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**Legal Aid, Sentencing and Punishment  
of Offenders Bill:**

*Implications for Personal Injury Litigation*



NINESTJOHNSTREET

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The Legal Aid, Sentencing and Punishment of Offenders Bill covers a wide range of issues comprising of four separate parts. Part 1 makes provisions on legal aid, Part 2 litigation funding and costs, Part 3 sentencing and punishment of offenders and Part 4 the final provisions.

The proposals were initially made in last year's Green paper and the Bill is sponsored by the Justice Secretary Mr Kenneth Clarke QC. The Bill was presented to Parliament for the first reading on 21<sup>st</sup> June 2011 and the second reading debate took place on 29<sup>th</sup> June 2011. The Public Bill Committee will now consider the Bill clause by clause every Tuesday and Thursday until it reports to the House by Thursday 13 October 2011.

**Part 1 – Legal Aid**

Significant cuts will be made to civil legal aid and one of the many areas in which legal aid will no longer be available is clinical negligence cases. This may curtail the number of potential claimants with complex yet valid claims from pursuing compensation. The government has observed that potential claimants will nonetheless be able to fund their litigation by way of Conditional Fee Agreements; however there will be appreciably less incentive to lawyers to enter into such agreements in these particularly testing cases once consideration has been given to Part 2 of the Bill.

**Part 2 – Litigation Funding and Costs**

Part 2 of the Bill seeks to implement the recommendations of Lord Justice Jackson's Review of Civil Litigation Costs following the publication of the consultation paper entitled '*Proposals for reform of civil litigation funding and costs in England and Wales*' on 15<sup>th</sup> November 2010. Specifically the Bill seeks to implement changes in relation to Conditional

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Fee Agreements (CFAs) and the success fees recoverable, Damages Based Agreements (DBAs) and the recovery of insurance premiums by way of costs.

***Clause 41 – Conditional fee agreements: success fees<sup>1</sup>***

Under the current regime of CFAs if a case is won the lawyer's base costs are generally recoverable from the losing party and the lawyer can recover an uplift on those base costs from the losing party. The maximum uplift or 'success fee' which may be recoverable is 100% of the base costs. These provisions are governed by sections 58<sup>i</sup> and 58A<sup>ii</sup> of the Courts and Legal Service Act 1990. Clause 41 amends the Courts and Legal Services Act to the effect that a success fee will no longer be recoverable from the losing party in any proceedings.

Lawyers will still be able to recover a success fee; however this will now be recoverable from their own client under a CFA. The success fee is to be subject to a cap of a certain percentage of the damages awarded to the client if they win. The cap and the damages to which the percentage assessment are to apply will be prescribed by the Lord Chancellor. In personal injury cases the cap is expected to be set at 25% excluding damages payable for future care or other future losses in accordance with the proposals made by Lord Justice Jackson and following the government's response to the consultation on the review in March 2011<sup>2</sup>.

This restriction of success fees to 25% of past losses may have significant consequences for personal injury litigation. A 25% success fee may not always reflect the significant measure of risk which is inherent in many of the more complex cases and may well result in seriously injured individuals not having access to appropriate and much needed representation.

***41 Conditional fee agreements: success fees***

*(1) In section 58 of the Courts and Legal Services Act 1990 (conditional fee agreements), in subsection (2)—*

*(a) omit "and" after paragraph (a), and*

*(b) after paragraph (b) insert "and*

*(c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase."*

*(2) After subsection (4) of that section insert—*

*"(4A) The additional conditions are applicable to a conditional fee agreement which—*

*(a) provides for a success fee, and*

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<sup>1</sup> The Clauses are found in the body of this article and the existing legislation can be found in the endnotes.

<sup>2</sup> Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response, March 2011

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*(b) relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.*

*(4B) The additional conditions are that—*

*(a) the agreement must provide that the success fee is subject to a maximum limit,*

*(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,*

*(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and*

*(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.”*

*(3) In section 58A of that Act (conditional fee agreements: supplementary), in subsection (5) after “section 58(4)” insert “, (4A) or (4B)”.*

*(4) For subsection (6) of that section substitute—*

*“(6) A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement.”*

*(5) In section 120(4) of that Act (regulations and orders subject to parliamentary approval) after “58(4),” insert “(4A) or (4B),”*

*(6) The amendment made by subsection (4) does not apply in relation to a success fee payable under a conditional fee agreement entered into before that subsection comes into force.*

### ***Clause 42 – Damages based agreements***

Clause 42 widens the scope of contingency fee agreements or damages based agreements. Currently section 58AA of the Courts and Legal Services Act 1990<sup>iii</sup> provides that DBAs are only enforceable when they relate to employment matters. The Bill will amend this section of the Act in order to allow for DBAs in most types of civil litigation including personal injury.

DBAs will provide another form of ‘no win, no fee’ agreement where lawyers would be able to recover a percentage of their client’s damages if the case is won, and will be available to both Solicitors and Barristers. As noted above in personal injury cases this will be subject to a cap which is expected to be set at 25% excluding damages payable for future care or other future losses. The Lord Chancellor may, but need not, prescribe the information which a legal representative must provide a claimant prior to entering a DBA.

#### ***42 Damages-based agreements***

*(1) Section 58AA of the Courts and Legal Services Act 1990 (damages-based agreements) is amended as follows.*

*(2) In subsection (1) omit “relates to an employment matter and”.*

*(3) In subsection (2)—*

*(a) after “But” insert “(subject to subsection (9))”, and*

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*(b) omit “relates to an employment matter and”.*

*(4) Omit subsection (3)(b).*

*(5) After subsection (4)(a) insert—*

*“(aa) must not relate to proceedings which by virtue of section 58A(1)*

*and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;”.*

*(6) In subsection (4)(b), at the beginning insert “if regulations so provide,”.*

*(7) In subsection (4)(d) for “has provided prescribed information” substitute “has complied with such requirements (if any) as may be prescribed as to the provision of information”.*

*(8) After subsection (6) insert—*

*“(6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.”*

*(9) After subsection (7) insert—*

*“(7A) In this section (and in the definitions of “advocacy services” and “litigation services” as they apply for the purposes of this section) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.”*

*(10) After subsection (8) insert—*

*“(9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.*

*(10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.”*

*(11) In the heading of that section omit “relating to employment matters”.*

*(12) The amendments made by this section do not apply in relation to an agreement entered into before this section comes into force.*

**Clause 43 – Recovery of insurance premiums by way of costs**

After the event insurance can be taken out by parties in a CFA funded case to insure against the risk of having to pay their opponent’s costs and their own disbursements if they lose. The recovery of the cost of these insurance premiums by way of a costs order is provided for by section 29 of the Access to Justice Act 1999<sup>iv</sup>.

This section is to be repealed by clause 43 and a new provision is created in relation to the recoverability of insurance premiums from a losing party. The new provision, the insertion of section 58C of the Courts and Legal Services Act 1990 means that the costs of the premium is only recoverable from the losing party in limited circumstances, including clinical

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negligence proceedings of a prescribed description. The exceptions is intended to reflect the fact that expert's reports in clinical negligence cases can often be very expensive.

Section 58C will enable the Lord Chancellor to prescribe the circumstances in which the premium would be recoverable and the maximum amount of the premium that may be recovered. This may be prescribed as a percentage of the relevant part of the premium or an amount calculated in a prescribed manner.

**43 Recovery of insurance premiums by way of costs**

*(1) In the Courts and Legal Services Act 1990, after section 58B insert—*

**58C Recovery of insurance premiums by way of costs**

*(1) A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy, unless such provision is permitted by regulations under subsection (2).*

*(2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where—*

- (a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,*
- (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks),*
- (c) the policy is of a prescribed description,*
- (d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence (“the relevant part of the premium”), and*
- (e) the amount is to be paid in respect of the relevant part of the premium.*

*(3) Regulations under subsection (2) may include provision about the amount that may be required to be paid by the costs order, including provision that the amount must not exceed a prescribed maximum amount.*

*(4) The regulations may prescribe a maximum amount, in particular, by specifying—*

- (a) a percentage of the relevant part of the premium;*
- (b) an amount calculated in a prescribed manner.*

*(5) In this section—*

*“clinical negligence” means breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services);*

*“clinical negligence proceedings” means proceedings which include a claim for damages in respect of clinical negligence;*

*“costs insurance policy”, in relation to a party to proceedings, means a policy insuring against the risk of the party incurring a liability in those proceedings;*

*“expert report” means a report by a person qualified to give expert advice on all or most of the matters that are the subject of the report;*

*“proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in court), whether commenced or contemplated.”*

*(2) In the Access to Justice Act 1999, omit section 29 (recovery of insurance premiums by way of costs).*

*(3) The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force.*

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***Clause 51 – Payment of additional amount to successful claimant***

Clause 51 is an attempt to address the inequality that exists in relation to a claimant's offer to settle a claim, in relation to a defendant's offer to settle. The cost sanctions against a defendant for failing to accept a claimant's offer to settle are generally considerably less than the sanctions against a claimant for failing to beat a defendant's offer. Clause 51 enables rules of court to be made to permit a court to order an additional amount to be paid by defendants to claimants who do not accept a claimant's offer to settle where the court gives judgment for the claimant that is at least as advantageous to the claimant as an offer they made to settle the claim. These provisions are in addition to the sanctions currently available to the court under Part 36 of the Civil Procedure Rules.

The Bill does not specify the level of payment to the claimant and this is to be specified by the Lord Chancellor at a later date. This may go some way to equalising the incentives between claimants and defendants.

***51 Payment of additional amount to successful claimant***

*(1) Rules of court may make provision for a court to order a defendant in civil proceedings to pay an additional amount to a claimant in those proceedings where—*

- (a) the claim is a claim for (and only for) an amount of money,*
- (b) judgment is given in favour of the claimant,*
- (c) the judgment in respect of the claim is at least as advantageous as an offer to settle the claim which the claimant made in accordance with rules of court and has not withdrawn in accordance with those rules, and*
- (d) any prescribed conditions are satisfied.*

*(2) Rules made under subsection (1) may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle.*

*(3) In subsection (1) "additional amount" means an amount not exceeding a prescribed percentage of the amount awarded to the claimant by the court (excluding any amount awarded in respect of the claimant's costs).*

*(4) The Lord Chancellor may by order provide that rules of court may make provision for a court to order a defendant in civil proceedings to pay an amount calculated in a prescribed manner to a claimant in those proceedings where—*

- (a) the claim is or includes a non-monetary claim,*
- (b) judgment is given in favour of the claimant,*
- (c) the judgment in respect of the claim is at least as advantageous as an offer to settle the claim which the claimant made in accordance with rules of court and has not withdrawn in accordance with those rules, and*
- (d) any prescribed conditions are satisfied.*

*(5) An order under subsection (4) must provide for the amount to be calculated by reference to one or more of the following—*

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- (a) any costs ordered by the court to be paid to the claimant by the defendant in the proceedings;*
  - (b) any amount awarded to the claimant by the court in respect of so much of the claim as is for an amount of money (excluding any amount awarded in respect of the claimant's costs);*
  - (c) the value of any non-monetary benefit awarded to the claimant.*
- (6) An order under subsection (4)—*
- (a) must provide that rules made under the order may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle, and*
  - (b) may provide that such rules may make provision as to the calculation of the value of a non-monetary benefit awarded to a claimant.*
- (7) Conditions prescribed under subsection (1)(d) or (4)(d) may, in particular, include conditions relating to—*
- (a) the nature of the claim;*
  - (b) the amount of money awarded to the claimant;*
  - (c) the value of the non-monetary benefit awarded to the claimant.*
- (8) Orders under this section are to be made by the Lord Chancellor by statutory instrument.*
- (9) A statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.*
- (10) Rules of court and orders made under this section may make different provision in relation to different cases.*
- (11) In this section—*
- “civil proceedings” means proceedings to which rules of court made under the Civil Procedure Act 1997 apply;*
  - “non-monetary claim” means a claim for a benefit other than an amount of money;*
  - “prescribed” means prescribed by order made by the Lord Chancellor.*

**What happens next?**

The legislation is due to come into force in Autumn 2012. The Bill is a clear step by the government to implement Lord Justice Jackson's cuts civil litigation costs.

Nonetheless, the Bill takes no account of the streamlined road traffic accident process which currently deals with claims worth between £1000 and £10,000. The Ministry of Justice are now consulting on extending the scheme to include higher value RTA claims of up to £25,000 or £50,000. The scheme applies fixed recoverable costs and a fixed success fee to each of three stages of the litigation process. Extending the scheme to £25,000 would capture around 90% of all RTA PI claims, and an extension to £50,000 would capture approximately 95%.<sup>3</sup>

Not all of Lord Justice Jackson's recommendations have been implemented. The proposals for qualified one way cost shifting have not been addressed by the Bill and may be

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<sup>3</sup> Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales, March 2011, paragraph 66.

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considered separately at a later date and the 10% increase in general damages has also been excluded from the Bill. These steps may be something which is implemented at a later date as the government advise in their response to the consultation that it will be introduced ‘*as part of the package*’<sup>4</sup>. The changes to the CFA regime requiring primary legislation will follow as soon as Parliamentary time allows and other changes will require changes to the Civil Procedure Rules or other secondary legislation.

What is clear is that the proposal which have made their way into the Bill may restrict access to justice for some of the most grievously injured individuals. Lawyers may not be in a position to take certain risks and represent potential claimants and those grievously injured claimants who do obtain representation may lose a significant proportion of their damages.

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<sup>4</sup> Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response, March 2011, paragraphs 23 & 35.

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### **i** **The Courts and Legal Services Act section 58**

58. — Conditional fee agreements.

(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.

(2) For the purposes of this section and section 58A—

(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and

(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.

(3) The following conditions are applicable to every conditional fee agreement—

(a) it must be in writing;

(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and

(c) it must comply with such requirements (if any) as may be prescribed by the [Lord Chancellor].

(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—

(a) it must relate to proceedings of a description specified by order made by the [Lord Chancellor] ;

(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the [Lord Chancellor].

(5) If a conditional fee agreement is an agreement to which section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies, subsection (1) shall not make it unenforceable.

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**ii** **The Courts and Legal Services Act section 58A**

58A. — Conditional fee agreements: supplementary.

- (1) The proceedings which cannot be the subject of an enforceable conditional fee agreement are—
  - (a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and
  - (b) family proceedings.
- (2) In subsection (1) “family proceedings” means proceedings under any one or more of the following—
  - (a) the Matrimonial Causes Act 1973;
  - (b) the Adoption and Children Act 2002;
  - (c) the Domestic Proceedings and Magistrates' Courts Act 1978;
  - (d) Part III of the Matrimonial and Family Proceedings Act 1984;
  - (e) Parts I, II and IV of the Children Act 1989;
  - (f) [Parts 4 and 4A of the Family Law Act 1996]; [...]
  - (fa) Chapter 2 of Part 2 of the Civil Partnership Act 2004 (proceedings for dissolution etc. of civil partnership);
  - (fb) Schedule 5 to the 2004 Act (financial relief in the High Court or a county court etc.);
  - (fc) Schedule 6 to the 2004 Act (financial relief in magistrates' courts etc.);
  - (fd) Schedule 7 to the 2004 Act (financial relief in England and Wales after overseas dissolution etc. of a civil partnership); and
  - (g) the inherent jurisdiction of the High Court in relation to children.
- (3) The requirements which the [Lord Chancellor] may prescribe under section 58(3)(c)—
  - (a) include requirements for the person providing advocacy or litigation services to have provided prescribed information before the agreement is made; and
  - (b) may be different for different descriptions of conditional fee agreements (and, in particular, may be different for those which provide for a success fee and those which do not).
- (4) In section 58 and this section (and in the definitions of “advocacy services” and “litigation services” as they apply for their purposes) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.
- (5) Before making an order under section 58(4), the [Lord Chancellor] shall consult—
  - (a) the designated judges;
  - (b) the General Council of the Bar;
  - (c) the Law Society; and
  - (d) such other bodies as he considers appropriate.
- (6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.
- (7) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a conditional fee agreement (including one which provides for a success fee)."

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**iii**  
**The Courts and Legal Services Act section 58AA**

58AA Damages-based agreements relating to employment matters

(1) A damages-based agreement which relates to an employment matter and satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.

(2) But a damages-based agreement which relates to an employment matter and does not satisfy those conditions is unenforceable.

(3) For the purposes of this section—

(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—

(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;

(b) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.

(4) The agreement—

(a) must be in writing;

(b) must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

(c) must comply with such other requirements as to its terms and conditions as are prescribed; and

(d) must be made only after the person providing services under the agreement has provided prescribed information.

(5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.

(6) Before making regulations under subsection (4) the Lord Chancellor must consult—

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

(d) such other bodies as the Lord Chancellor considers appropriate.

(7) In this section—

“payment” includes a transfer of assets and any other transfer of money's worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);

“claims management services” has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act).

(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).

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**iv** **The Access to Justice Act 1999 section 29**

29. Recovery of insurance premiums by way of costs.

Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.