



Department of
Justice

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Alternative Method for Funding Money Damages Claims

Consultation Document

November 2015

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1. Introduction

- 1.1 This is a consultation on an Alternative Method for Funding Money Damages Claims. In September 2010 the Minister of Justice announced a review which examined how people could best be helped to secure access to justice in a cost effective manner. One of the recommendations of the Review was that most money damages cases should be removed from the scope of legal aid, provided that an alternative means of securing and improving access to justice could be implemented.
- 1.2 A consultation in 2013 did not identify a way forward. Two options were shortlisted (both involving a conditional fee agreement, with the success fee payable by the successful plaintiff or by the losing defendant). Both options were rejected, following further consideration, due to the significant additional costs incurred arising from the success fees and insurance premiums for after the event insurance which would underpin the arrangements. In light of the continuing pressures on the legal aid budget, in March 2015 the Minister announced his intention to take the majority of money damages cases out of scope without putting in place an alternative. The Minister committed to keeping potential alternatives under review.
- 1.3 While the detailed policy to give effect to the Minister's decision was being developed, the Access to Justice Review Part II was considering alternative approaches to funding money damages claims. The Report of the Review, published on 3 November 2015, contains recommendations for an alternative approach which would maintain access to justice while minimising the cost to legal aid.
- 1.4 This consultation invites comments on the recommendations for an alternative approach to funding money damages claims set out in the Report. The Report has been published for general consultation, however, it was considered appropriate to hold a specific consultation on funding money

damages claims to focus in on the detailed recommendations in the Report, and ensure the complex issues involved are given appropriate consideration.

- 1.5 The proposed approach will increase access to justice by providing a means for pursuing claims by the middle group of people who do not qualify for legal aid, but cannot afford to pursue claims independently due to the risk of paying their own legal costs, and the defendant's costs, if they lose the case.
- 1.6 The approach will also allow the majority of money damages claims to be removed from the scope of legal aid. It is important to emphasise that the overspend on the legal aid budget means that doing nothing is not an option. The legal aid spend on money damages in 2014/15 was £2.7m. The removal of most money damages cases from scope will save the legal aid fund £1.5 - £2m per annum.

2. Purpose of the Consultation

- 2.1 The aim of this consultation is to invite comments on the recommendations in the Report and also to explore the implications of the reforms for key stakeholders. A list of questions is provided at section 10 to assist the responses.

3. How to Respond

- 3.1 When you are responding to this document please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where appropriate, how the views of the members were assembled.
- 3.2 Please submit your response to this consultation by post, fax or email to:

Money Damages Consultation
Public Legal Services Division,
Department of Justice,

Massey House,
Stormont Estate,
Belfast BT4 3SX

E-mail: moneydamages@dojni.x.gsi.gov.uk

Fax: 028 90 16 9502

Phone: 028 90 16 3462

Textphone: 028 90 52 7668

Closing Date

3.3 Responses must be received by 19 February 2016.

Confidentiality of Response

3.4 The Department will publish a summary of responses following the completion of the consultation process. Unless individuals specifically indicate that they wish their response to be treated in confidence, their name and the nature of their response may be included in any published summary of responses. Respondents should also be aware that the Department's obligation under the Freedom of Information Act 2000 may require that any responses, not subject to specific exemptions in the Act may be disclosed to other parties on request in accordance with the legislation.

Miscellaneous

3.5 A copy of this consultation document will be placed on the DOJ website at www.dojni.gov.uk.

3.6 You may make additional copies of this document without seeking permission. If you require further printed copies of this document, we would invite you to access the document through our website and make copies yourself. An electronic version is available on the Department's website at www.dojni.gov.uk. If you do not have access to the internet and require us to

provide you with further copies, please contact the Consultation Co-ordinator at the address at paragraph 3.2 above with your specific request.

- 3.7 Copies in other formats, including Braille, large print, audiocassette, computer disk etc. may be made available upon request. If it would assist you to access this document in an alternative format or a language other than English, please let us know and we will do our best to help.
- 3.8 Section 75 of the Northern Ireland Act 1998 requires all public authorities in Northern Ireland to have due regard to equality of opportunity between the nine equality categories and have regard to promote good relations between persons of different religious belief, political opinion, or racial group. Public Authorities are also required to meet legislative obligations under the Disability Discrimination Act 1995, particularly in the formation of public policy making. The Department is fully committed to fulfilling its Section 75 obligations on the promotion of equality of opportunity, good relations and meeting legislative requirements in Northern Ireland.
- 3.9 An initial screening of the policy has indicated that an Equality Impact Assessment (EQIA) is not required. An Impact Assessment Screening recommended that a Regulatory Impact Assessment be conducted as the policy is developed as part of the consultation process. Information relating to equality and regulatory impacts is being sought as part of the consultation exercise. The evidence provided in the responses will be used to inform a further screening of the policy.

4. Background

- 4.1 The 2011 Access to Justice Review recommended that “most money damages cases, except for the more complex clinical negligence cases, should be removed from the scope of legal aid, provided that an alternative means of securing and improving access to justice can be implemented”.

5. Previous Consultation

- 5.1 The Department subsequently launched a Consultation on 4 April 2013 on six options for reform.
- 5.2 The consultation ran for 12 weeks and closed on 28 June 2013. A copy of the consultation is available on the Department of Justice website <https://www.dojni.gov.uk/sites/default/files/consultations/doj/consultation-on-alternative-methods-of-funding-money-damages.pdf>

6. Post Consultation Report

- 6.1 The Post Consultation Report, which issued in June 2014, noted that while a consensus had not emerged through the consultation, very valuable information had been provided. A copy of the Post Consultation Report is on the Department of Justice website <https://www.dojni.gov.uk/sites/default/files/consultations/doj/money-damages-post-consultation-report-june-2014.pdf>
- 6.2 The Department, therefore, took forward a programme of work to examine further the advantages and disadvantages of the shortlisted options from the original consultation. Option one, leaving money damages wholly within scope of legal aid, is not a realistic option in light of the financial pressures. Our main concern with the other two options which were shortlisted, Conditional Fee Agreements (CFAs) with success fees and insurance premiums for after the event insurance to cover the costs of the claimant if they were

unsuccessful, was due to the additional costs. These additional costs would not only impact upon the 5% of personal injury cases which are currently legally aided, but would extend to cases which are privately funded.

- 6.3 There was also uncertainty about the insurance market which we envisaged would underpin the CFAs to protect the claimant against adverse costs if they lost the case.

7. Financial Pressures and Revised Approach

- 7.1 In light of the continued financial pressure on the legal aid budget, in March 2015 the Minister announced that the majority of money damages cases would be taken out of scope without alternative provision being made. That policy was being developed when the Access to Justice Review Part II re-examined the issue and made recommendations for an alternative approach which it suggests would address previous concerns. The Minister has accepted the recommendations, subject to further consideration and consultation.

8. Access to Justice Review Part II

- 8.1 Issues which have an impact on money damages are addressed in different chapters of the Report of the Access to Justice Review. In particular, conditional fees and self-funding are dealt with in Chapter 22, Chapter 23 deals with issues around the scope of legal aid and Chapter 24 has relevant recommendations on the control of civil legal aid. A summary of the recommendations relating to money damages and their location in the Report is at Annex A. The full Report can be accessed at:

<https://www.dojni.gov.uk/sites/default/files/consultations/doj/access-to-justice-review-consultation.pdf>

- 8.2 The paragraphs below set out how the individual recommendations collectively will result in a new approach for money damages cases. When taken together the outline of the new system would involve:

- The vast majority of categories of money damages claims would be removed from the scope of legal aid.
- CFAs would be introduced which would include a success fee (capped at 20%) which is payable by the plaintiff.
- The success fee would not apply to cases of road traffic accidents.
- Qualified One Way Cost Shifting (QOCS) would be introduced – this means that the successful defendant would be unable to recover their costs except in limited circumstances of bad faith or fraud.
- Legislative provision would be made to prevent an increase in damages.
- Where legal aid continued to be available for some very serious cases, it would act as a supplement and not a full alternative to CFAs.

8.3 The Department considers this alternative approach to be viable, but before finalising the policy would welcome views on the individual recommendations. Although there will be some additional costs to the plaintiff and the defendant, these are more modest than the alternatives previously considered. The analysis contained in the Report indicates that this structure will ensure that claims which are progressed under the existing arrangements will continue to be progressed but that, in addition, potential claimants who do not currently have sufficient means, but are excluded from legal aid, would be able to pursue those claims thus improving access to justice. Your views are invited on this approach and on the specific recommendations in the Report set out in the following paragraphs.

Conditional Fees and Self Funding (Chapter 22)

8.4 The Report recommended that Conditional Fee Agreements (CFAs) are introduced, however, it identified sufficient safeguards to minimise the impact on costs. The key recommendations are:

- the CFAs would include a success fee for cases other than road traffic accidents (which account for 66% of cases). The fee would be capped at 20% of total damages which would mean the plaintiff would have an

interest in negotiating the scale of the success fee within the limits of the cap;

- the plaintiff would be liable for the success fee in the remaining 34% of cases;
- Qualified One Way Cost Shifting (QOCS) would be introduced – this means that the successful defendant would be unable to recover their costs except in limited circumstances of bad faith or fraud. This would remove the need for an insurance product to protect the claimant from the defendant’s costs if their case is unsuccessful. (QOCS has been introduced in England and Wales and is being introduced in Scotland);
- a legislative provision would be made to prevent an increase in damages; and
- legal aid would act as a supplement, not a full alternative to CFAs, by funding the investigative costs from legal aid only until those cases within scope reach the stage to be transferred to a CFA agreement, which would offer further savings to the legal aid fund.

8.5 In making these recommendations, the Report notes that the discussion around CFAs has been looked at through the prism of the future of money damages within the legal aid scheme. It suggests that the real debate should be around finding ways that would allow the whole population of Northern Ireland to have a mechanism to pursue meritorious damages claims. It refers to the middle group of people, “Nigela” (not in group eligible for legal aid) and the need to help this group who may be currently unable to pursue cases.

8.6 The Report notes the legitimate concern that if CFAs become available the majority who currently pursue cases privately could lose out by facing a deduction from their damages. Alternatively, if CFAs are structured in a way which protects claimants by instead imposing additional liabilities on defendants, then those defendants (including government departments) will have cause for complaint and will argue that such reforms are not affordable in the current economic climate. It concludes that it is possible to help “Nigela” without unfairly penalising anyone else involved in personal injury

litigation, and the recommendations in the Report, which draws on the experience of other jurisdictions, will achieve this.

The Scope of Civil Legal Aid (Chapter 23)

8.7 The Report recommends that legal aid is removed from the great majority of money damages cases, subject to safeguards. In terms of timing, it recommends that the removal of legal aid should be timed to coincide with, or else follow, the introduction of CFAs, assuming it proves possible to bring these in without delay. It proposes that legal aid should operate as a supplement, not a full alternative to CFAs. In other words public funding should be available only for those elements of a case, such as high investigative costs and disbursements, which might not allow the case to be viable under a CFA alone.

8.8 A key issue for the consultation is to determine which cases should remain within the scope of legal aid. The Report recommends that only a very limited range of money damages claims should remain within scope. The Report recommends that the following remain within scope:

- claims against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights;
- claims concerning the abuse of children or vulnerable adults or sexual assault;
- clinical negligence claims relating to babies with severe neurological injury; and
- claims relating to diffuse mesothelioma.

8.9 The Report recommends that clinical negligence as a category should be removed from scope.

Control of Civil Legal Aid (Chapter 24)

- 8.10 The Report outlines criteria which should be taken into account before determining whether legal aid should be granted, which in essence introduces the Private Client Test, in regard to consideration of prospects of success and the cost benefit ratio. This is already being considered as part of a separate project and has been subject to consultation and will be implemented.
- 8.11 The Report recommends that there should be a minimum damages threshold which would apply before legal aid is granted for investigative purposes. Under the draft Funding Code a minimum damages threshold of £5,000 was intended but the Report suggests that £10,000 is a more realistic figure (which is aligned to the jurisdiction of District Judges in the county court).
- 8.12 The Report recommends that legal aid should be refused, or funding limited, if alternative funding may be available, through insurance or other funding, or where the case is suitable for a CFA.
- 8.13 The Report recommends that a contribution should be obtained from those who make a successful claim supported by legal aid, which is capped at 20% of the net damages recovered.
- 8.14 The Report recommends risk rates be introduced whereby lawyers are paid less by the legal aid fund if they lose the case, than they would be paid by the other side in the event of a win.

9. Conclusion

9.1 The Department considers the recommendations in the Report offer a viable alternative method of funding money damages claims, which addresses the issues which have occurred in other jurisdictions and avoids a significant increase in costs.

9.2 The Department accepts that these proposals will significantly alter the legal landscape and the conduct of litigation. These proposals will offer a significant saving to the legal aid fund of up to £2m per annum, and will also provide a funding mechanism that would allow the whole population of Northern Ireland to have a further mechanism to pursue meritorious damages claims.

9.3 The Department is very keen to hear a wide range of respondents views on how best to give effect to the recommendations outlined in the Report and to allow it to evaluate the impact they will have on the different stakeholders.

10. Consultation Questions

10.1 The Department welcomes the views of as many consultees as possible on the recommendations in the Report, and on the specific questions posed below.

- Q.1 Do you agree that Conditional Fee Agreements (no win/no fee) can enhance access to justice including for those who are not eligible for legal aid and cannot afford to litigate in the current system?
- Q.2 Do you envisage any difficulties with the operation of CFAs in Northern Ireland for the plaintiff, defendant or legal profession?
- Q.3 Should a 100% success fee be allowed, or should a lower success fee be set (subject to the overall cap of 20% of damages);
- Q.4 Should the 20% cap on the success fee apply to the total damages awarded, or should a lower tapered cap apply for high value cases in line with the proposals in Scotland¹?
- Q.5 Do you agree that the success fee should not apply in cases of road traffic accidents? Are there other types of cases where the success fee should not apply?
- Q.6 What impact would the introduction of Qualified One Way Cost Shifting have on defendants (we would particularly welcome quantitative evidence from defendants)?
- Q.7 Should the plaintiff have some of their damages protected where they become liable for some of the defendants costs when they fail to beat an offer?

¹ The Taylor report for Scotland proposes a 20% cap on the first £100k awarded, a 10% cap on £100k to £500k, and a 2.5% cap on higher amounts.

- Q.8 Do you agree with the Report's proposals for the areas that should be retained within scope of legal aid? If not, what areas should remain within scope, and why?
- Q.9 Do you agree that legal aid should operate as a supplement, not a full alternative, to CFAs and should only be for elements of a case? Please provide details of any difficulties you envisage in implementing this proposal.
- Q.10 Do you agree that the private client principle of applying a minimum damages threshold should apply? Please provide details of any difficulties you envisage in implementing this proposal.
- Q.11 Do you agree that legal aid may be refused, or funding may be limited if alternative funding is available to the client, or the case is suitable for a CFA? Please provide details of any difficulties you envisage in implementing this proposal;
- Q.12 Do you agree that it is appropriate that those who have benefited from legal aid to pursue a case should make a contribution to the legal aid fund to make it self-funding, subject to a cap of 20% of damages?
- Q.13 Do you agree that risk rates (rates lower than would be recoverable from the other side if successful) should be paid in unsuccessful legal aid cases to incentivise the pursuit of meritorious cases and to produce savings for the legal aid fund?
- Q.14 What additional safeguards or protocols should apply in money damages cases?

11. Equality Impact Assessment and Regulatory Impact Assessment

11.1 Information relating to equality and regulatory impacts is being sought as part of the consultation exercise. The evidence provided in the responses will be used to inform a further screening of the policy. Please tell us about any impacts, either positive or negative. The impacts can affect claimants, members of the legal profession, defendants of claims, or other groups impacted. Please be as specific as possible and support this with relevant factual information and data where possible.

Q.1 Do you think the proposals would have a particular impact, either positive or negative, on any of the Section 75 groups? If so please describe the impact that you anticipate.

Q.2 Do you think the proposals would have a particular impact, either positive or negative, against any of the following factors: crime impact; community safety and victims; health; human rights; rural areas and communities; social inclusion; economic impact (including impact on businesses) or environmental impact? If so please describe the impact that you anticipate.

Annex A

Access to Justice Review Part II (the Report) – Key Recommendations on An Alternative Method for Funding Money Damages Claims

Chapter 22 - Conditional Fee Agreements

The Report Recommends

- the volume of new personal injury claims should be closely monitored over the first three years of the new system so that adjustments can be made at the earliest opportunity if required; (Section 22.42)
- CFAs should be made available by bringing into operation Article 38 of the Access to Justice 2003 Order (Section 22.43);
- Claimants are protected against adverse costs orders under a system of Qualified One Way Cost Shifting (QOCS), this will bring Northern Ireland into line with the equivalent safeguards in England and Wales and similar reform proposals in Scotland (Section 22.43); and
- The risk and extent of claimants losing a share of their damages through payment of a success fee is mitigated by regulation and binding restrictions on success fees (Section 22.43).

The report says that the detailed rules governing the introduction of CFAs should be the subject of consultation. It provides a table with the most significant policy questions and the recommended approach (subject to the outcome of the consultation) (Section 22.44). The approach it recommends is:

- CFAs should be available for all proceedings except criminal and family proceedings;
- No success fee should be allowed for road traffic claims;

- A 100% success fee may be needed for all cases with a 50% prospect of success, but a lower figure could be considered initially if that more cautious approach is strongly supported on consultation;
- QOCS should apply to all personal injury claims;
- The claimant's protection against adverse costs in QOCS should not apply where the claim is struck out as frivolous or vexatious, where the court finds the claim to have been fundamentally dishonest; or if the claimant has recovered damages in the action but becomes liable for costs (typically where damages awarded fail to beat the defendant's payment into court);
- The success fee should be capped at 20% of total damages, including in cases which settle pre-issue (but consideration could be given to tapering the amount depending on the amount of damages awarded and consideration should be given to appeal cases where the protection does not apply in England and Wales);
- The success fee should apply to the full amount of damages awarded;
- Consideration needs to be given as to whether some of the damages are protected where the claimant recovers damages but also becomes liable to pay costs because they recover less than the defendant offered;
- Consideration should be given as to whether additional safeguards are required (for example, the ability of the client to challenge unfair success fees); and
- Consideration should be given as to the damages cap which should apply in non-personal injury claims.

Chapter 23 The Scope of Civil Legal Aid

- Legal aid should be removed from the great majority of money damages cases, and if resources allow, the removal of legal aid should be timed to coincide with, or else follow, the introduction of CFAs, assuming it proves possible to bring these in without delay (Section 23.12);
- Legal aid should operate as a supplement, not a full alternative, to CFAs and should be available only for those elements of a case, such as high

investigative costs and disbursements, which might not allow the case to be viable under a CFA alone (Section 23.13);

- Clinical negligence as a category should not remain in scope, only a very limited range of money damages claims should remain within scope, limited to those which can be regarded as a high priority in light of their importance to the individual or the state² (Section 23.15),
- Exceptional funding will be available for any damages cases removed from scope if there is a legal entitlement under the European Convention of Human Rights (Sections 23.17 and 23.48 – 54).

Chapter 24 – Control of Civil Legal Aid

- Prospects of success should be taken into account and cases with poor prospects should be refused and cases with unclear prospects should be able to access only limited funding (Section 24.7)
- A cost benefit ratio should apply to money damages cases which remain in scope as well as money damages claims seeking exceptional funding (Section 24.10);
- There must be a minimum damages threshold, no private paying client would invest much money investigating a potential claim unless it was likely to be substantial and proposes £10,000 would be the more realistic figure); (Section 24.11);
- Civil legal aid may be refused, or alternatively funding may be limited if alternative funding is available to the client (through insurance or otherwise) or there are other persons or bodies, including those who might benefit from the proceedings, who can reasonably be expected to bring or fund the case; (Section 24.12);
- Civil legal aid may be refused, or alternately funding may be limited, if the case appears suitable for a conditional fee agreement (Section 24.12);

² The Report suggests that the Department consult only upon the following remaining within the scope of legal aid:

- Claims against public authorities concerning serious wrong-doing, abuse of position or power or significant breach of human rights; claims concerning the abuse of children or vulnerable adults or sexual assault;
- Clinical negligence claims relating to babies with severe neurological injury or clients with diffuse mesothelioma;
- Housing claims relating to despair or harassment.
-

- An additional financial obligation should be imposed on those damages claims supported by legal aid (a Supplementary Legal Aid Scheme (SLAS) to make the legal aid scheme self-funding) and this should be the amount which would have been claimed from the legal aid fund if the claim had not succeeded, or 20% of the net damages recovered, whichever is the lesser³(Section 24.19); and
- Risk Rates should be introduced which are substantially below the levels of costs recoverable from the other side in successful cases to incentivise the pursuit of meritorious cases and to produce savings for the legal aid fund (Sections 24.24 and 24.25).

³ In cases supported by both a CFA and legal aid, regulations should safeguard 80% of the damages recovered. If the CFA success fee and the SLAS payment together exceed 20% of damages, both should be reduced pro rata so that they total no more than 20%.