 made the CFA success fee and ATE insurance premium recoverable from losing defendants from April 2000.

² <http://www.judiciary.gov.uk/publications-and-reports/reports/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>. The Preliminary Report is available at the same website address as the Final Report

³ A year or two later, the Association of Personal Injury Lawyers (APIL) argued that the growing use of CFAs 'has provided access to justice in personal injury cases for those who previously did not litigate through fear of costs...'

⁴ In clinical negligence claims against the NHS Litigation Authority, the proportion of cases funded under CFAs has recently overtaken that funded under legal aid.

19. The regime of 'recoverable' CFAs has lasted for the last 11 years in England and Wales⁵, During that time, there have been increasing concerns of a compensation culture. The Prime Minister appointed Lord Young of Graffham to examine the health and safety laws and the compensation culture. As Lord Young reported⁶, this has gone further than increasing legal costs to affecting wider societal behaviours. Moreover, the original intention to help provide access to justice for those of relatively modest means above the financial eligibility limits for legal aid has been distorted by cases being brought on CFAs by those who are otherwise well able to fund the case. For example, cases which unions would once have funded are now run on recoverable CFAs, as are commercial cases. Some respondents to the consultation paper indicated that CFA use can be a litigation tactic to put pressure on the other party to settle.

The Government's proposals

The case for change

20. The arguments for the need for change were set out in detail in Sir Rupert's Review, and were summarised in the Government's consultation paper. They are not repeated here, but it is worth emphasising the trend of increasing claimants' costs in personal injury claims over the past 5 years, both in relation to damages, and to defendants' costs. A leading supermarket reported that the average costs paid out to claimants has increased by 40% between 2005 and 2010; 60% of the money paid out goes to claimant lawyers, and only 40% to the injured party. The figures for the NHS Litigation Authority (NHSLA) are similar. Over the same period, the claimants' costs paid have increased by about 45% (whereas the NHSLA's own legal costs have declined by about 30%). A general liability insurer has indicated that in 1999 claimant solicitors' costs were equivalent to just over half the damages agreed or awarded at 56%. By 2004, average claimant costs were 103% of the damages. By 2010 average claimant costs represented 142% of the sums received by the injured victims. The insurer also indicated that whilst average damages paid had increased since 1999 by 33%, average claimant costs paid (including disbursements and ATE premiums) have increased by 234%.

Developments since the consultation paper was issued

21. There have been significant developments since the Government's consultation paper was published last November, which have been referred to by a number of respondents to the consultation paper. In *MGN v UK*⁷, the European Court of Human Rights found that, in that case, the recoverable success fee regime in England and Wales

⁵ As Sir Rupert notes at paragraph 1.9 of his Final Report, there is no evidence of any other jurisdiction having a similar system.

⁶ *Common Sense, Common Safety* October 2010

⁷ *MGN Ltd v the United Kingdom* [2011] ECHR 39401/04

breached the defendant's Article 10 Convention rights (freedom of speech).

22. In another court case⁸, involving a catastrophic personal injury, the Court of Appeal considered the use of a CFA with a recoverable success fee. While the lead judgment was given by Lord Justice Jackson⁹, the Chancellor of the High Court, Sir Andrew Morritt, commented on the current CFA regime:

“That such a system increases the costs involved is obvious. That it does so to such an extent may not be so well known. And where else may an investor (or punter) obtain a short term, risk-free, return of between 22.5% and 100% of his investment (or stake)? The facts of this case appear to show that access to justice for one party may well lead to a substantial denial of justice to the other.”

Personal injury claims

23. Personal injury, including clinical negligence, is by far the largest category of cases where CFAs are used. As Sir Rupert noted, personal injury claims are typically between (injured) individuals against well-resourced bodies, whether insurance companies or the NHS. Claimants with meritorious cases will be able to bring claims – as they did when CFAs were first introduced in the 1990s, and as they currently do in Scotland¹⁰ - with any success fee payable out of damages excluding damages for future care and loss, which will be protected. Non-pecuniary general damages such as pain, suffering and loss of amenity will be increased by 10% as part of the package. A regime of 'qualified one way costs shifting' (QOCS) will be introduced which will mean that claimants do not need to take out ATE insurance to anything like the extent they do now; when they do, they will pay the premium themselves, which will encourage the market to set more reasonable premiums.

Clinical negligence claims

24. The same issues arise for clinical negligence claims as for personal injury more widely. However, the Government is concerned about the high costs of expert reports which can be required in clinical negligence cases before a meritorious claim can be pursued. There are various ways in which the costs of these expert reports can be met, from the lawyer funding the reports in the expectation that the costs will be

⁸ *Pankhurst v White and MIB* [2010] EWCA Civ 1445

⁹ In his judgment, Sir Rupert observed: “I regret to say that I regard the arrangements made by the claimant's solicitors in this case as grotesque. In addition to their base costs (ie their proper costs of conducting the litigation) they are extracting from the Motor Insurers' Bureau a 'success fee' of some £100,000 for running a risk which simply did not exist.”

¹⁰ See para 104 of the consultation paper, which referred to Sir Rupert's comment that “... it is significant that in Scotland personal injury cases are conducted satisfactorily on CFAs, despite the fact that success fees are not recoverable.”

recovered when the claim succeeds (or earlier where an interim payment is made), to joint reports being commissioned with the defendant (the National Health Service Litigation Authority (NHSLA) in most clinical negligence cases, although the NHSLA does not extend to Wales or to non-hospital cases). The Government is in discussions with the NHSLA about how it can commission and share expert reports on liability at an early stage with claimants. This, in turn, would help encourage early notification of claims. The Government will continue to work with the NHSLA, claimant and defendant representatives and general liability insurers, and their counterparts in Wales, about how joint expert reports in clinical negligence cases can be commissioned wherever possible. But for those meritorious claims where claimants have no alternative option for funding expert reports, the premium for ATE insurance limited to the costs of expert reports will remain recoverable. The Government will consider this further with stakeholders, and the details will be set out in secondary regulations in due course.

Road Traffic Accident Process for Personal Injury Claims

25. The Road Traffic Accident (RTA) Process for Personal Injury Claims was introduced in April 2010 and so had run for some months by the time the consultation started. Many respondents commented that the process seemed to be working well, and should be allowed further time to bed down, before changes were made. They further suggested that the process was succeeding in controlling costs and therefore success fees and ATE insurance premiums should continue to be recoverable.
26. The Government agrees that the new process is generally working well, and acknowledges that it has clear continuing support from both claimant and defendant representative groups who maintain a collaborative approach to making it work. Indeed, we are consulting separately on extending it. But the Government does not accept that there is any fairness or logic in retaining recoverable success fees or ATE insurance premiums in what are more straightforward claims, when that recoverability is to be abolished for more complex claims which fall outside the process. The majority of claimants RTA cases have the benefit of before the event legal expenses insurance (BTE insurance), and therefore will be able to pursue their claim at no additional cost. In any event, claimant solicitors will still be able to charge success fees from their clients, but rather than receiving a fixed recoverable rate, they will be able to compete for business by setting a lower rate for claimants.

Non-personal injury claims

27. CFAs are also used, but to a much lesser extent, in non-PI claims, such as housing, nuisance, contract and judicial review claims. Claimants will still be able to use CFAs in these cases. While there is a public policy interest in protecting - to at least some extent - the general damages for non-pecuniary loss such as pain, suffering and loss of amenity, this does not extend to other cases in the same way as to non-personal injury claims. For example, in successful defamation claims, while damages

may be awarded, there is no need to limit what portion of those damages may be used to fund legal costs where the main object of the proceedings is to protect reputation. But the Government supports the increase in damages for non-pecuniary loss such as pain, suffering and loss of amenity in all tort cases, and successful claimants will benefit accordingly. While Sir Rupert suggested that QOCS might be considered for introduction in some non-personal injury claims, the Government is not persuaded that the case for this has been made out at this stage. CFAs are very much a minority form of funding in these claims, and rolling out QOCS to these cases would distort the market by imposing substantial changes on all cases in a particular category of proceedings for a small number of claimants. The Government will examine the experience of QOCS in personal injury claims before considering whether it should be extended further.

Before the event (BTE) insurance

28. We know that, even where individuals have BTE insurance, CFAs with recoverable success fees are nevertheless used by claimants, for example in RTA claims. However, the Government is aware that BTE insurance can be and is used as an alternative to ATE insurance as a means of covering the risk of having to pay the opponent's legal costs. There is no reason why that should not continue, but on a more widespread basis. Sir Rupert suggested that positive steps should be made to encourage the take up of BTE insurance more widely, including for small businesses. As stated in the consultation paper¹¹

“The Government therefore supports Sir Rupert’s view on BTE insurance and would welcome a change in culture so that there is a greater use of existing BTE policies and the development of the market to expand BTE insurance coverage.”

Other proposals

29. The other proposals complement the changes to the CFA regime. The restriction on using damages-based agreements (DBAs, or ‘contingency fees’) is no longer appropriate in a modern litigation system and will be lifted. The principle of no win no fee litigation has been well established by CFAs. Appropriately regulated DBAs will provide a useful alternative form of funding for claimants, without imposing additional costs on defendants.
30. The proposals on reforming Part 36 of the Civil Procedure Rules (offers to settle) including the reversal of *Carver v BAA* will encourage earlier and better settlement. A new test of proportionality will ensure that, in appropriate cases, costs are controlled where they are being incurred in a way that is disproportionate to the value, complexity and importance of the claim.

¹¹ At paragraph 286

31. Lastly, the Government will increase the rates that successful individual litigants (litigants in person) can be recovered from losing opponents. These rates – which are for time spent, rather than in relation to any additional costs - have not been increased since the mid-1990s, before the CFA recoverability changes were introduced. As a result, since that time, all the increased returns have been for successful claimant lawyers and not for individuals who choose to represent themselves. These individuals can and do pursue claims and defences themselves – particularly those running small businesses – and it is important to remember that lawyers are not always required, and that there are other avenues for securing redress, or defending claims. The Government therefore agrees that increasing the recoverable rate for litigants in person is not only right but long overdue.

Conclusions

32. Claimant solicitor practices are businesses, with responsibilities towards their partners and employees, as well as their clients. They will inevitably adapt to maximise their profits while serving their clients' interests. The current CFA regime has served them well as legal costs have increased. Costs have increased particularly because of the substantial additional costs that defendants face, and the fact that individual claimants have no real interest in controlling their costs incurred in litigation, unlike – to some extent at least – parties using every other form of private litigation funding. While it may be that 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 future¹². Still less does it follow that claimants will not be able to pursue meritorious claims, and damages received at proportionate costs.
33. Some weaker cases which are currently brought will be deterred. Taken as a whole, the package of measures will restore a much needed sense of proportion and fairness to the current regime – not by denying access to justice, but by restoring fair balance to the system. Defendants should benefit from more proportionate total legal expenses, with legal costs for the NHS falling by around a third.
34. As many respondents have said, it is true that high costs in civil cases are not caused by the CFA regime alone. The Government accepts that the additional costs of recoverable success fees and ATE insurance premiums are one part of the cause of high costs: they are intrinsic to it, and our proposals are an integral part of addressing the problem. But there is much more to be done. Much of Sir Rupert's Final Report addressed issues of costs and case management, and work on this is being taken forward by the judiciary. In addition, the consultation paper *Solving disputes in the county court*, which the Government is publishing simultaneously, is seeking views on changes to streamline the civil process in the county courts. This includes Lord Young's proposal for extending the current process for RTA personal injury claims to all personal injury claims and on introducing a scheme of fixed recoverable costs for claims under £25,000 as proposed by Sir Rupert.

¹² It is interesting to note that while claimant representatives have argued for the retention of the recoverability of ATE insurance premiums in England and Wales, they have disagreed with its introduction in Scotland. In responding to Lord Gill's Scottish Civil Courts Review, both the Association of Personal Injury Lawyers (APIL) and the Motor Accident Solicitors Society (MASS) argued that the ATE insurance premium should not be recoverable in Scotland: it would have a 'negative impact on civil litigation in Scotland' and 'lead to an undesirable increase in satellite litigation ...'

Next steps

35. Changes to the CFA regime requiring primary legislation will follow as soon as Parliamentary time allows. Other changes will require changes to the Civil Procedure Rules or other secondary legislation. Further consultation will follow in due course, as appropriate. It is envisaged that the reforms will be implemented together, once the legislation is enacted, aside from the reversal of *Carver v BAA* and increases to recoverable fees for litigants in person which can be taken forward independently more swiftly.

Summary of Consultation Responses

36. During the consultation period, 625 formal responses were received, including responses via the online questionnaire, via email, or in hard copy. Some (45) of these respondents chose to comment on certain aspects of the proposals, but did not answer the consultation questions. An additional 9 responses were received after the consultation closed; these are not included in the numerical analysis, but the comments have been considered.
37. In addition to the 625 formal responses, we received 256 identical campaign letters from people explicitly stating that they were writing to respond to the consultation. There were three key concerns set out in these letters. Firstly, that 'many people who get a 'no win no fee' deal now will not be able to do so in the future.' Secondly, that claimants might lose a share of their damages to pay their lawyer, and finally, that the changes would benefit 'big insurance companies' at the expense of injured people.
38. By far the largest number (211) of formal responses came from members of the legal profession. Responses were also received from general liability insurers, ATE insurers, local authorities, trade unions and the media. Other respondents included members of the judiciary, claims management companies, defendants such as supermarkets and other businesses, and various representative organisations. There were also several responses via the online questionnaire where those responding did not leave their contact details.
39. Many identified the key issue in the consultation paper as the proposal to abolish the recoverability of CFA success fees and ATE insurance premiums. Views were clearly split amongst respondents. Most claimant representatives and ATE insurers argued strongly that recoverability should remain, in full or in part in order to maintain access to justice and preserve damages for claimants. On the other hand, defendant representatives and general liability insurers were more united in their views in support of Sir Rupert's primary recommendations: that recoverability of success fees (and ATE insurance premiums) should be abolished. They pointed to the disproportionate costs caused by the current regime, and did not believe that genuine claims would be disadvantaged.
40. Aside from the key proposal on recoverability, to which many respondents on the claimant side were strongly opposed, there were some issues on which there was more of a consensus. Most respondents agreed that general damages for civil wrongs should be increased by 10%, with those on the defendant side accepting this measure as part of an interlocking package. Similarly, the majority of respondents agreed with the proposals relating to Part 36 offers and the

reversal of the effect of *Carver*. The large majority of respondents also agreed that the hourly rate recoverable by litigants in person should be increased.

Responses to Specific Questions

41. This section provides an analysis of the answers that respondents gave to the specific questions raised in the consultations paper. The numerical analysis is based on the 580 respondents who answered the consultation questions. There were a further 45 responses from people who made comments on certain aspects of the proposals, but did not answer specific questions. These comments have been considered and feature in the textual commentary below. Of the 580 responses with answers to consultation questions, there were of course respondents who did not answer every question; this is indicated below where appropriate.

Conditional fee agreements and success fees

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

42. This question was answered by 556 respondents, 396 (71%) of whom disagreed that the recoverability of success fees should be abolished, and 160 (29%) agreed. All general liability insurers, respondents from the media and local authority responses answered ‘yes’ expressing support for the proposal. The majority of law firms and ATE insurers, and all trade unions answered ‘no.’

In favour of recoverable success fees

43. A number of respondents pointed out that the current regime had ensured access to justice for a large number of people and was working well. They argued that the fixed recoverable success fee system which now applies to a large proportion of personal injury cases works well in practice and applying it more widely would deal with a lot of the problems identified in the consultation paper. However, a significant number of those who supported recoverability of success fees in principle accepted that some reform was needed to better regulate or control the success fees but that abolishing recoverability of success fees altogether was unnecessary. Some felt that the reasons given in the consultation paper were insufficient and inaccurate. With fixed recoverable success fees in the majority of personal injury cases by volume, it was wrong to assume that 100% success fees were regularly charged or that challenge by assessment was rare. Success fees were controlled through costs assessment. The problems around excessive profits and cherry picking by lawyers under the current regime can be dealt with by reducing or fixing success fees and not abolishing recoverability altogether.
44. The majority of those representing claimant interests strongly disagreed with the suggestion that the recoverability of CFA success fees should be abolished. Although most accepted that some reform was needed, they felt that abolishing recoverability of success fees was not the best

option if the objective of the reform was to make the costs of civil litigation more proportionate. The most common reason cited by respondents in opposing the abolition of recoverability was that this would remove, reduce or impede access to justice for claimants:

- Respondents argued that CFAs were introduced to give access to justice to ordinary people when legal aid was withdrawn for personal injury cases. Success fees allowed lawyers to take on more difficult and risky cases. CFAs with recoverable success fees ensured high quality legal advice which could lead to more compensation for claimants.
- Respondents suggested that under the proposals cases with less than 70% chance of success would not be taken on. In the circumstances respondents felt that the concept of 'cherry picking' would become a reality and that it would lead to a reduction in the number of meritorious claims which are pursued.
- Some respondents were of the view that success fees were akin to insurance premiums, the costs of which should be payable by the wrongdoer and not the claimant.

45. A large majority of those who disagreed with the proposal to abolish the recoverability of CFA success fees felt that doing so would breach the principle of full compensation for claimants. If recoverability were abolished the claimants would have to pay the success fee out of their damages. Some felt that damages in England and Wales are only compensatory (unlike in the USA where they are punitive), therefore taking a cut from the claimant's damages was wrong in principle as this meant taking away the claimant's compensation for the injuries suffered. One respondent saw the proposal as 'Robin Hood in reverse' - taking from poor vulnerable claimants to give to better resourced defendants and general liability insurers. One respondent commented that the principles of full compensation for the injured should take priority over costs rules, and that it was wrong to expect the claimants to pay for fees out of their damages for physical and emotional losses.
46. Other respondents pointed to wider consequences for claimants of abolishing the recoverability of success fees: if claimants had to pay their lawyer's success fee then this may lead to claimants settling for less in order to reduce the costs payable to their lawyer. A deduction from claimant's damages reduced their ability to finance their future disability needs and would force them to rely on state to cover the shortfall.
47. A number of respondents felt that the impact would be particularly disproportionate on people with serious injuries as they stood to lose a large proportion of their damages.
48. Other respondents also expressed concern that abolishing the recoverability of success fees would also have an adverse impact on claimant lawyers. Recoverable success fees allowed lawyers to recover

the often significant costs of cases which are discontinued or lost, which they would no longer be able to recover.

Against recoverable success fees

49. On the other hand, the proposal to abolish recoverability of success fees was strongly supported by those representing defendant interests, mainly general liability insurers and defendants including businesses who face claims under CFAs. These respondents argued that the current level of legal costs claimed and recovered under CFAs in civil litigation had become disproportionate to the issues and amounts in dispute. They said that rather than creating a fund and encouraging lawyers to take on more risky cases, the current system encouraged lawyers to 'cherry pick' cases in order to maximise their profits. It was suggested that CFAs were now prevalent in litigation even where the parties are wealthy or commercial organisations which were able to fund their cases. Removing recoverability in their view would have no impact on access to justice and genuine claims would still be brought.
50. One respondent commented that the present regime amounted to a sanction for bonuses for lawyers. The media respondents disagreed with arguments for recoverability being presented under the banner of access to justice, which in their view were arguments for 'access to profit for lawyers.' Not only was recoverability unjust; it also distorted the legal services market in such a way as to prevent the development of desirable new ways of funding access to justice at no cost to public funds.
51. A number of respondents argued that abolishing the recoverability of success fees would be beneficial for business. They agreed that abolishing recoverability would lead to claimants taking more of an interest in their claim which would drive behaviour, control price and introduce competition between lawyers. Abolishing recoverability of success fees would also dispose of the anomaly that 'no other country in the world has such an unusual system'.
52. On 'full compensation', one defendant respondent commented: 'there is no established principle or right to 'full compensation' in England and Wales. Claimants have only been able to recover full compensation for the past ten years: prior to 2000 deductions from damages were accepted'.
53. Those representing media defendants suggested that the current arrangements with recoverable success fees have had an adverse effect on local and regional newspapers and a disproportionate impact on defendants which have to pick up these costs. They felt that abolishing recoverability would ensure greater equality between parties and keep costs of CFA funded cases down.
54. A number of respondents disagreed with the assertion made by claimant lawyers about the adverse impact of abolishing recoverability of success

fees. They believed that a well managed solicitor firm would be able to generate enough funds to cover the cost of lost or abandoned cases without the need to recover the success fees from defendants provided they did not need to pay referral fees

Q 2 – If your answer to Q1 is no, do you consider that success fees should remain recoverable from the losing party in those categories of case (road traffic accident and employer’s liability) where the recoverable success fee has been fixed?

55. 370 respondents answered this question, with 336 (91%) of those considering that success fees should remain recoverable where it has been fixed, and 34 (9%) answering ‘no’.
56. Most respondents who disagreed with the proposal to abolish recoverability of success fees felt that success fees should remain recoverable from the losing party in the categories where they have been fixed, namely road traffic accident and employers’ liability cases. Respondents felt that the fixed costs regime in these cases was agreed after extensive research and had worked well in supporting access to justice for claimants. There was general consensus that the fixed success fees in these areas have helped to control costs, to avoid ‘cherry picking’ of cases, and to prevent satellite litigation. Most argued that the scheme should be extended to other personal injury cases including clinical negligence claims.
57. However, those who agreed with the proposal to abolish recoverability strongly argued that if recoverability was abolished then that should apply across the board. They believed that allowing exceptions to the no recoverability rule would introduce complexity to the system and may lead to satellite litigation.

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

58. 445 respondents answered this question, with 124 (28%) answering ‘no’ – that success fees should not remain recoverable in these cases, and 321 (72%) answering ‘yes’.
59. Most respondents in favour of retaining recoverability of success fees felt that there was no justification for denying individuals access to justice because the remedy sought was not monetary. A large number of respondents felt that judicial review and housing cases were more complex and often CFAs were the only alternative in the absence of legal aid. The issue in these cases was access to justice and there was a likely inequality in the resources of claimants compared with the public body or landlord. They argued that CFAs would only be viable with recoverable success fees. Without recoverable success fees many of these cases would not be pursued

60. One respondent commented that 'judicial review claims are important in dealing with the exercise of power by public authorities over the lives of individuals – the rule of law requires judicial scrutiny over the executive. Judicial Review claims already have the 'permission stage filter' to stop unmeritorious claims'.
61. With regard to housing disrepair claims, a number of respondents (housing practitioners) emphasised that success fees should be recoverable where both specific performance and damages were sought: most housing disrepair cases involve claims for both specific performance and damages. Damages were generally modest (often £1000-£5000) and rarely in excess of £15,000. Removing the recoverability of success fees would be a huge deterrent to access to justice for the most vulnerable in society, in particular women, minority groups and the poor.
62. Those arguing against retaining recoverability of success fees from the losing party in cases where damages are not sought cited access to justice for defendants. Some respondents considered that if recoverability were abolished then it should be across the board. Some felt that there was no evidence why judicial review and housing disrepair cases needed to be treated differently and that any exceptions could lead to unnecessary complexity in the rules and satellite litigation.

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

63. This question was answered by 427 respondents, 283 (66%) of those disagreed that this would provide a workable model, and 144 (34%) thought that it would.
64. A number of respondents did not confine their answer to cases where damages were not sought - for example a number of respondents explained why a 25% cap on recoverable success fees would be unsuitable in clinical negligence cases.
65. Those who said that a proposed cap of 25% was inappropriate in non-damages cases did so for a range of reasons: 100% success fee should be recoverable in these cases; the cap was too low and would prevent solicitors from taking on any cases with less than 80% chance of success; the cap was arbitrary and was not supported by statistical evidence; a low cap provides no incentive for early settlement. Others felt that a cap was unnecessary and parties should be able to agree on the appropriate level in individual cases; some preferred a staged success fee approach. One respondent commented: 'If a success fee is restricted to 25%, only cases with an 80% + prospect of success will be economically viable. Many applications for judicial review, resolving difficult points of statutory interpretation, and areas in the public interest would not be resolved'.

66. Those who considered that a 25% cap was appropriate in non-damages cases did so on the basis that this was better than the current position where a 100% success fee was recoverable. Others supported it for being fairer, comparable to employers' liability claims and for giving certainty to defendants. Some respondents opted for a lower cap, for example 12.5%.

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

67. Of the 482 respondents who answered this question, 345 (72%) answered 'yes', arguing that success fees should remain recoverable in certain categories of cases. Some of these did so because they feel success fees should remain recoverable in all cases. All general liability insurers, media respondents and local authorities who answered this question answered 'no'.

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

68. This question was answered by 340 respondents. A large majority of respondents who disagreed at Question 1 felt that recoverability of success fees should remain for all cases and in the very least for personal injury including clinical negligence cases to ensure access to justice for claimants. These cases in respondents' views involved an asymmetrical relationship between claimants and defendants: without recoverability of success fees it would not be possible to bring these cases. Some respondents were concerned that without recoverability certain other cases would not be brought including judicial review; county court discrimination claims; civil actions for false imprisonment; malicious prosecution; and other torts involving abuse of power.
69. The particular emphasis was on the need to ensure that complex clinical negligence cases could be brought. Respondents explained that clinical negligence cases often involved complex issues, and required significant financial investment and time spent in assessing whether there was a claim; it was fair that the losing party should pay these costs. One particular concern was expressed in respect of very complex 'test' cases that if claimants were unable to secure funding for these cases then the risk was that defendants would be able to pick test cases to develop the law in the direction they wished and claimants in follow on cases would lose out.
70. A number of respondents argued that the proposal to abolish recoverability of CFA success fees if implemented would be open to legal challenge under Article 6 of the European Convention of Human Rights.

71. Other categories of case put forward by respondents where success fee recoverability ought to remain included: insolvency litigation; professional negligence; housing and social welfare cases; defamation related proceedings; work stress; employment litigation in the high court; fatal accidents and human rights related cases.
72. In relation to Question 6 (about the maximum recoverable success fee and whether this should be different in different categories of case), most respondents in support of retaining the recoverability of success fees felt that 100% should remain in all cases. A few respondents accepted that a maximum of 50% would be acceptable. However, most expressed support for fixed staged recoverable success fees which they felt was preferable to total abolition of success fees and would provide a safe route to access to justice and a level playing field with certainty and savings for defendants.
73. Of those who opposed the recoverability of success fees in any case, some respondents argued that there should not be any exceptions to the recoverability of success fees and that the size and complexity of the case was immaterial. They pointed out that many catastrophically injured claimants were passengers and so the issues to be resolved related more to quantum than liability. The risk was therefore reduced to Part 36 offers.
74. Some respondents were of the view that with qualified one way costs shifting (QOCS) most personal injury claimants including those involved in complex clinical negligence claims should be adequately protected and should contribute to the costs relating to their claim. Some said that the retention of recoverable success fees in clinical negligence cases would perpetuate the current position in which claimants have no interest in the level of the success fee. Any proposed exceptions could lead to confusion and satellite litigation.
75. One respondent commented that there was an urgent need to restrain the growth of litigation and removing recoverability of success fees would contribute towards that.

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

76. This question was answered by 496 respondents, with 338 (68%) agreeing that the maximum success fee should remain at 100%. Many of the 158 (32%) who answered 'no' were on the defendant side of the debate, such as general liability insurers, the media and local authorities.
77. The majority of respondents agreed. Some felt that the reasons for allowing 100% success fees when CFAs were first introduced had not changed. Some agreed with the 100% maximum subject to a number of conditions: a cap on the amount which the claimant would lose; the maximum being restricted where the damages award exceeded the claimant's offer to settle; damages-based agreements being permitted

and the indemnity principle being abolished; success fees being recoverable from the losing side and staged success fees being used.

78. Some respondents felt that a maximum was unnecessary in commercial cases as parties were on an equal footing. A number of respondents expressed support for a system of staged fees of up to 50% (and others 25%) which they felt would help control speculative litigation.

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

79. Responses to this question, of which there were 406, were more evenly split than on other issues; 180 (44%) answered ‘no’ and 226 (56%) answered ‘yes’.
80. The majority of respondents supported a cap on the amount of damages which may be charged in success fees in personal injury cases. Respondents felt that such a cap would strike a balance between maintaining access to justice and protecting a meaningful award for claimants. Respondents said that the voluntary cap of 25% before the introduction of recoverability worked well. However, there was a need to protect the interests of those of lesser means. One respondent commented that claimants should derive some benefit from the litigation and lawyers representing a successful litigant should be able to recover reasonable remuneration for the work they have carried out; a cap would allow successful claimants to retain a reasonable sum’.
81. Those who objected to a cap felt that prescribing a cap would hinder meritorious claims from being pursued and would restrict competition. There was a concern that a cap could encourage satellite litigation on the level of general damages. Further, a cap of 25% would make it uneconomical for cases to be appealed. Others felt that claimants should not have to pay anything out of their damages.

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

82. Of the 355 respondents who answered this question, most supported a cap of 25%, although some suggested a higher (50%) and others a lower (10%) cap for different reasons.
83. A number of concerns were raised on the issue of a cap on success fees. One respondent was concerned that it was not clear whether the proposed 25% cap was inclusive or exclusive of value added tax (VAT) and whether the cap was to be shared between counsel and solicitors. They said that there was no such cap in the USA or Canada. Their view was that imposing a cap would make bringing fatal accident cases even more difficult. Some respondents argued that where a solicitor pays for disbursements the cap should be increased to 35%.

Q10 – If your answer to Q 8 is yes then should such a cap be binding in all personal injury cases or should there be exceptions, and if so what and how should they operate?

84. A large majority of the 185 respondents who answered this question felt that the cap should be binding in all personal injury cases with no exceptions as this could lead to satellite litigation. Others felt that anything too binding was too restrictive and there should be scope to disapply the cap in some categories of case with the court's approval. A number of respondents felt that a cap would not be practical in complex cases, e.g. industrial disease and medical negligence, as costs in these cases could often be disproportionate to the damages due to the defendant's attitude.

After the event insurance premiums

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

85. There were 496 responses to this question, and of those 341 (69%) answered 'no', arguing that ATE insurance premiums should remain recoverable, this included all ATE insurers. All general liability insurers, media respondents and local authorities agreed that ATE insurance premiums should no longer be recoverable across all categories of civil litigation.
86. As with Question 1, the answers to this question were again split between those representing claimant interests (who said 'no') and those representing defendant interests (who said 'yes'). The reasons cited were similar to those for and against retaining the recoverability of success fees. Those who said 'no' defended the existing arrangements by arguing that the principle of recoverable ATE insurance premiums is consistent with the full compensation principle and affords access to justice. While they accepted some concerns over the level of premiums, they felt these could be addressed by rule changes and judicial enforcement. They pointed out that the increased use of staged premiums, a healthy market - especially for personal injury, and the defendant's ability to challenge ATE insurance levels could provide a check on premium levels. In the absence of ATE insurance, defendants' costs recovery was fraught with uncertainty and may force defendants to settle claims.
87. A representative of ATE insurers commented that ATE insurance has been one of the success stories of the access to justice movement. 'To remove recoverability of it will place large corporations and public bodies like the NHSLA beyond the law'.
88. Other respondents argued that the payment of ATE insurance in personal injury cases was in practice a payment of money from one part of the industry to another so although the cost of ATE insurance could be significant, it was not usually an issue for the claimant. ATE

insurance benefited defendants too, as they could recover their costs in the cases they won. Some respondents pointed out that defendants could avoid the costs of ATE insurance: defendants are advised at an early stage that ATE insurance has been taken out and they can therefore avoid these costs by admitting liability early. If this happened before proceedings were issued then ATE insurance might not be necessary. Most respondents in support of retaining recoverability of ATE insurance premiums felt that claimants should be reimbursed all the reasonable costs of obtaining compensation: ATE insurance was a legitimate cost.

89. These respondents warned of unintended consequences if recoverability were abolished including:
- a reduction in access to justice for claimants of modest means. Premiums would have to be paid upfront which most people would not be able to afford. This would inhibit the bringing of claims and negligent acts would go unchecked;
 - a reduction in the number of cases insured and the insurance pool, thereby increasing premiums for claimants that wanted to insure to a level they could not afford;
 - an increase in the number of fraudulent and frivolous or weak cases; and
 - a reduction in the Government revenue from tax and VAT.
90. There was some acceptance on the part of these respondents that ATE insurance premiums could be disproportionate in some cases, but they argued that proportionate and regulated premiums should remain recoverable.
91. Overall, respondents opposed to the abolition of ATE insurance premium recoverability were concerned that there was no viable way of funding disbursements: very few BTE insurance policies provided disbursement funding as claims progress.
92. On the other hand, those who agreed with the proposal to abolish the recoverability of ATE insurance premium from the losing side argued that ATE insurance should be payable by the party taking it out and not the losing defendants. They were concerned that ATE insurance imposes substantial costs burdens on defendants as they had no control over these costs. As a result, the premiums were inflated and claimants were under no obligation or interest in negotiating a fair premium. Some pointed to the ATE insurance model used in Scotland, under which the premium was payable by the claimant and this encouraged the use of BTE insurance as a cheap add on. This also meant that claimants had an interest in the claim and a vested interest in keeping the costs down.
93. One defendant representative said that ATE insurance was the most pernicious aspect of the current regime: it allowed satellite profiteering,

distorted premiums and removed equality of arms. Others felt that if claimants wanted to manage their risk, they should take out ATE insurance at their own cost. Lawyers cherry picked cases – so the need for ATE insurance was highly debateable. It was felt that if Sir Rupert's proposals were implemented in full (with QOCS), honest claimants with meritorious cases would be protected.

94. It was argued that in most cases ATE insurance just added a further layer of expense. In the small percentage of cases where ATE insurance could be justified the premium should be paid by the claimant. One respondent pointed to a police investigation into an established firm of solicitors about the use of ATE insurance and the issue of so-called 'hold harmless' policies.
95. Some respondents said that compensators paid out substantially more in ATE insurance premiums than they recovered in cases which they win. Another respondent commented: 'ATE insurance premiums should not be recoverable. This will stop the high volume of satellite litigation on this issue. The market place will decide whether premiums can be set at reasonable levels. Courts should not have to decide what portion of ATE insurance premiums the defendant should have to pay'.
96. There were also concerns that the current system put little market pressure on premiums as the purchaser did not pay for it – which meant that there was no pressure to deliver value for money. If claimants had an interest, the market would readjust and premiums would settle at a reasonable level. In any event, claimants were not at risk of having to pay the opponent's costs until proceedings were issued.

Q 12 – If your answer to Q11 is no, please state in which categories of case ATE insurance premiums should remain recoverable and why.

97. The majority of respondents who answered 'no' to Question 11 were of the view that ATE insurance premiums should remain recoverable in all categories of case. It was suggested that it was fair and reasonable for all reasonable costs incurred by a winning party to be recovered from the losing party, including the ATE insurance premium. Respondents argued that most ordinary people do not hold BTE insurance and would require protection against costs in order to pursue a claim. One respondent argued that QOCS may reduce the number of cases where ATE insurance was required, but removing recoverability would significantly reduce access to justice. If ATE insurance was unrecoverable, claimants would face the risk of paying the other side's costs, their own disbursements and any balance of their solicitor's costs and the success fee. This would mean that only cases with very significant damages and strong prospects of success would be taken. Fewer claims would be commenced and the risk of personal bankruptcy or corporate insolvency would increase where claims were pursued to trial.

98. Some respondents specified the categories of case where they felt that the recoverability of ATE insurance premiums should remain, including: personal injury cases including clinical negligence; insolvency litigation; judicial review; housing disrepair; defamation; intellectual property; actions against the police; and professional negligence. Clinical negligence was highlighted as an area where costs could be very high which resulted in substantial insurance premiums which would be unaffordable to most claimants.
99. A number of respondents expressed a preference for the recoverability of staged ATE insurance premiums and put forward alternative proposals for the recoverability of capped or staged ATE insurance premiums. It was felt that the recoverability of ATE insurance premiums should at least remain for disbursements.

Q 13 – If your answer to Q11 is no, should recoverability of ATE insurance premiums be limited to circumstances where the successful party can show that no other form of funding is available?

100. A large number (278) of respondents did not answer this question. Of the 302 that did answer, the majority (68%) answered 'no'.
101. Of those who said 'no', a large number argued that this already happened: solicitors were already required to advise clients on all funding options. Others rejected the proposal for being unworkable and impractical. Some warned of the risk of satellite litigation if such a requirement were implemented.
102. One respondent pointed out that in personal injury and clinical negligence cases, if it was shown that a claimant had BTE insurance and then took out ATE insurance, the ATE insurance premium should not be recoverable. Some were concerned about the limitations on BTE insurance which in their view effectively prevented claims. One respondent felt that it was not right to talk of union funding, along with BTE cover, as another 'alternative form of funding': union funded cases were carried out under a collective CFA and relied upon either ATE insurance or self-insurance.
103. Some felt that the test should remain whether a CFA agreement was a 'reasonable' option for the successful party. Any other test would be unfair.
104. Some of those who answered 'yes' said that if it was shown that the claimant was conspicuously wealthy or had BTE/Union funding then it would be unfair to expect the defendant to bear the costs of ATE insurance. Some qualified their answer subject to the availability of 'proper' BTE insurance.

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

105. The 444 respondents who answered this question were fairly evenly split, with 230 (52%) answering yes and 214 (48%) no. ATE insurers themselves were also split, with some answering 'yes', although they did so because they felt all ATE insurance premiums should be recoverable, rather than only those relating to disbursements.
106. Those who said 'no' to this question included some respondents representing claimant interests. The main reason given was their general opposition to abolishing recoverability (of success fees and ATE insurance premiums) in all cases. Other concerns included the uncertainty over whether a disbursements only market would be viable. One respondent pointed out that an ATE policy for disbursements only would result in the market contracting as it went against the principle of 'many paying for the few'. Another issue was whether claimants could afford disbursements, particularly in complex clinical negligence cases.
107. Of those who said 'yes', most claimant representatives felt the recoverability of ATE insurance premiums should apply to all cases - but was vital in clinical negligence cases due to the high cost of expert reports. A significant number asserted that even with QOCS, claimants would need to take out ATE insurance to cover their liability for disbursements. The claimants would be unable to carry these substantial costs. Claimant solicitors could not just carry the risk for clients, as they would be looking to reduce costs. It was thought that rather than to 'tax' claimants' compensation, the least unfair option would be for defendants to bear the cost of insurance with some controls over the cost of the insurance premium.
108. A number of respondents who said 'yes' also pointed out that a disbursements only ATE insurance market might not be viable. Some respondents specifically commented that recoverable ATE insurance must exclude counsel's fees.
109. Respondents suggested a range of categories where ATE insurance should remain recoverable for disbursements, including: personal injury cases (including clinical negligence); insolvency litigation; judicial review; housing disrepair; defamation, intellectual property; actions against the police and professional negligence.

Q 15 – If your answer to Q14 is yes, should recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?

110. A large number (298) of respondents did not answer this question, most likely due to their answer to Question 14. Of the 282 that did, the majority (71%) answered 'no'.

111. Most respondents who answered 'yes' to Question 10 also agreed that recoverability of ATE insurance premiums must be limited to non-legal representation costs to avoid abuse, for example with costs being loaded onto counsel who was not on a CFA rather than solicitors.
112. One respondent said that recoverability should not be allowed to extend further than was required to fulfil the purposes of ensuring access to justice. A number of respondents pointed out that this would be no different to what currently happened anyway. One respondent commented that the ATE insurance premium in respect of expert reports and court fees should be recoverable.

Q 16 – If your answer to Q14 or 15 is yes, should recoverability of ATE insurance premiums relating to disbursements be limited to circumstances where the successful party can show that no other form of funding is available?

113. Again dependent on the answers to Questions 14 and 15, only 240 respondents answered this question, and 173 (72%) of those disagreed that this recoverability should be limited to circumstances where the successful party can show that no other form of funding is available.
114. Those who said 'no' in reply to this question referred to their answer to Question 13. They felt that limiting the recoverability of ATE insurance premiums in respect of non-legal costs where no other form of funding was available would be unworkable, would create complexity with unnecessary means testing and carried the risk of satellite litigation.
115. One respondent thought that availability of alternative funding should be a relevant factor in deciding whether or not costs had been reasonably incurred. However, it should not be an absolute rule because it would be difficult to apply and would create satellite litigation.
116. Of those who said 'yes' a number commented that under the current CFA arrangements this already occurs. One respondent suggested that the issue of freedom of choice of solicitor (e.g. under a BTE insurance policy) would need to be addressed to ensure that individuals with limited financial means were not prejudiced and limited in choice. A number of respondents repeated their comments around the limitation of BTE insurance policies.

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

117. The responses to this question were clearly split between claimant and defendant interests. A number of claimant respondents identified the lack of funding for disbursements as a major flaw in Sir Rupert's proposals. There were concerns that if the proposals on recoverability were implemented without a satisfactory answer, it would mean access to justice would be denied for many people on low incomes.

118. A number of respondents thought that the best way of funding disbursements, especially in clinical negligence cases, would be through the legal aid fund but accepted that this was not feasible given financial constraints.
119. A large number of claimant respondents felt that there would be no satisfactory way of funding disbursements if the recoverability of ATE insurance were abolished. These costs would fall on claimants or their solicitors, neither of whom would be able to afford to pay for them. It would be wrong in principle to expect the 'injured' party to pay. Solicitors would be unable to underwrite the costs which could be very substantial in some cases. One respondent indicated that they carry disbursement funding of £15m at any one time. However, they could not accept this risk if it were not underwritten by ATE insurance. A bank loan might be an option but it was thought unlikely that banks would provide a loan without the protection of ATE insurance policy to solicitors.
120. Particular concerns were expressed in respect of catastrophic injury cases, where few claimants could afford to pay for expensive expert reports and solicitors were unlikely to accept this additional risk. Respondents suggested that there was no evidence that an affordable ATE insurance market would be able to develop such a product for which premiums would be deferred. Many therefore concluded that in the absence of recoverable ATE insurance, there was no other effective means of funding disbursements. This, respondents argued, would have a detrimental impact on access to justice as a large number of meritorious cases would not be brought because of fear of disbursement costs and risk.
121. Trade union representatives who favoured retaining recoverability felt that genuine one way costs shifting with either self-insurance for disbursements, under a modified section 30 of the Access to Justice Act 1999, or using the current model for enhanced recoverable success fees in section 30 cases would secure funding for a large proportion of the populations.
122. Respondents in favour of abolishing recoverability thought that claimants could afford to pay for disbursements as they were not substantial in most cases. Impecunious clients would be able to take out insurance, the cost of which could be self-insured. Market forces would operate to keep the policies low since clients would demand low cost policies. It was argued that the absence of ATE insurance had not prevented claims being made in the past. ATE insurance products were likely to be available and operate as they did now. One respondent said that they were engaged with promoting the uptake of BTE insurance and saw this having a greater role to play in future. It was felt that a greater take up of ATE insurance by claimants would exert price control over a product which had not had transparency of pricing.
123. Some respondents explained that in addition to ATE and BTE insurance, there were a number of alternatives: private funding (the majority of

cases are of low value and would require a GP report which most could afford); solicitor funding; membership funding; third party funding; legal aid funding; defendant funding or a mixture of the above.

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

124. This question was answered by 377 respondents, and the majority of those (63%) agreed that recoverability of the self insurance element should be similarly abolished if recoverability of ATE insurance premiums is abolished. Trade Union respondents tended to disagree.
125. The answers were unevenly split. A large number of claimant respondents felt that recoverability of ATE insurance premiums should be preserved and along with it the recoverability of the self-insurance element. Others felt that if the recoverability of the ATE insurance premium were abolished then the recoverability of the 'self-insurance' element by membership organisations should also be abolished for fairness and consistency.
126. One respondent felt that in 'run of the mill' cases where disbursements are modest membership organisations should not be treated more advantageously. However, where disbursements would be likely to be substantial, for example in large complex cases which require initial expert evidence, the recoverability of the self-insurance element should remain, perhaps subject to approval by the court.
127. Trade union representatives argued that the section 30 arrangements were an efficient way to provide cover at costs which were required to be lower than the equivalent ATE insurance premium. They explained that section 30 insurance was not subject to heavy indemnity limits as with some ATE insurance products and was available in test cases (unlike ATE insurance). In their view, it was vital for the justice system to have exceptional cases to develop the law and the costs of these were unpredictable. There were concerns that a huge swathe of cases would not be brought. It was suggested that if ATE insurance recoverability were abolished, retaining recoverability of the self-insurance element would at least preserve some access to justice for those members and ensure appropriate cases are brought forward.
128. Those who said 'yes' to this question pointed out that before recoverability was introduced membership organisations bore the burden of unsuccessful cases through membership fees. Recoverability shifted this burden to taxpayers. However, there had been no reduction in membership fees so unions could easily meet this burden again. One respondent was concerned that trade unions made substantial profits out of the existing arrangements. Another said that the current regulations provided a loophole which allowed certain organisations to avoid proper regulation by the FSA. There was no protection if a

membership organisation failed and was unable to deliver its promised indemnities. This loophole should be closed.

10% increase in general damages

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

129. There were 441 responses to this question, of which 280 (63%) agreed that successful claimants should secure an increase of 10%. It is worth noting that of the 37% who disagreed, many did so because they felt that 10% was not a high enough increase, rather than suggesting that an increase was not necessary at all.
130. The majority of those who agreed felt that: general damages were simply too low; a review of damages was long overdue; and the increase should be greater than 10%. Many also commented that the figure should be regularly reviewed. Some stated that 10% was proportionate and effective. It was also felt that the increase would enable a defendant to decide whether to contest a CFA funded case on its merits, rather than responding to pressure to settle early due to risk of high costs. A few responses suggested the 10% should also apply to past losses.
131. One response stated ‘solicitors will compete to reduce the success fee offset against general damages so claimants receive more. Alternative Business Structures will encourage emergence of efficiently run ‘injury representatives’ able to manage claims at lower costs’.
132. There were mixed views about whether damages should be increased if recoverability was abolished. Some agreed to the increase, but only if recoverability was abolished and as part of the overall package of proposals; others agreed to the increase, but not in place of recoverability.
133. The consultation paper proposed a refinement (at paragraph 100) that a preferable way of framing the proposal might be ‘to retain an element of the success fee which is recoverable by the claimant, but to provide for this to be calculated as a sum equal to 10% of the general damages award’. Some preferred this formulation. It was suggested that a proper definition of damages for pain, suffering and loss of amenity and better guidelines regarding amounts payable for specific types of injury were required.
134. As stated above, a number of responses that answered ‘no’ to this question commented that 10% was not enough. There were concerns, among both those in agreement and those opposed to the increase, that this would be difficult to implement in practice and that it would not work in certain cases: housing cases; in cases where damages are low; where costs exceed damages, e.g. defamation; or in cases that settle - it would only work in those that go to trial.

135. Many of those who disagreed stated the proposal was contrary to the compensatory principle and damages should be a separate issue to costs. A few responded that the current precedents and JSB guidelines worked well and that there was concern that the increase may provide a windfall for claimants not on CFAs.
136. Other suggestions included: that the percentage should be proportionate and so should differ dependent on the case; a 110% increase was needed to bring in line with the EU and the US; and that this particular issue required further research and evidence. Also, support was expressed for the Law Commission Report 'Damages for Personal Injury: Non-Pecuniary Loss' (1999).¹³

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

137. There were 420 responses to this question, of which 322 (77%) did not agree that any increase should be limited to CFA claimants and legal aid claimants subject to a SLAS.
138. The majority of those who disagreed stated that the increase should be across the board for fairness and consistency. Another common reason for disagreement was that having more than one system would be too complicated, would create uncertainty and satellite litigation and would be unworkable in practice. There was concern it could lead to a disproportionate increase in damages for pain, suffering and loss of amenity and that separate rules for CFA cases would be costly and time consuming. Many also felt that damages should not be affected by how a claim was funded.
139. A number of responses stated that limiting the increase to those claimants would give a perverse incentive to use a solicitor on a CFA in every case. A few suggested that an increase in the percentage of recoverable costs applied to base costs would be more sensible and some felt the increase should be limited to those whose financial hardship warrants the uplift. Several commented the proposal failed to address the purpose of reducing unsustainable costs of civil litigation.
140. Among those who agreed that any increase should be limited, the majority stated that otherwise it would cease to be targeted at those who required CFAs or legal aid to gain access to the courts. A number also felt that if the increase were not limited to those claimants, there would be an element of a 'windfall' which would create an uneven market place.
141. Some responses suggested that the increase should also apply to cases funded by membership organisations. A few respondents commented

¹³ http://www.lawcom.gov.uk/lc_reports.htm#1999

that if the purpose of the increase was to help pay for a success fee, there was no reason to extend to non-CFA cases, and this should be clearly reflected in the rules.

Part 36 Offers

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

142. This question was answered by 446 respondents, and the majority (67%) answered 'yes', agreeing with the proposal. Responses from the claimant side tended to be more supportive than those from defendant representatives, although many general liability insurers supported the proposal as part of the overall package.
143. The most common reasons given in support were that it would encourage early settlements hereby reducing litigation costs and that it would bring better balance to the current system of sanctions and rewards, encouraging defendants to take Part 36 offers more seriously.
144. The most frequent reason given for disagreeing with the proposal was that the current system works well and there was no need for change. Others (in particular defendants, local authorities and general liability insurer respondents) considered that the proposal goes too far and would create an imbalance in favour of claimants, so putting pressure on defendants to settle. Media defendants in particular were concerned that this pressure would reduce their freedom of expression. Some respondents argued that as a matter of principle Part 36 sanctions should remain linked to costs rather than damages as this would better drive behaviours. And several respondents referred to Lord Woolf's original proposals: interest of 25% above the rate that would otherwise be payable on awards up to £10,000; 15% interest on awards of between £10,000 and £50,000 and 5% on awards over £50,000.
145. A substantial number of those who agreed with the proposal expressed some concern either about the sufficiency of the proposed uplift or the application of the proposal to claims seeking non-financial remedies.
146. A range of respondents (claimant solicitors, legal expenses insurers, unions) considered that a 10% uplift would be insufficient to encourage defendants to settle and that the pressure would remain on the claimant to do so. In particular it was argued that 10% of damages was within the reasonable margin for different claim valuations so that an additional 10% uplift would have little effect. Many respondents also said the proposal would have limited impact because it would affect only the small proportion of claims finalised at trial. One suggestion to resolve this was that the sanction should also apply to cases settled for more than the claimant's offer (on application to the court).

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

147. Over half (55%) of the 404 respondents who answered this question considered that, in principle, the proposed additional sanction should apply to all Part 36 offers, including where a non-financial remedy was claimed.
148. The most common reasons given were simplicity and fairness – all claimants should benefit from stronger Part 36 sanctions to encourage settlement. However, many raised concerns about the time and resource that would be spent by the court and the parties in the exercise of valuing non-financial claims (for which, by their nature, there would probably be little or no evidence of actual value), the complexity involved and the uncertainty about the factors on which the valuation would be based. This concern was the main reason given by those who thought the proposal should not apply to all Part 36 offers. It was noted, for example, that making a summary assessment of value for the purpose of allocating a claim to the correct track was quite different from valuing a claim for the purpose of awarding the proposed uplift. There was a significant concern (including from judicial respondents and legal representative organisations) about the prospect of appeals and satellite litigation around the court’s valuation of the claim, which some thought could only be subjective. Others were more optimistic; for example, a claimant lawyer said ‘assessing monetary value may be challenging in some matters but workable parameters would become clear over time’.
149. Many respondents (including specialists in areas such as judicial review and other public law claims, housing, immigration) suggested that as an alternative in claims where a non-financial remedy was sought, the additional sanction proposed should be related to costs rather than damages. Other suggestions included the award of additional interest on damages or costs or the award of a specified lump sum.
150. Fewer respondents specifically considered the issue of offers relating only to liability. Those that did tended to say that the additional sanction (uplift equivalent to a 10% increase in damages) should be applied to offers relating only to liability, to encourage early settlement of liability issues - which would ultimately affect both the amount of damages awarded and costs. As one respondent put it, ‘it is currently difficult to agree settlement pre-hearing where liability is tried as a separate issue, as there is no way of rewarding the winning party where they beat their pre-trial offer.’ It was also suggested that this would reflect the current case law that an offer on liability carries the deemed costs under Part 36 - which costs will be for the whole claim¹⁴. One respondent suggested

¹⁴ Onay v Brown (2009) EWCA Civ 775; Sutherland v Turnbull [2010] All ER (d) 02 (Nov)

an alternative sanction of a 10% increase in the percentage liability finding, which they considered would better encourage early settlement of liability when the value of the claim was not clear enough for a full Part 36 offer, so reducing later costs.

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

151. Of the 374 respondents who answered this question, 75% agreed that the proposal should apply to incentivise early offers. Of these, many thought that the proposal as set out, combined with the existing penalties, would achieve this. However, others were concerned that the proposals did not sufficiently encourage early offers. Claimants would stand to gain the additional uplift even if their offer was made very shortly before the trial. Various suggestions were made to increase the incentive for claimants to make early Part 36 offers including:
- a higher uplift for offers made before a specific stage in the claim. A number of options were suggested for the stage at which the uplift would reduce to 10%: the date of issue; the lodging of allocation questionnaires; 90 days before trial; or within 2 months of disclosure and exchange of evidence;
 - a lower uplift for claims made after a specific stage in the claim e.g. case management directions;
 - increasing the existing interest penalties in addition to the 10% uplift;
 - allowing recovery of success fees of up to 100%.
152. Of those that thought Part 36 should not work specifically to incentivise early offers, the main reason given was that this would put pressure on the parties to make a decision before the case had been fully or sufficiently investigated. As one respondent put it, rather than 'early', 'timely is the right word, once the case can be assessed properly to achieve justice.'

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

153. This question was answered by 368 respondents, with the majority (71%) saying 'no'. The majority of general liability insurers and local authorities and other defendants were in the 29% who said 'yes'.
154. The majority of respondents to this question (tending to be but not exclusively from claimant lawyers and representative groups, unions and ATE insurers) did not consider that the uplift should be reduced where the damages reach a certain level. The main reasons given were that a percentage uplift would always be proportionate to the value of the claim, and a percentage uplift of at least 10% was necessary to encourage claimants to make offers in higher value claims where the risks and costs are higher. It was also considered that a standard

approach would be more certain and easier to operate and would avoid satellite litigation - which litigation would reduce the point of the proposal i.e. to encourage settlement and reduce costs. Others were concerned that limiting the uplift for higher value claims would be unfair to claimants in these cases and may lead to understating the value of the claim to take advantage of better Part 36 rewards, or negotiating around the trigger point or points (if a system of tapered reduction was adopted).

155. Of those that thought the uplift should be lower at higher values of claim (tending to be but not exclusively defendants including local authorities and general liability insurers, or judicial representatives), most did not give reasons. One reason stated was that, at higher claim values, a penalty/reward set at 10% of the court's award could be disproportionate to the additional costs involved in pursuing the case to trial and therefore create too much pressure on defendants to settle.

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

156. The response to this question was similar to that of question 24, with 70% of the 372 respondents who answered it saying 'no'.
157. A number of suggestions were received on how a system of lower rewards/penalties for higher values of awards should operate. A number of respondents (legal representative organisations, judicial representative groups, consumer representative groups, general liability insurers) thought that a sliding scale or tapered reductions would be preferable to a single trigger point. Some also advocated an overall upper limit on the amount of the penalty uplift. A Judicial representative group stressed the need for any uplifts to be fixed so that court time is not required to assess them. A number agreed with Sir Rupert's proposal (in his response to the consultation paper) of: a 10% uplift for awards up to £500,000; for awards from £500,001 up to £1m – an uplift of £50,000 plus 5% of excess over £500,000; and, for awards above £1m – an uplift of £75,000 (with no further increase). Other suggestions included:
- a graded system starting at the multi-track limit (currently £25,000);
 - 10% up to £250,000 then a reduction of 1% for every additional £100,000 until 5%
 - a reduced uplift starting at £10,000 with a maximum uplift of £50,000;
 - a reduced uplift starting at £100,000;
 - a reduced uplift starting at £300,000;
 - the uplift to apply to general damages for pain, suffering and loss of amenity (PSLA) only or to apply to PSLA only for total damages over £250,000.

Others considered that a maximum uplift of £25,000 should provide sufficient incentive to encourage settlement.

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

158. This is one of the proposals with the greatest support on all sides of the debate. The question was answered by 388 respondents, and 77% were in support of the effect of *Carver* being reversed.
159. The vast majority of respondents responding to this question (including respondents from all groups) agreed that the decision in *Carver* had introduced an unwelcome uncertainty into the Part 36 provisions. This made it difficult for the parties to assess the risk of not accepting a Part 36 offer. Greater certainty and simplicity would, they said, encourage offers, reduce court hearings and unnecessary argument and thereby reduce costs. A number of respondents considered that the decision had already been reversed by the case of *Gibbon v Manchester City Council*¹⁵.
160. The Government was concerned that the effect of reversing *Carver* might be seen to endorse the principle that the parties are entitled to press on to trial – using expensive judicial resource and increasing their legal costs – even where there was very little difference in their respective positions. Views were therefore sought on an alternative system linking the trigger point for Part 36 sanctions to a specified value range around the offer rather than the actual offer figure.

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

161. The majority of the 370 respondents who answered this question did not agree that there was merit in the alternative scheme as proposed by FOIL, with 80% saying ‘no’. The main reasons given were that it would create uncertainty and satellite litigation, thereby increasing rather than reducing litigation costs, that it would not encourage settlement, and was unnecessarily complicated. Others agreed with Sir Rupert that the costs risks associated with a trial are significant and should be sufficient deterrent to stop either party pursuing a claim to trial unnecessarily. A significant number of respondents (in particular claimant representative organisations, claimant lawyers and trade unions), said that this proposal would increase pressure on claimants to settle for amounts up to 10% lower than the ‘true value’ of the claim, because the claimant could not take the risk of having to pay their own costs if the court awarded less than 10% more than the offer.

¹⁵ [2010] EWCA Civ 726.

162. That said, a number of respondents (mainly defendant lawyers, defendants and government bodies) thought that there was some merit in the proposals. One solicitor representative body said, for example, that the scheme would provide certainty and help claimant solicitors to explain that ‘valuation of damages is not a precise science’ and that the size of awards can vary between courts and judges. Another respondent commented that it would retain certainty on the application of sanctions whilst introducing a ‘welcome reasonable margin’.

Qualified one way costs shifting

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

163. There were 412 responses to this question, of which 263 (64%) disagreed with the approach and 149 (36%) agreed.
164. Generally the reason given for agreeing was that it was necessary to protect claimants against adverse costs if ATE insurance premiums were no longer recoverable. Others commented that it would reduce the need for, and cost of, ATE insurance. However, a significant number of those who supported QOCS had concerns about the details of the proposal. These concerns were similar to many of the concerns expressed by those who disagreed with the approach.
165. The key concerns were that the proposed formulation would not provide sufficient certainty to claimants at the outset as to whether they would be protected from adverse costs. In particular respondents said there must be more certainty about (i) the level of wealth or income at which claimants would be considered able to pay the defendants costs, and (ii) what would constitute unreasonable behaviour to the extent that QOCS should no longer apply. Most agreed that QOCS should not apply where a case had been brought fraudulently, but there was concern that the courts rarely made a finding of fraud so that without a tight definition there may be an increase in such claims. Others said that without more certainty about conduct there would be an increase in interim applications and challenges which would increase litigation costs.
166. Those that disagreed with the approach did so for six basic reasons.
- The current system worked well and there was no need for change.
 - The proposals were too uncertain to give claimants real protection against adverse costs and that they would still need to take out ATE insurance (at their own expense), which would deter claims.
 - The proposals would increase speculative or frivolous claims from claimants no longer at risk of paying defendants’ costs. This was a particular concern for some local authorities who explained that their present robust approach in defending claims - which has led to a dramatic reduction in the number of speculative claims brought

against them - would be threatened, thereby increasing costs. ATE insurers and some lawyers, in particular, argued that ATE insurance providers currently risk assess claims so that only stronger claims are brought. With QOCS as an alternative to ATE insurance, this additional check would no longer take place, they claim that this could lead to a 'tidal wave' of frivolous claims which may force defendants into making 'economic settlements' – so increasing rather than decreasing defendants' legal costs.

- Implementing the full package of measures, including QOCS, would make ATE insurance (in particular products to cover disbursements and/or Part 36 risks) unviable. This issue was raised, in particular, by ATE insurers and claimant solicitors. Some ATE insurers, in particular, advised that in their view ATE insurance for disbursements only would not be viable. Respondents were also concerned that ATE insurance would become unaffordable. This was because only claimants with riskier cases would choose to take out ATE insurance and also because ATE insurers would have to investigate a claimant's means before agreeing to insure the claim. On the other hand, some respondents, in particular claimant lawyers, thought that ATE insurance premiums would fall.
- The uncertainty of the proposed formulation would lead to satellite litigation. This led some to argue that QOCS would only work if it was unqualified – save as to fraud by the claimant. Claimant solicitors in particular argued that defendants would bring points on behaviour and the claimant's finances to try to avoid QOCS or pressurise the claimant into settling or withdrawing.
- The proposals would impact on defendants unfairly.

167. A number of respondents also commented on the application of Part 36 of the Civil Procedure Rules to QOCS saying that it was not appropriate to require the claimant to pay the defendants costs where a Part 36 offer had been rejected and not beaten at trial on the basis that the claimant had been unreasonable in rejecting the offer. Failure under Part 36 was not necessarily unreasonable. Assessing damages is not an exact science and can be difficult particularly where experts disagree.

168. In response to this question, it was noted that it would be difficult to identify the claimant in some types of claim (examples were given of road traffic accident claims and some commercial claims) where it was often a matter of chance as to which party brought the claim and in split liability claims there was a question as to which element of costs would shift.

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

169. This question was answered by 385 respondents. 235 (61%) agreed that QOCS would significantly reduce the claimant's need for ATE insurance and 150 (39%) disagreed.

170. Some respondents said that QOCS would reduce (but not eliminate) the need for ATE insurance, because it would no longer be necessary to insure against having to pay the other side's costs. However, the majority referred to a continuing need for claimants to insure against: disbursement costs if the claim was unsuccessful; the costs risk arising from a defendant's Part 36 offer (if refused and then not beaten at trial); pre-litigation costs; and uncertainty over whether the defendant was insured or the defendant's means.

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

171. There were 351 responses to this question, of which 120 (34%) agreed and 231 (66%) stated QOCS should not be extended beyond personal injury.
172. Some thought that QOCS should be tested in relation to personal injury claims in the first instance before being extended to other types of litigation. In particular, some respondents argued that in claims outside personal injury both claimants and defendants were of much more varied financial status, with many more defendants being uninsured or small organisations and some claimants being large organisations or companies. They considered that in these circumstances QOCS would be much more complicated to apply and the impacts would be difficult to predict.
173. A key reason given by respondents for extending QOCS to other claims was fairness and ensuring that all claimants were able to bring claims if the main proposals (to make success fees and ATE insurance non-recoverable) were introduced. Others stated that QOCS was equally as necessary to provide immunity from costs in non-personal injury claims as in personal injury claims and that it would be unfair in some types of claim (where it could be chance whether personal injury was involved or not) such as housing disrepair or actions against the police, that QOCS would apply only where the claimant happened to have suffered a personal injury.
174. Some respondents said that QOCS should be extended to all civil claims or all claims where ATE would otherwise be purchased. Others referred to claims where the parties were financially very unequally matched such as claims brought by individuals against large organisations, public authorities or insured defendants. More specifically, respondents stated that QOCS should apply to the following types of claims: judicial review and appeals to the Upper Tribunal; housing disrepair and other housing related claims such as unlawful eviction and homelessness; professional negligence; publication proceedings (although there were dissenting views on this); statutory appeals; insolvency related claims; discrimination claims; actions against the police; human rights breaches; constitutional torts; all non-money claims; and all claims where insurance was not compulsory.

175. In relation to judicial review claims, it was recognised by some that QOCS may increase the number of claims made but that any unmeritorious claims (in particular by parties in person) would be weeded out at the permission stage. However, some respondents, while supporting an extension beyond personal injury, thought that QOCS was not generally necessary in judicial review claims because it was already possible to apply for a protective costs order (PCO) in public interest cases.
176. Some respondents argued that, for judicial reviews relating to environmental matters only, unqualified one way costs shifting would ensure that the UK complied with its international obligations.¹⁶
177. Some respondents identified particular types of claim to which QOCS should not apply including: contested probate; actions against the police; and boundary disputes. It was also suggested that QOCS should not apply in substantial commercial claims where there were not the same issues of disparity of power and generally favourable claimant success rates as in personal injury claims and where international clients value two way costs shifting.

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

178. This question was answered by 284 respondents, who generally considered that QOCS should apply in types of cases where there was an inequality in the financial situation of the parties ('David and Goliath') such as where the claimant was an individual and the defendant a public authority or insured, and QOCS was necessary to ensure access to justice. Some refined this by saying that there must also be public policy reasons to protect the claimant against adverse costs. Others referred to the remaining factors identified by Sir Rupert: claims in which the claimant was generally successful and claims where QOCS would be a cheaper way of protecting claimants against adverse costs than ATE insurance. It was suggested by some that QOCS should be available in the types of case where legal aid was not available. General liability insurers in particular stressed the need for it to be available for valid and honest claims but not for fraudulent or frivolous claims. However, some respondents considered that QOCS should either be available for all claims or none. This was on the basis either of fairness between claimants, or to avoid the satellite litigation they considered would follow from seeking to define those cases to which QOCS would or would not apply.

¹⁶ The Public Participation Directive and The Aarhus Convention

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

179. Of the 281 respondents who answered this question, the majority considered that QOCS should apply to all claimants however funded. Most did so on the grounds of fairness. Some said that it would be unfair to create a two tier system by distinguishing between cases on funding grounds, or that extending QOCS to all was essential to retain a level playing field if success fees and ATE insurance premiums were to be unrecoverable. A number of respondents were concerned about the complexity and workability of restricting QOCS to CFAs and the capacity for satellite litigation. For example, there was an issue as to how QOCS would apply to cases which were initially BTE funded but where CFA funding was later required due to limitations on the BTE cover. Some respondents (including claimant lawyers and local authorities) were concerned that limiting QOCS to CFAs would encourage claimants to use CFAs and so benefit from QOCS.
180. There were, however, differing opinions as to whether QOCS should apply to claimants funded by BTE insurance or a membership organisation. Some respondents (particularly local authorities, general liability insurers and some claimant solicitors) argued that QOCS should not apply to claimants funded in this way, on the basis that such claimants were not themselves at risk of adverse costs or were not in a significantly unequal financial position and therefore did not need costs protection. Others argued that QOCS should apply equally to those funded by third parties and BTE equally – to do otherwise would discourage claimants from taking out BTE insurance or other measures to protect themselves against litigation costs.
181. Those who considered that QOCS should apply to claimants on CFAs only gave a number of different reasons. Some said that as QOCS was being proposed as an alternative to ATE insurance, it was only justified in the circumstances where a claimant would take out such insurance.

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

182. There were 349 responses to this question, which were fairly evenly split, with 186 (53%) who disagreed and 163 (47%) who agreed that QOCS should cover only claimants who are individuals.
183. Of those respondents who thought that QOCS should be limited to individual claimants, the main reason given was that QOCS should not apply to commercial organisation claimants which should be presumed to have the means to pay the winning defendant's costs - although there was some softening of this line for commercial organisations bringing proceedings in the public interest. There was a concern about the complexity of developing suitable financial limits for claimants who were not individuals. Some respondents also said that there was no

justification for QOCS to be applied to groups of individuals making a claim.

184. Of those that considered QOCS should be extended beyond individual claimants, the arguments were more varied. Some considered that QOCS should apply to all claimants whose financial resources were such that they would not be able to pay the defendant's costs, others said variously that small voluntary charities should not be excluded or that QOCS was necessary for small and medium sized businesses to be able to pursue their rights. It was also suggested that if extended beyond personal injury claims, QOCS should apply to persons acting in an individual capacity for a class of individuals (such as trade unions) and to not for profit organisations bringing judicial review proceedings in the public interest. Some respondents were concerned that limiting QOCS by a number of different criteria (type of claim and claimant) would make the regime too complex.

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

185. This question was answered by 325 respondents. Of these, 219 (67%) agreed there should be more certainty and 106 (33%) disagreed.
186. As noted above, many agreed with the reservations concerning the clarity around the financial circumstances in which QOCS would apply and the types of behaviours which would disqualify a claimant from QOCS. Indeed, the majority of respondents who answered this question said that there should more certainty. The most common reason given by a range of respondent groups (including claimant lawyers, legal representative organisations and claimant representative organisations) was that it was vital to avoid claimants' unnecessary fear of adverse costs which would stop them from bringing a claim or mean that they continue to take out ATE insurance. Several respondents referred in particular to middle income claimants with a property who would be most concerned about the costs risk. Others said that the increased certainty in the proposal would reduce satellite litigation and would reduce the cost of lengthy explanations that would otherwise be necessary for claimants before entering into any funding arrangement.
187. Respondents suggested various ways in which greater certainty could be achieved. For example, in relation to claimant conduct it was suggested that rules should provide for any applications regarding conduct (in particular in relation to the reasonableness of the claim) to be made early in the proceedings. Others suggested that guidance or rules should make clear the type of conduct that would be sufficient to disapply QOCS. It was clear from the responses that there were differing views between claimants and defendants as to what behaviour should be required to merit disapplying QOCS, with claimant lawyers tending to suggest a very much lower threshold than defendants and general liability insurers.

188. In relation to the financial circumstances of the claimant, many respondents suggested that there should be nationally published limits (relating to claimant income and capital) below which costs protection would be automatic whilst some suggested that further guidance with specific examples would help. Others stressed that, in their view, the trigger for QOCS to apply should link the financial circumstances of the claimant relative to the size of the claim and likely costs to trial. Some, whilst agreeing in principle that there should be more certainty, thought it would be difficult to devise a test with sufficient objectivity.
189. Those that did not agree that there should be more certainty around the financial circumstances where QOCS would not apply, tended to be defendants, defendant lawyers and general liability insurers. Some argued that the judiciary should have discretion as to whether QOCS should apply on the basis of conduct and the claimant's means in each case. Others argued that the legal aid formula on which Sir Rupert's proposals were based was well tried and tested having been in operation for over 60 years and that claimants would know if they were conspicuously wealthy. It was also suggested that a more detailed test would amount to a form of means testing which would increase complexity and lead to satellite litigation.

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

190. There were 284 responses to this question, of which 163 (57%) disagreed and 121 (43%) agreed with the proposals for a fixed amount of recoverable costs.
191. Those that supported the refinement tended to do so for two reasons. The first reason given was that a fixed amount of recoverable costs would provide greater certainty for claimants, make the threat of having to pay costs if they lose more manageable and reduce the need for ATE insurance (provided the fixed amount was modest). The second was that it would discourage frivolous claims.
192. However, many raised concerns about how the refinement would operate. Some stressed that the fixed amount of costs for which the claimant may be liable and the financial threshold at which a claimant would become liable to pay the defendant's costs must be known at the outset of the claim, otherwise the claimant's costs risk would remain too uncertain to obviate the need for ATE insurance and would stop claimants bringing claims. Others were concerned about what they considered to be the very real prospect of defendants making routine applications - on the basis of the claimant's means or behaviour - for a declaration that QOCS should not apply at all or that the claimant should be required to pay costs above the fixed amount. This concern was also shared by a number of those who did not agree with the proposal.

193. Of those that disagreed with the refinement, a commonly cited reason was the difficulty in setting a fixed amount of recoverable costs which was large enough to deter claims but not sufficient to require ATE insurance. A number of respondents said that if the amount was large enough to deter frivolous claims, a person of moderate means would need ATE insurance or other costs protection. Another concern was that it would be a major deterrent to claimants of modest means or that it would discriminate against claimants with lower incomes. Clearly the deterrent effect would depend on the level at which fixed recoverable costs were set and some respondents suggested figures which they considered would be reasonable. A number of lawyers and legal representative organisations dealing with housing related claims suggested a fixed amount of no more than £1,000 (which they said should be payable in instalments); whilst in relation to judicial review claims the fixed costs figures suggested by Sir Rupert of £3,000 up to permission stage and £5,000 post permission stage were endorsed. A number of local authorities suggested minimum recoverable costs of between £1,250 and £1,500, in particular in fast track personal injury claims.
194. Some respondents appeared to interpret the consultation paper to be proposing a system of fixed recoverable costs reflecting actual costs (such as the fixed recoverable costs for road traffic accidents¹⁷) saying that in their particular fields (professional negligence and publication claims), cases varied so significantly that fixed costs were unlikely to reflect the actual costs in each case.
195. Others pointed out that an early consideration of costs liability in relation to means would not necessarily provide certainty as claimants' means might change over the course of the litigation, nor would it help regarding issues of unreasonable behaviour which might be raised at any point in the proceedings.

Alternative recommendations on recoverability

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

196. Many respondents did not answer this question, and it is not possible to determine whether they do not support either alternative package, or whether they decided not to answer for some other reason. Of the 580 respondents who provided responses with answers to our consultation questions, 119 (21%) expressed support for Alternative Package 1 and 40 (7%) expressed support for Alternative Package 2. It is worth noting that some of those who preferred Alternative Package 1 also put forward their own suggested refinements.

¹⁷ CPR 45 Part II.

197. Of those who were in favour of Alternative Package 1, many felt that it would 'strike a better balance' than the primary recommendations. Some argued that it included better drivers and incentives for good behaviour by defendants. Another benefit of Alternative Package 1, put forward by some respondents, is that it could be implemented 'without unwieldy primary legislation'. Some respondents expressed support for the overall approach of this package, but were concerned about specific elements of it, such as there being no recoverability of the success fee where the claimant could have used funding other than CFA. Another concern raised by some respondents related to there being no recoverability of success fees or ATE insurance premiums during the pre action protocol period. It was argued that some types of claim, such as clinical negligence, require detailed investigation at this stage of the case, when the risk is high. Whilst Alternative Package 1 generally received greater support than Alternative Package 2, some of those in support also put forward their own refinements. For example, the Access to Justice Action Group and the Association of Personal Injury Lawyers amongst others, put forward their own package of proposals drawing on elements of Alternative Package 1, to control rather than abolish recoverability of success fees.
198. Those who preferred Alternative Package 2 were more likely to be on the defendant side, and usually preferred the primary package of recommendations, but made it clear that Alternative Package 2 is preferable out of the two alternative options. Support usually centred around the way in which recoverability of ATE insurance premiums would be abolished, rather than restricted. One respondent suggested this would act as an 'important brake on runaway costs'.
199. Many respondents did not support either of the alternative packages of recommendations. This was usually due to support for the primary package. The Association of British Insurers suggested that 'any dilution of the proposals would be highly undesirable'. Responses from the media expressed similar concern about the alternative packages, in that they would allow payment of success fees and/or ATE insurance premiums by defendants in some cases. Another argument against the use of the alternative options was the need for simplicity. Some argued that the alternative packages would add complexity and could lead to costs wars and satellite litigation. There were also some responses from people who did not think the current regime needs changing, particularly in the light of the RTA claims process, and therefore argued that neither the primary package nor the alternative packages are necessary. Some respondents had specific concerns in relation to Alternative Package 1, these included how admissions would be clearly defined, and the suggestion that the proposal would increase ATE insurance premiums, due to it only covering higher risk cases.

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

200. Responses to this question ranged from those who thought fixed recoverable success fees should be extended to all personal injury, or even all categories of case, to those who thought they should not be extended at all. Some of those who argued against extending fixed recoverable success fees suggested that those cases not currently covered were those that were too complex for them to be suitable. Many respondents argued that extensive further analysis and stakeholder engagement would be needed in order to set fixed recoverable success fees in new areas. Some went on to say that, for this reason, only those types of case with a sufficient volume of claims on which to base analysis would be suitable. One respondent gave housing claims as an example of a type of case which would not be suitable for setting fixed recoverable success fees, due to the low volume of claims and wide disparity between different case types. Several respondents stated that, even where fixed recoverable success fees are set, 100% success fees at trial should remain.

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

201. A large number (298) of respondents did not answer this question, but of those that did, 75% agreed that recoverability of the self-insurance element by membership organisations should be treated in the same way as ATE insurance premiums with the Alternative Packages.
202. Many argued that there is no reason to treat them differently, and that there should be a 'level playing field' between claimants with ATE insurance, and those bringing their claim with the help of a membership organisation. Some trade union respondents argued that the self-insurance element should be recoverable regardless of what happens to ATE insurance premiums. They suggested that trade unions act as an effective filtering process, as they do not take on unmeritorious claims. They also pointed out that the self-insurance element could not be more expensive than an equivalent ATE insurance premium.
203. Some respondents (70) answered 'no' to this question, this was either due to support for the primary package of recommendations, or because they felt that the current system works well and does not need changing.

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

204. Many respondents listed specific aspects of Alternative Package 1 which they think should not be implemented, these included:

- Fixed recoverable success fees; it was argued by some that certain areas of litigation are not suitable for setting fixed recoverable success fees, which could not properly take account of the varying costs and risks in different cases.
 - Not allowing recoverability of ATE insurance premiums in the pre-action protocol period; it was suggested by some respondents that this breaches the principle of ‘the many pay for the few’. Some were concerned that this proposal might drive some ATE insurers out of the market.
 - No recoverability of ATE insurance premiums relating to Part 36 risks; some respondents argued that Part 36 risks are genuine, and claimants should therefore be able to recover an ATE premium to cover these risks.
 - Recoverability of ATE insurance premiums to be capped at 50% of damages. It was claimed that this proposal could cause difficulty for claimants, who would have no way of knowing whether or not 50% of damages would cover the cost of ATE insurance premiums at the outset of their claim.
 - No recoverability of the success fee where the claimant could have used funding other than a CFA; some respondents suggested that this proposal would be unworkable.
205. On Alternative Package 2, the main concern was that ATE insurance premiums would not be recoverable, but two way costs shifting would be retained. One respondent argued that either ATE insurance premiums should remain recoverable, or QOCS should be introduced.

Proportionality

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

206. There were 354 responses to this question, of which 202 (57%) disagreed and 152 (43%) agreed that this should be introduced.
207. Those that agreed with the proposal to introduce the new test - including a significant number of defendants and general liability insurers - tended to say that it would address the significant current problem of disproportionate costs. Others agreed that the proportionality test set out in *Lowndes* was flawed in that disproportionate costs did not become proportionate because they were necessary. Costs could be reasonably and necessarily incurred and still be disproportionate and that if parties incurred disproportionate costs they should know they were doing so at their own risk. It was suggested that the issue of proportionality should be given greater weight than currently, even as a long stop.

208. A variety of different reasons were given for disagreeing with the proposed new test of proportionality. Many said that it was not necessary. It was argued that the current test struck the right balance and was working well - if a step was necessary and reasonable it was also proportionate. Costs that are truly disproportionate would be reduced on assessment under the current rules. Others said that, when combined, the existing rules on costs assessment and case management were sufficient or would be if they were more forcefully applied. This was a strong theme of the responses with respondents calling for more active case management by the courts.
209. Others argued that the proposed new test put too much emphasis on comparing costs to the financial value of the claim. It was argued by many respondents that it was not possible to put an objective financial value on certain types of claim. Examples given included: the importance to the claimant of dry and secure accommodation in housing disrepair claims (in relation to which a number of respondents with a special interest in this area said that the new test would make such claims unviable); the right of a social tenant to occupy their home; the reputation of claimants in defamation cases; and immigration cases involving expulsion and legal status. The importance of the claim to the claimant should therefore also be a key factor.
210. There was also a concern that the test did not give sufficient recognition to the fact that there was a certain irreducible amount of work required to take forward a claim, regardless of its value. Some said, for example, that the costs/benefit approach proposed would impact disproportionately on complex low value claims such as claims for noise induced hearing loss and work related stress.
211. Many suggested that the proposed test would introduce uncertainty and complexity – in particular because it was not clear on what basis costs would be reduced if the total amount was judged disproportionate. It was thought this would lead to challenges and satellite litigation. In addition, it was suggested that uncertainty about the effect of the test would make it more difficult for claimant solicitors to estimate their clients' recoverable costs and therefore risk assess claims.
212. Others argued that the proposed new test would be unfair to claimants in that the court would not look sufficiently at the defendant's conduct as a reason for disproportionate costs. It was argued that it would encourage defendants (who could afford to do so) to introduce unnecessary and unreasonable arguments to increase claimant costs to disproportionate levels, thereby putting pressure on claimants to settle rather than incur costs that would not be recovered under the new test. As one claimant lawyer put it: 'work reasonably undertaken to ensure a level playing field i.e. defendants leaving no stone unturned, may be disallowed'. It was suggested that this pressure could reduce the quality of work undertaken for claimants.

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

213. Those that suggested alternatives to ensure that costs are proportionate generally suggested a more forceful application of the existing rules (including more consistent and stronger case management) and enforcement of the pre-action protocols. Others suggested more encouragement of negotiation and mediation, including compulsory pre-action settlement and simplification of or streamlining the process. Some referred in this context to the Government’s intention to consult on extension of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and the linked fixed recoverable costs which were considered to increase certainty regarding costs for both parties.

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

214. In response to Question 42, the overwhelming majority of respondents said that their view would remain the same if Sir Rupert’s alternative recommendations were introduced or no change was made to the present CFA regime. A judicial respondent indicated that, in their view, the new test should apply to base costs only in those circumstances.

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

215. There were 291 responses to this question, of which 152 (52%) agreed that these revisions would be helpful and 139 (48%) disagreed.

216. Many of those who disagreed with the proposal said that the further clarification as proposed would not reduce uncertainty or satellite litigation. Many said that it would be very unhelpful. Others said that examples could be misapplied and may lead to time and costs being spent in seeking to apply or distinguish them from the case in hand. Some (in particular defendant lawyers and general liability insurers) said that the court’s discretion should not be fettered excessively and that the uncertainty would be better addressed by the courts decisions in applying the new test. It was suggested in particular that there was a danger that the proposed new test could be undermined if it was seen as applicable to a small number of exceptional cases.

217. Of those who agreed with the proposal (including a spread from different respondents groups) the most common reason was that it would reduce or help to reduce satellite litigation. However, a significant number of these noted that it would not avoid satellite litigation altogether and that this was a continuing concern. Others said that it would help to reduce uncertainty around the recoverability of costs under the new test.

218. Many said it was essential to qualify the test if it were to be introduced to ensure that it was not inappropriately applied. However there seemed to be a significant measure of disagreement about what appropriate application would be. Some respondents (many being claimant lawyers) indicated that any Practice Direction should make clear that the test was intended to apply only to the small number of cases where costs that were reasonable were nevertheless proportionate (the long stop approach) – which would be essential to give claimants the maximum possible protection. Others (in particular general liability insurers, ATE insurers and trade unions) disagreed with the assumption that the impact of the test would be limited to a small number of cases. Many indicated that in their experience these types of cases were commonplace.
219. Others considered that it was not possible or appropriate to provide an exhaustive list of examples and it would be better if the costs practice direction set out wider principles to be followed by the courts. One respondent stressed that the proportionality test should be applied in costs and case management as well as in the post proceedings costs assessment process.

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

220. Respondents provided a wide range of specific examples of the circumstances where it would be inappropriate to challenge costs assessed as reasonable on the basis of the proportionality principle. The most commonly given examples were:
- Lower value claims where unavoidable costs might be disproportionate, in particular where the issues are generally more complex, for example: employer's liability claims; low velocity road traffic accidents; lower value clinical negligence claims;
 - Claims where the behaviour of either the defendant (most commonly referred to) or the paying party had caused an increase in costs. Examples of such conduct included: the case being unreasonably defended; late admissions of liability; breach of the pre-action protocol or other time limits; cases where no effective Part 36 offer had been made; delay; refusal to engage; and fraudulent or frivolous claims.
 - Test cases – deciding a point of principle of wider application;
- Other examples mentioned by a number of respondents included:
- Claims where the claimant has a disability, or claims on behalf of children;
 - Cases involving multiple defendants;
 - Cases where the fixed costs regime applied;

- Cases of obvious complexity, for example involving a number of medical or other experts reports;
- Cases which have been settled on the basis of a compromise in relation to liability and cases involving contributory negligence (where the costs/damages ratio would be expected to be higher);
- Social welfare and housing claims;
- Claims brought by insolvency practitioners who have to carry out detailed investigations into concealed fraud.

Damages Based Agreements

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

221. The issue of DBAs divided respondents; 52% of the 353 respondents who answered this question said 'no' and 48% said 'yes'. Unlike some of the other questions, where responses were split by claimant and defendant perspective, most groups of respondents included differing views.
222. Of those who were in support of this proposal, many simply saw it as another funding mechanism to allow access to justice for claimants. It was felt by some that solicitors should be free to offer as full a range of funding options as possible to their clients. Others commented that as CFAs are already widely used, there is no reason not to allow DBAs, with one respondent suggesting that 'damages-based agreements are the natural next evolutionary stage of conditional fee agreements.' Some respondents felt that DBAs encourage efficiency as solicitors have an incentive to minimise cost in order to maximise profits. It was also noted that DBAs 'work well elsewhere' although some respondents were concerned that allowing them would create a US style litigation culture.
223. Within those responses supportive of DBAs, there was some concern that they are only appropriate in certain types of case. Some respondents thought they would work well in commercial litigation, but should not be allowed in personal injury, in order to protect individual claimants' damages. Others thought they would work particularly well in group actions. Housing disrepair claims and actions against the police were given as examples of where DBAs might be less suitable, due to the low financial damages at stake. Some respondents only supported DBAs as part of the whole interlocking package of measures, or subject to rigorous safeguards.
224. Of those who answered 'no' to Question 45, many were concerned about the potential for conflict of interest between claimants and their solicitors, with lawyers having a direct financial interest in the client's potential awards. Some also felt that there would be incentives to settle early, in that solicitors may be more influenced by whether extra work was worthwhile in terms of their potential profit, than the claimant's legal

entitlement. Many respondents were against DBAs because they do not believe that claimants should lose any part of their damages to pay their lawyer, and that allowing DBAs would 'violate the full recovery principle'. It was also argued that, as a matter of principle, damages should not be linked to costs. Others simply argued that damages are too low in England and Wales for DBAs to work. Finally, there was concern that DBAs would be difficult to explain to personal injury clients, and would 'only add to confusion for claimants'.

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

225. A slightly lower number (327) of respondents answered this question, but the outcome was similar to that for Question 45, with 49% considering that claimants should have to receive independent advice for the DBA to be valid, and 51% thinking the opposite. Many of those who disagreed with the principle of allowing DBAs answered this question by suggesting that if the Government did decide to implement, independent advice should be mandatory.
226. Those in favour of claimants having to obtain independent advice often felt it was necessary to ensure the claimant fully understands the terms of the agreement, to address the potential conflict of interest and guard against potential abuse. Some respondents also suggested specific areas on which independent advice would be needed, such as in relation to early settlement offers. However, many respondents were opposed to the requirement for independent advice, and this was largely due to the practical difficulties and additional costs associated with it. Examples of these difficulties included defining 'independent' and protecting against 'poaching' of claimants. Respondents pointed out that there is no equivalent process for CFA claimants, and suggested that existing regulation of lawyers should be sufficient to ensure that lawyers advise their clients appropriately. A number of respondents were not opposed to the principle of a claimant seeking advice, but they did not think that it needed to be a mandatory element of the process.

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

227. The majority (76%) of the 323 respondents who answered this question said 'yes', although some of these went on to say that existing regulation of solicitors and barristers should be sufficient.
228. Views were similarly split on the issue of specific regulation, with some claiming that it is necessary to protect claimants, and others arguing that the current regulations sufficiently cover the conduct of lawyers and their relationships with their claimants. Those who argued that specific regulation was necessary suggested that it should cover: the amount of damages that can be taken (including or excluding VAT); how disbursements are dealt with; ensuring full advice about all funding options is given; and the risk of unfair early settlement. Those who felt

that specific regulation was unnecessary argued that it would add expense to the system and could lead to over complication. They also pointed out that there is no such specific regulation for CFAs.

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

229. This question was answered by 317 respondents, the large majority (91%) of whom agreed that costs recovery for DBA cases should be under the conventional basis. Those saying ‘yes’ included all general liability insurers, media respondents and local authorities.
230. Some respondents only supported DBAs on the basis that costs recovery for DBA cases should be on the conventional basis. Many felt that defendants should not be affected by the way the case is funded, which is a matter for the claimant and their lawyer to agree. On the other hand, some supported the current CFA regime with full recovery, and therefore thought that DBAs should operate on a similar basis, with the claimant not being liable for any costs.

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

231. Of the 294 respondents who answered this question, 70% considered that if QOCS is introduced, it should apply to claims funded under DBAs.
232. Many respondents felt that if QOCS was introduced, it should apply to DBAs in the same way as CFAs, and that there was no reason to treat them differently. Some emphasised that the system should be simple and consistent, and suggested that having QOCS apply equally to CFAs and DBAs would help achieve this. It was stressed that these proposals should work as part of the interlocking package, rather than as standalone measures. For example, QOCS should only apply if recoverability of ATE insurance premiums was abolished. Those who opposed QOCS applying in DBA cases usually did so because of a general opposition to the proposals for QOCS and/or DBAs.

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

233. This question was answered by 221 respondents, 51% of whom agreed that the maximum fee should be limited to 25% of damages excluding damages referable to future care or losses. Some respondents suggested alternative amounts.

234. Of those who supported the limit, many argued that individual claimants need protecting. Some suggested that the cap was not necessary in commercial litigation, where the claimant might be a large organisation.

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

235. Views were split amongst the 228 respondents who answered this question. Some considered that this would be necessary as 25% would be too restrictive to cover the risk of paying for disbursements. Others felt that all claimants required the same degree of protection, and that the maximum fee should be the same in all cases.

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

236. The 222 respondents who answered this question had mixed views on how a cap would work in non-personal injury cases. Some respondents suggested that the cap should be the same across all categories for simplicity, with others arguing that further analysis would be required to set informed limits for different categories of case. Some respondents felt that it was not necessary to limit the maximum fee at all, and that market forces and existing regulation would govern the amounts charged. Others felt that one overarching limit such as 25% was not appropriate, and that there should be a scale based on the value of the claim.

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

237. Many respondents suggested various ways of funding disbursements in DBA cases. The suggestions included:

- The claimant funding disbursements themselves, although there were concerns about those who could not afford to. Some suggested that loans might be an option;
- Claimant solicitors, either with an increased percentage in fees to cover the risk, or as part of the normal agreement;
- Disbursement only ATE insurance, either paid for by the claimant, or with some remaining recoverability;
- Public funding through legal aid (in some cases);
- BTE insurance, with some respondents suggesting the market will develop in this area;
- It was also noted that defendants often agree to pay for expert reports in cases where liability is admitted.

Litigants in Person

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

238. There were 312 responses to this question, of which 254 (81%) agreed that the prescribed rate should be increased.
239. The majority of those who agreed did not comment further. However, most that did agreed with the reasons set out in the consultation paper, and many simply stated the current rate was too low. A few respondents commented that the rate should be increased as they felt there would be an increase in litigants in person if the other proposals for reform were implemented.
240. Among those who disagreed, comments were that the current rate was fair. There was concern that an increased rate would encourage litigants in person and some felt this may lead to increased costs. A few respondents felt that if no financial loss can be proved, then no amount should be recoverable. It was also suggested that the hourly rate recoverable should reflect individual circumstances.

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

241. There were 244 responses to this question, of which 60 felt £16.50, 106 felt £20 and 78 felt some other rate was appropriate.
242. Few comments were received for this question. Among those who agreed the rate should be increased to £16.50, there was general agreement with the proposal in the consultation paper and that the current rate was too low. Several stated that for ease of calculation an increase to £20 was appropriate. However, some felt that this rate would disadvantage some, while others would be better off.
243. Many of those who responded stating 'some other rate' suggested £14.40 was most appropriate, because this reflects the mean average hourly UK earnings. A few stated the figure should be proportional to the individual's usual salary and based on personal circumstances. It was also suggested that the recoverable rate should be at the judge's discretion.

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

244. There were 241 responses to this question, of which 171 (71%) agreed that the prescribed rate should be increased.
245. Various figures were suggested, ranging from £75 to £500 per day. A number suggested around £87.23, in line with increases in the Average Earnings Index. The majority suggested £100 and did not comment further.

246. Other comments received included; the rate should be a figure to cover actual loss of earnings; it should be an hourly, rather than daily, rate; it should be a rate assessed by the judge; and there should be negotiation on the rate, capped at £150.
247. Those who disagreed with the proposal did not comment further.

Questions relating to the Impact Assessments

Question 57 - Do you agree with our assessment of the competition impact of these proposals?

248. Not all respondents answered this question. Most of those who responded were representing claimant interests. A number of respondents felt that the competition assessment was inadequate and lacked data. A large number of those who agreed with the assessment questioned whether the competition assessment outlined in the impact assessment would be in the interests of justice. They explained that currently solicitors compete on quality of service, advice and outcomes. If the proposals are introduced solicitors would also compete on price. This in their view would lead to a drop in quality. Claimants would find it difficult to differentiate between suppliers on quality as opposed to price. They agreed this would lead to lower compensation being awarded and consequently claimants falling back on state.
249. Some respondents warned that there would be other unintended consequences of implementing the primary proposals i.e. abolishing recoverability of success fees and ATE insurance. The legal services market would contract as smaller firms would be forced out. The proposals would therefore lead to a medium term reduction in competition. Alternative business structures would open the marketplace to larger entities such as 'Tesco' who would be able to cross subsidise this new area of business from existing profitable areas.
250. There were also concerns that success fees would become standardised to the maximum permitted to ensure costs neutrality and absorb losses from irrecoverable costs incurred by claimant conduct. Some respondents said that the proposals on removing recoverability of ATE insurance would lead to a reduction in insurance companies.
251. Those representing defendant interests agreed with the competition assessment.

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

252. Not all respondents answered this question. Most of those who responded were representing claimant interests. A number of respondents felt that the assessment of the impact on small business was inadequate and lacked data.

253. Some expressed concern that abolishing recoverability and the introduction of QOCS would increase litigation against small businesses. Others said that small businesses would find it more difficult (without recoverable success fees and ATE insurance) to pursue disputes with larger suppliers or customers.
254. The media respondents thought that the majority of proposals would be good for newspapers, government bodies and large corporations.
255. Small businesses have to have insurance which protects them. If they follow health and safety law and carry out appropriate risk assessments of their business practice then they will considerably limit their liability to claims and should not be disproportionately affected.
256. Some were concerned about the impact on the ATE insurance market and felt that more discussion ought to take place with ATE insurers to explore a potential insurance product just for disbursements.
257. A number of respondents suggested that most PI claims are subject to compulsory insurance not sold on underwriting costs. Any reduction in the number of cases or amounts paid would not result in a reduction in insurance premiums.
258. Those representing defendant interests agreed with the small business assessment.

Q59 – Do you have any evidence that any of these proposals will impact disproportionately on people depending on the following protected characteristics?

259. Most respondents did not indicate that they have any evidence of any disproportionate impact on specific groups. The table below shows the number of respondents, out of 580 who answered the consultation questions, who said ‘yes’ to each of the protected characteristics.

	Number	Proportion of total respondents
Disability	71	12%
Sex	39	7%
Gender Reassignment	12	2%
Race	32	6%
Religion or belief	19	3%
Sexual Orientation	10	2%
Pregnancy & Maternity	22	4%
Age	51	9%

260. Some respondents put forward the argument that claimants with some of the above protected characteristics are more likely to have complex personal injury claims to bring, and that they would be disproportionately affected by the proposals. The arguments set out by respondents in relation to disability, sex, race and age are set out in detail in the Equality Impact Assessment.

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

261. There was limited response to this question. A number of respondents felt that the preliminary impact assessments were thin on evidence.
262. Others were concerned that social and economic costs or efficiency arguments had not been sufficiently assessed. Some respondents said that the potential impacts in specific areas like insolvency litigation or on specific groups like the Bar or the Judiciary had not been assessed, nor the issue of alternative business structures. Some also criticised the impact assessments for failing to take account of the legal aid proposals. Some commented that the costs savings to local/central government were not certain and that the costs might increase. One respondent pointed out that a major factor to the level of legal costs is the behaviour of defendant insurers and their decisions about litigation. The impact assessment did not consider this.
263. Defendant respondents said that the impact assessments took a rather simplistic view that claimants on CFAs would be worse off because of increase costs liabilities and fewer cases being pursued. They felt that this was at odds with the findings of Sir Rupert and Professor Fenn that 61% of claimants would be better off.
264. Some respondents disagreed with the assessment on QOCS that it might encourage more claims. They felt that claimants would be more reluctant to litigate if there is any uncertainty re QOCS. Some also disagreed that a 10% increase in general damages would increase the number of claims. It was thought that such a small increase would not provide an incentive to bring claims.
265. One respondent said that the Department should be more enthusiastic in supporting Sir Rupert's thorough and fair report.

Annex A: List of respondents

The respondents who gave details included individual members of the judiciary, individual solicitors and barristers, academics, members of the public and the following organisations:

Abbey Legal Protection

Access Legal from Shoosmiths

Access to Justice Action Group (AJAG)

ACE Group

Action Against Medical Accidents (AvMA)

Addleshaw Goddard LLP

Ageas Insurance Ltd

Airmic

Alarm - The National Forum for Risk Management in the Public Sector

Alarm Subsidence Special Interest Group

Alarm Wales

Alistair Kelman

Allen & Overy LLP

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