Proposals for Reform of Civil Litigation Funding and Costs in England and Wales

Implementation of Lord Justice Jackson's Recommendations

Response by Thompsons Solicitors

THOMPSONS
SOLICITORS

Executive summary

1. **We support refinement of the legal process, not for the sake of it and not to favour one party but if it is needed and if it genuinely improves the process for all parties.**

2. **Ending recoverability of success fees will have a hugely negative big impact on claimant lawyers and on claimants – lawyers will be less able to run cases and small legal businesses will close. Claimants meanwhile will be unable to find a lawyer to take their claim.**

3. **Ending recoverability will disenfranchise thousands of injured people.**

4. **There are alternatives to this, including mediated success fees, an alternative to ATE to pay for disbursements and genuine, unqualified, one way costs shifting.**

5. **The RTA portal should be allowed to bed down before primary legislation is considered.**

6. **Alternative Package 1 or the formulation proposed in paragraph 100 are better options for access to justice than ending recoverability of success fees altogether.**

Introduction

Thompsons employs over 400 lawyers in 28 offices across the UK. At any one time we will be running 70,000 claims on behalf of people who have been injured at or away from work, through no fault of their own.

As the coal miners' compensation scheme average damages show[1], the evidence supports our belief that we do a good job for our clients. As the cases referred to throughout this response make clear, we do not shy away from taking on challenging claims.

The proposals in the consultation paper taken from the report of Jackson LJ will threaten Thompsons' ability to get the maximum compensation for our clients, potentially leaving them with less than their case is worth. The proposals will also reduce our ability to investigate and pursue cases which are legitimate and would currently succeed but which are challenging.

We support the view on the Jackson proposals of the Working Group on Civil Litigation Costs which recently published "On a Slippery Slope: A response to the Jackson Report". These leading academics concluded that "the Jackson proposals are inconsistent with a fundamental principle of civil justice" and will have "an adverse impact upon access to justice because they favour the financial interests of defendants over the interests of claimants in getting effective legal advice and assistance and proper compensation for their injuries."

The academics also concluded that the proposals "will **reduce the availability of legal services to injured persons** because legal and practical limits on what lawyers can charge will inevitably cause them to turn away clients they represent under the current system."

The proposals emanate from a review of civil justice, the methodology of which the academics criticised as exhibiting "systematic bias in favour of evidence presented on the defendant's side when it contradicts that relied on by claimants[2]."

The report also points out that the statutory sources that Jackson LJ relies on to demonstrate the costs of civil litigation provide only a partial and often misleading picture, in particular because they attach undue importance to the tiny minority of cases (1% or 2%) that go to trial as opposed to the overwhelming bulk that are settled out of court.

The Working Group conclude that the evidential base for such a radical reform as Jackson proposes is "entirely inadequate".

It is Thompsons' view that the proposals will, if pursued as Jackson LJ recommends, create four distinct groups (we cross refer to the relevant consultation questions – please refer to our responses to these to gain more understanding of our reasons):

[1]Government Industrial diseases compensation statistics www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090626/text/90626w0013.htm#09062662001966

[2]Working Group on Civil Litigation Costs *On a Slippery Slope: A response to the Jackson Report* February 2011 Chapter 6 (6.7)

1. The disenfranchised (Questions 1,2,4,5,6,7,19,40,41)

1.1 Any reforming government with a commitment to social justice will look to ensure we have a simple justice system that is responsive to public needs. The risk with these proposals is that thousands of people who have been injured through no fault of their own will be denied access to justice. That cannot be something we would imagine any government can be comfortable with.

1.2 People will be denied access to justice if success fees and ATE insurance are no longer recoverable.

1.3 Success fees enable lawyers to build up a "pot" to pay themselves in cases that are unsuccessful or not pursued after initial investigation and where there is no money to come in from the negligent party.

1.4 Of our cases over 30% of those we take on fail, most of them before commencement of court proceedings. But of those which we take to court 10% fail at trial or have to be withdrawn before then.

1.5 So in over 30% of our cases we are not paid. We have to rely on the ATE policy to cover unrecoverable disbursements and we fall back on the success fee pot from successful cases to cover the costs we have incurred in the cases which fail.

1.6 Non recoverability of success fees will have a devastating impact on claimants' ability to secure legal representation because, without that pot, lawyers will not have the funds to take on cases other than those that have high prospects of success.

1.7 Paragraph 100 of the consultation suggests retaining an element of the success fee that might be recoverable by the claimant, equal to 10% of the general damages.

1.8 While this would be preferable to total non-recovery, it does not resolve the issue of how the considerable costs of investigating cases will be paid for.

1.9 Thompsons' criteria for fighting a case is if it has a greater than 50% chance of success.

1.10 Under the reforms we calculate that in workplace accident cases our success fee pot will be almost 50% smaller than currently because the success fees will only be able to be taken from clients' damages, and they will be capped. This ignores the impact of enforced proportionality regardless of conduct.

1.11 In practice this means that the reduced success fees would no longer support pursuing cases that are 50/50 or better – a case would need to be 75/25 or better (higher in industrial disease cases).

1.12 Many of the cases we currently pursue will not meet a 75/25 test, even though the injured person may have a claim that would probably (but not definitely) settle or succeed at trial. Examples of the type of fast track claim that would not meet the 75/25 requirement under the proposals appear at the end of this section

1.13 Injured people like these will be disenfranchised because their case will take time to investigate or liability may be difficult.

1.14 Claimants unable to find a lawyer prepared to take on their claim, because there is no money to cover the legitimate costs of doing so, will fare no better by going to a compensation claims firm or even by dealing direct with a defendant insurance company.

1.15 Claims firms will, under these reforms, "cherry pick" and reject all but safe cases. Insurance companies will either reject an unrepresented individual's claim out of hand, or will offer them a settlement to go away that will be significantly lower than the actual value of the claim.

1.16 Representatives of the insurance industry may argue in their response to this consultation that unrepresented claimants are not treated in this way. The Frontier Economics report "Outcomes for legally represented and unrepresented claimants in personal injury compensation", commissioned by the Association of British Insurers in 2006, tried to show that unrepresented claimants received as much or more compensation than represented ones. The report was fundamentally flawed. A critique of the report carried out by Brian Critchley of the London Metropolitan University (**Appendix 1**) showed that the design of the research ignored important variables and that comparisons had not been done on a like for like basis.

"If I had been told by lawyers that they could not pursue my claim because it was going to be very expensive to run and the outcome wasn't certain then I would have felt cheated and disappointed."

All quotes are from Thompsons clients

Real examples of fast-track claims that would not meet the 75/25 requirements

1. A deafness case. Defendants initially argued the claim was out of time and sought a split trial to try that as a preliminary issue. Then they conceded the claim was in time. The defendants started off denying liability, but later admitted liability. The defendants obtained a medical report without approval and sought to dispute causation. Only when the case was listed for trial did they settle the claim for £4,500.

2. A fibromyalgia case – a condition for which causation is very difficult to prove. Liability was disputed throughout. It was necessary to obtain expert reports to prove the condition and causation and the case eventually settled for £6,750.

3. A claim by three brothers abused as children by a trainee Priest whilst in a Catholic children's home. The abuse occurred in the early 1970's and the complexity was such that they were listed to be tried together over three days in Newcastle. A month before the hearing the cases settled for between £5,000 and £7,500 each.

4. A psychological injuries case as a result of the cash centre where the client worked being subjected to two ram raid attacks. Liability was denied throughout and disclosure was resisted throughout as it involved sensitive security information. A specific hearing was required on disclosure before the documents were provided. The insurers then sought a further hearing to put their arguments on whether the client was a primary and/or secondary victim. Only after arguments were rejected did they agree to settle the claim for £7,000.

5. Facial injuries suffered by a client when the wooden post of a hammock bought in a well known DIY chain snapped. The client attempted to deal with the defendant herself and after evidence and reports the defendant offered £1,000 and then £1,700 when this was rejected. Thompsons being instructed and a new medical report obtained led to the defendants upping the offer to £8,000 and then eventually to £10,000, for which the case settled – 10 times more than the original offer.

2. The shortchanged (Questions 8,9,10,11,12,19)

2.1 We carried out a survey of 10,949 fast track work accident cases concluded between 1.5.09 to 31.12 10 with damages between £1,000 and £25,000 and 572 fast track industrial disease cases over the same period.

2.2 We attach the data for both accident at work and disease results as **Appendices 2 and 3**.

2.3 The analysis, based on an approach seen and not disputed by Jackson LJ in relation to case studies, demonstrates that CFA funded claimants will always lose under the proposals.

2.4 In accident at work cases we calculate the total loss will be over £**12 million** – an average loss of £1,096, amounting to **22.5%** of their compensation.

2.5 The loss increases as the case is pursued further from 21.3% in cases settled early under the Protocol, to 23.6% where the case is settled after court proceedings are commenced, rising to 26.3% where the claim is fought to trial.

2.6 This is a perverse incentive for insurers to drag a claim out, defend the indefensible and force the injury victim to accept lowball offers.

2.7 The figures also demonstrate that it will not be viable to pursue the cases to trial as only a fraction of the success fee is payable in the winning cases to cover the costs in the losing cases. It's like a bookie offering odds of approximately 4 to 1 on in a 2 horse race where both horses are equally matched, i.e. risk £1 on a 50/50 chance and the payout is only 26.8p if you win.

2.8 Again this amounts to the same perverse incentive on insurers to act unreasonably and force injury victims to undersettle their claims.

2.9 The vast majority of industrial disease cases are also in the fast track and our figures demonstrate that all claimants will always lose under the Jackson proposals.

2.10 The total loss over 572 fast track industrial diseases cases will be over **£1.2 million**, an average loss of £2,090, amounting to **28.2%** of their compensation.

2.11 Application of the Jackson proposed cap means that the disease case loss remains relatively stable wherever it settled, ranging from 30.8% to 27.4% to 28.7% (where the claim is fought to trial) but, because the proportion of the agreed success fee payable falls as the case proceeds from 68% to 40% to 17.7% (where the claim is fought to trial), there is again a perverse incentive for insurers to drag a claim out, defend the indefensible and force the injury victim to accept low offers.

"The government has got it wrong. People have a right to compensation if they have genuinely been injured because someone was at fault."

3. The misled

3.1 Sir Rupert believes that abolishing recoverability of CFA success fees and ATE insurance premiums would ensure that claimants on CFAs take an interest in the costs being incurred on their behalf and suggests that is important and will encourage costs transparency which will in itself drive down those costs to the benefit of the consumer.

3.2 We believe whole heartedly in transparency with respect to costs. However we do not believe that the proposed changes will empower the consumer, but rather, the reverse. It will encourage the issue of what are the correct damages in a case to be obscured.

3.3 We suggest that claimants having an interest in the costs of their case (for which read facing a deduction from their damages to pay their lawyer when they currently receive 100% of their true compensation) is an illusion that gives false hope. Lawyers will be forced to turn down cases that could be run under the current system and perverse incentives will apply to encourage claimants to settle early (for a figure that is likely to be less than the case is actually worth).

3.4 Forcing people to accept damages that are lower than their case is worth is not empowering them.

3.5 The idea that the claimant is in a position of strength to choose knowledgably between lawyers as if they were soap powders is a nonsense. The claimant is usually a first time user of a personal injury legal service and therefore has no experience to fall back on as to either costs or damages. They are also injured and therefore vulnerable and not in a good position to make an informed choice.

3.6 Unless it is a rear end shunt, claimants don't know if their case is meritorious. And they won't know if it was turned down because the lawyer didn't want to incur the costs of investigating it.

3.7 They won't know if the advice they are being given to accept an offer is the right advice or because their solicitor is anxious to settle the claim quickly in order to avoid running up any further costs that they cannot get back.

3.8 And even if a market develops where the claimant is able to compare prices between lawyers that is no comment on quality. Cheap or no cost representation – we suspect the choice will be between the "no deduction from your compensation" claims firms who will lead the rush to the bottom by ruthlessly cherry picking only the best cases, and a scale of deductions from others – when the lawyer has nothing to fall back on if they don't win says nothing about the quality of the service.

3.9 The reality is that an injured person isn't able to stop their lawyer either avoiding costs in this way or properly incurring further costs that the claimant would not wish to be incurred.

3.10 Neither will increased availability of Before the Event (BTE) insurance create greater transparency. The opaque financial relationship between insurers and their panel law firms can only ever cloak the service a claimant receives in secrecy.

3.11 The irony is that this dramatic change is unnecessary in any event: the existing CFA and costs system already provide the transparency that Jackson LJ seeks. Costs can only be incurred if they are reasonable and proportionate to secure a fair settlement.

3.12 And for a government looking to save public money, undersettlement means individuals may then become reliant on state benefits when, had they pursued or received full compensation, they wouldn't be.

"I couldn't believe the amount of work my lawyer did for me and my family over the years, especially as it was very uncertain if it would get anywhere because it was so complicated. It took three years to get justice for me and my family. I could never have afforded to pay for that myself. But now, who will pay lawyers to dedicate that sort of effort to a case?"

4. The enriched

4.1 Jackson's proposals offer no savings to government, will result in costs to society but will save insurers millions of pounds.

4.2 There is no precedent that we can find that shows insurers who have saved money through reform of the legal process will reduce their premiums in response. Indeed Dominic Clayden of Aviva says that premiums will have to rise if Jackson LJ's recommendations are implemented in full[3]. Those who will benefit are not the consumer but the insurance company shareholder.

4.3 A reduction of claims by 25% will impact on CRU and NHS recovery. On 2009/10 figures there would be £39 million (25% of £154.7m) less recovered.

4.4 There would also be a significant impact on VAT recovery because there would be fewer experts instructed and fewer lawyers' bills submitted.

4.5 The only scope for savings for the government would be as defendant, if claimants are put off bringing a claim altogether and/or if less costs have to be paid out in defending the cases that were still brought, even if, for the claimant, that meant poorer representation.

4.6 Putting claimants off from claiming does not mean employers are any less negligent. If employers know that injured employees will not be able to pursue claims then they will take short cuts with health and safety to save money and increase profits.

[3]**Insurer claims public will pay more if Jackson is implemented** Law Society Gazette Thursday 25 February 2010

RTA portal and faster settlements (Question 41)

Thompsons wants to see cases settling more quickly than they do. We have long called for the courts to rigorously enforce the PI protocols and to punish "bad behaviour" by parties who allow claims to drag on instead of entering into proper settlement negotiations.

There is no need for the government to be looking at all this reform when rules already exist and systems are being tested and improved that are can produce earlier settlements.

Faster settlements should not however be achieved by the undersettling of claims.

The RTA portal for 75% of all PI cases, is said to be having a significant impact on case duration, with claimants getting their damages faster. It appears that the number of claims notification forms are on target to exceed 500,000 in the first year.

Insurers are said to be reporting considerable savings, while there is no indication that claimants are receiving less damages.

While there are inevitable teething problems, there is said to be confidence among all parties that they will be ironed out.

However, it is too early to say for sure that the portal is a success and it certainly needs to be allowed to bed down for at least 18 months.

"My employer wouldn't admit liability for my injury until they had all the medical reports and other papers which proved what had caused it. It took two years for them to eventually admit liability and settle. Yet it was only a few thousand pounds compensation we were asking for."

"The prospect of losing a big chunk of my compensation to a lawyer would have stopped me claiming. As it is I got free legal representation through my union and kept all my damages."

The questions

Section 2.1 – Conditional fee agreements and success fees

Q1. Do you agree that CFA success fees should no longer be recoverable from the losing party in any case?

No.

Success fees are paid to lawyers in successful personal injury cases by the negligent party to recognise the fact that under conditional fee agreements (CFAs) no costs are payable in the cases which do not succeed.

The recoverability of success fees enables personal injury (PI) law firms to build up a fund. That fund is not only for their own costs in cases that are lost and unsuccessful but also the costs of investigating cases that subsequently cannot proceed as they do not have reasonable prospects of success.

Thompsons will pursue a case if it has more than a 50% chance of success. Yet many of the cases we receive don't attain that threshold and cannot proceed after investigation. Investigation costs money. If a solicitor cannot pay for that investigation work from the fund built up by success fees recovered, then they will have to charge to investigate those cases.

People injured through no fault of their own, who have a legitimate but less than straightforward case, will be unable to find a lawyer willing to accept their case on the revised CFA terms. This will be a denial of justice.

Ending the requirement for insurers to pay success fees will cut by a fifth at least the costs that enable claimant lawyers to run a practice that offers free access to justice to all who are negligently injured and to properly identify those who have a case with a greater than 50% chance of success.

Jackson LJ and other senior judges apparently believe that injured people should have a stake in the costs associated with their case because, the argument goes, this will keep costs low.

There has been no evidence produced to demonstrate this or, if there was evidence, whether there would be any adverse consequences.

If the reasoning is that having an interest in the costs of the case will mean that claimants shop around for the cheapest deal and so lawyers reduce the success fees they deduct to very little or nothing, that in itself will do nothing for quality and will encourage cherry picking of cases likely to win. We cannot see what positive implications this has for claimants or for access to justice.

In the US, where money is taken from injured people's compensation, the costs are much higher than in England and Wales.

Q2. 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 accidents and employer's liability) where the recoverable success fee has been fixed?

Yes.

As a result of an industry wide agreement mediated by the Civil Justice Council (CJC) success fees are fixed in 80% of PI claims. The process used extensive data collected by Professor Paul Fenn. Thompsons was the biggest claimant supplier of data to that process.

The result has been a lasting agreement across the industry and should in our view be a model for other areas of litigation.

Figures were agreed based on a complex "decision tree" methodology which sought to ensure that success fees broadly equated to the costs incurred but not recovered in failed cases. The figures are reasonable in amount and were accepted by the insurance industry, e.g. 12.5% in road traffic cases, 25% in workplace accident cases and so forth.

The cornerstone of the system incorporates a basic success fee which only reaches 100% in those very few cases proceeding to trial (where it must follow if the defendants haven't settled, the risks are considered by them to be at least 50/50). Although 100% success fees are only paid in a small minority of cases, it preserves access to justice for all cases including the riskier claims.

A flat rate success fee would have rendered risky cases uneconomic: a far greater risk of a major loss of income but no commensurate increase in payment. The current arrangement also, neatly, encourages early settlement where the basic success fee applies.

The aim of the mediation was that the success fees once fixed should be cost neutral. It proceeded on the basis of a "basket" of cases, some of which would not proceed, some of which would be lost and some of which would be won.

The process ensured that access to justice was not damaged and that risky but meritorious cases would still be pursued.

When the statistical modelling carried out for the CJC indicated that the cost neutral success fee for accident at work cases was approximately 27%, further complex modelling was undertaken to produce staged success fees.

The result was one figure applicable in cases settled pre-trial and another for those which are fought to trial. Based on the logic that no insurer would fight a case to trial unless there was at least a 50% chance of a successful defence, the success fee was set at 100% for accident at work cases which proceed to trial, but a reduced success fee for settled cases at 25%.

By recommending that success fees no longer be recoverable, Jackson LJ appears to disregard the detailed work (which, took time but could be objectively justified and was agreed by insurers and claimant lawyers alike) done by people, particularly Paul Fenn, who went on to be members of his own review team.

There is no justification for shifting the burden from the losing, negligent party to the injured consumer. Fixed success fees are cost neutral. Indeed it is perverse to propose reforms which favour the stronger party and hit the weaker injury victim. Jackson LJ himself accepts there exists an asymmetric relationship in personal injury cases (Chapter 19 para 1.3 (ii)).

Q3. 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?

Yes.

Q4. 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?

No.

Q5. Do you consider that success fees should remain recoverable from the losing party in certain categories of case where damages are sought eg complex clinical negligence cases?

Yes. Success fees should be recoverable in all personal injury and clinical negligence cases. The relationship between claimant and defendant is accepted as being an asymmetric one, by its nature economically unequal. A defendant has deep pockets, easily able to defend claims and only required to deny. The injured claimant has to prove their case and has not got anything like the same resources.

Without recoverable success fees, it will be financially unviable in many cases for consumers to pursue claims.

Q6. 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?

i) The maximum recoverable success fee should be 100%.
ii) The model fixed by mediation and signed up to by the insurance industry should remain (see our response to Q2 above).

Q7. Do you agree that the maximum success fee that lawyers can charge a claimant should remain at 100%?

Yes. The maximum success fee does not get paid in the vast majority of cases because 98% of cases do not go to trial. The maximum success fee protects claimants where defendants fight cases all the way.

Q8. 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?

We do not agree with the premise of the question.

In our view there should not be any deductions from claimants' damages. No amount of damages should be charged as a success fee.

Success fees should be recoverable from the defendants in successful cases: they were negligent and they, not the injured claimant, should pay out of compensation for the claimant's injuries, losses and expenses related to the accident.

We cannot comprehend how there would be an appetite for deductions from damages which have caused such a furore in the media and elsewhere, have caused chaos in equal pay claims and have been condemned by consumer groups.

The proposal appears to be based on the US system where lawyers take a slice of the claimant's winnings. However, damages in the US are significantly higher than in the UK, to take account of the deductions.

Justice for consumers, working people and the vulnerable, will suffer if there are deductions.

The question exposes how wrong it is to end recoverability. Where there is recoverability the claimant loses out whether there is a cap or not.

Without a cap on deductions, claimants risk losing more or in some cases all their damages. Yet a cap will also mean that some with more difficult but currently viable cases will get nothing because the capped success fee will not reflect the risk in pursuing the case so lawyers will not take their claim on.

A deduction may not put off a road traffic accident victim (where there are no personal repercussions), but for a workplace accident victim pursuing a claim against their employer, with all the potential work ramifications that go with that, the risk of losing the case or the prospect of having to hand over a significant proportion of their compensation to their lawyer may deter them from claiming altogether.

The question suggests that deductions are politically acceptable per se but the cap is a device to mitigate any political embarrassment such a change causes. This misses the point. Capping success fees means ignoring the extensive data of a member of Jackson LJ's team and the costs neutral success fees conclusion that has industry wide agreement.

Q9. If your answer to Question 8 is yes, should the cap be:
(i) 25% or
(ii) Some other figure (please state with reasons)?

We do not support deductions. In our view the question of a cap should not arise. See our response to Q8.

Q10 If your answer to Q8 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?

We do not support deductions. In our view the question of a cap should not arise. See our response to Q8.

"If a lawyer had said that I needed to pay several thousand pounds up front for a medical report, I couldn't have done it."

Section 2.2 – After the Event Insurance premiums

Q11 Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?

No.

A consumer is able to risk pursuing a claim because they can take out an ATE policy to cover potentially substantial disbursements incurred to investigate and pursue their case – disbursements which are not recoverable if their case is turned down or lost. In addition they are liable for the defendants' costs.

If ATE were no longer recoverable, there would have to be a **genuinely alternative mechanism** for claimants to be able to pay for unrecoverable disbursements. One option might be self insurance for disbursements under a modified s30 of the Access to Justice Act 1999 or using the current model for enhanced recoverable success fees in s30 cases which is specifically designed to provide cover for disbursements.

Thompsons sees many clients with cases worth less that £25,000 where the costs of disbursements are particularly high because of the difficulties with proving causation. See **Appendix 4**.

In successful cases, the polluter pays ('loser pays all') and the consumer gets the ATE premium back from the losing party.

If the case is turned down or lost the ATE policy covers unrecoverable disbursements in running the case, such as for an independent medical report, as well as the other side's costs.

The existence of ATE and the recoverability of the premium in cases that are won doesn't mean that lawyers pursue cases regardless as to whether they win or lose. As with any insurance, if too many cases are lost insurers will refuse to provide cover. In addition the lawyer on a CFA would have insufficient in their 'pot' from success fees to pay own costs in the cases lost.

It is suggested by Jackson LJ that the consumer's risk as to the other side's costs should be taken away by the introduction of "one way costs shifting" (OWCS). But that concept is both qualified and very vague. It is based on judicial discretion which is not exercised until the end of the case when the decision as to whether to take out ATE will have been taken at the beginning of the case when the facts and evidence available would have been very different.

If OWCS were to be unqualified or the qualification set out clearly such that only very exceptional cases were exempted (say those pursued against uninsured individuals or those brought by the very wealthy) then the risk of having to pay the other side's costs would go and one part of the liability being covered by the ATE policy (and therefore one part of the cost of the ATE premium) could be removed without an adverse impact on consumers.

However, whether costs are shifted, qualified or unqualified, will not deal with the question of who is going to pay for a medical report and other disbursements if a case is lost or cannot be pursued. If there is no ATE, consumers will either find that lawyers will not take a case on or they will be asked to pay disbursements up front.

With unqualified OWCS in place the reduced risk will reduce premiums by, we estimate, about a third.

Consumers likely to be hit particularly hard by having to meet the cost of a medical report at the start of their case would be those suffering from diseases such as dermatitis or asbestos related conditions. There is an unavoidability about having a medical report – the cost of which can be substantial, though the damages in the case may not be – in industrial deafness and RSI cases. In all these case types causation is almost always an issue and can only be established by evidence from medical experts.

Real case studies that show the cost of disbursements in complex claims below £25k are included at **Appendix 4**.

Q12 If your answer to Q11 is no, please state in which categories of case ATE insurance premiums should remain recoverable and why.

ATE insurance premiums should be recoverable in any case where disbursements are incurred or there is a risk that the claimant will have to pay the other side's costs.

Q13 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.

This is already the position under *Sarwar -v- Alam [2002] 1 WLR 125*.

Trade union funding is however wrongly referred to (on page 63 of the consultation) as alternative funding. Union funding is not akin to Before the Event (BTE) insurance. In cases funded by unions, the claimant correctly recovers either ATE (where the union funding does not extend to disbursements or opponent's costs – hence there is no alternative funding for those costs/disbursements such that ATE is properly required) or a self insurance additional amount under arrangements in accordance with S30 of the Access to Justice Act 1999.

"I am very concerned that if people like me are unable to pursue our claims in the future that employers will start cutting corners with health and safety because they won't be concerned about legal action."

Q14 Do you consider that ATE insurance premiums relating to disbursements only should remain recoverable in categories of civil litigation?

Yes but as outlined in response to Q11, only if there are alternatives. There would also need to be genuine one way costs shifting, not the qualified discretionary version proposed by Jackson LJ.

Q15 If your answer to Question 14 is yes, should recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?

No. Otherwise who is to pay counsel's fees in cases which do not succeed? ATE recoverability should only be limited in this way if litigants can obtain alternative protection against having to pay the costs of legal representatives such as counsel, e.g. by a CFA with counsel where there is a recoverable success fee.

Q16 If your answer to Question 14 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?
We refer to our response to Q13. The issue of alternative funding is already adequately covered by existing case law.

Q17 How could disbursements be funded if the recoverability of ATE insurance premiums is abolished?
If ATE were no longer recoverable there would need to be genuine OWCS and then either self insurance for disbursements under a modified s30 of the Access to Justice Act 1999 or the current model for enhanced recoverable success fees in s30 cases, which is specifically designed to provide cover for disbursements.

Q18 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?

No.

Firstly self insurance has been established as an efficient, cost-effective means to provide cover at premiums which are (and by statute must be) lower than the equivalent ATE premium.

Secondly self insurance under s30 not being subject to indemnity limits means it can be used in complex or heavily contested multi track claims and in test cases where the membership organisation is prepared to take considerable risk in the wider interests of its members.

ATE which is entirely commercial would either have huge premiums or refuse to cover.

Section 2.3 – 10% increase in general damages

Q19 Do you agree that, in principle, successful claimants should secure an increase in general damages for civil wrongs of 10%?

The Law Commission Report number 257 Damages For Non Pecuniary Loss (1999) made recommendations that damages for non pecuniary loss for certain PI cases should be increased.

It did so on the basis that "a constantly recurring theme which emerged across the range of responses was that the views of society as a whole should be taken into account in determining the level of damages in non pecuniary loss in PI cases. It was felt by a great many that this would require an increase in awards" (paragraph 3.14).

The shortfall in the levels of awards were considered to be less significant for more minor injuries but in their consultation the commission found that "at least 50% considered that damages for non pecuniary loss are too low across the board" (paragraph 3.5). They considered that 'serious' personal injuries should be considered to be cases where damages for pain, suffering and loss of amenity for the injury alone would be more than £2,000.

They also considered that awards of between £2,000 and £3,000 should have tapered increases by less than a factor of 1.5 (an award of £2,500 would be uplifted by around 25%, to £3,125 for example) (paragraph 3.110).

The commission's recommendations were considered by the Court of appeal in the case of *Heil -v- Rankin [2000] 3 All ER 138*. The Court of Appeal declined to follow the recommendations except to a limited extent and only to cases in excess of £10,000.

We endorse the position of the Law Commission and support an increase in damages as recommended including cases valued between £2,000 and £10,000.

It would be adding insult to injury to not implement the Law Commission recommendations, thereby keeping damages artificially low, whilst awarding a nominal 10% increase in order to provide a 'sop' towards the deductions from the compensation that will inevitably result from ending recoverability of success fees and ATE/s30 premiums. The net result after the new deductions would mean that whilst damages would nominally increase the net amount receivable by the claimant would decrease.

"If there is nothing in place to ensure that people can go to work safely and to sue their employers if they are injured then we go back to Victorian times."

Indeed we are not convinced that the vast majority of claimants will get the 10%. Over 90% of PI cases settle and if we can take it as read that insurers will not volunteer to pay it (Dominic Clayden, director of technical claims at Aviva, is on record that insurers do not accept the 10% increase and that they will simply pass the cost on to policy holders if made to pay it *Law Society Gazette 25 February 2010*), then who enforces it? Will it be proportionally and politically acceptable, let alone practical, to proceed to trial for £1,500 in a case with general damages of £150?

The reality is that insurers will continue to make global offers in the same amount as at present but claim to have factored in the extra 10%. The proposals to end recoverability and introduce a new proportionality test will prevent any claimant challenging that.

In addition, even if it was paid it would, effectively, create a two tier justice system – those with BTE would retain the extra 10% whilst all other litigants would have to use it and more to pay the success fee and to pay for ATE or disbursement funding.

At **Appendix 5** we give real examples of the very significant losses claimants will incur.

Q20. Do you consider that any increase in general damages should be limited to CFA claimants and legal aid claimants subject to a SLAS?

We understand that this question refers to the proposal at paragraph 100, although it does not reflect the refinement set out there.

The suggestion that claimants on a CFA can recover part of the success fee capped at 10% is certainly a better option than the proposed ending of recoverability combined with 10% extra general damages. For the reasons outlined in answer to Q19 we do not believe that claimants will receive the additional 10% damages.

This proposal would at least mean the 10% would be recovered and it could then be used to reduce (although not eliminate) the need for deductions.

Indeed we consider the 10% figure could be increased and the proposal would still be better for insurers and government as the 10% payment would then be confined to CFA cases (about 30% of the total) and would not be payable in the vast majority of cases, such as road traffic claims funded by BTE.

Section 2.4 – Part 36 Offers

Q21 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?

Yes, though in practice combining it with the ending of recoverability of success fees and ATE/s30 premiums and a proposed new proportionality test makes it a hollow proposal. Claimants are unlikely to be able to pursue a case to trial to get the extra 10%, as they will lose more than they will gain. This would make it a smokescreen to mask the true effects of the wider proposals.

Q22 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)?

Yes.

Q23 Do you agree that the proposal should apply to incentivise early offers?

Yes. It should be 10% if offered post allocation and more if offered earlier.

Q24 Do you consider that the increase should be less than 10% where the amount of the award exceeds a certain level?

No.

Q25 Do you consider that there should be a staged reduction in the percentage uplift as damages increase?

See the response to Q23 above.

Q26 Do you agree that the effect of Carver should be reversed?

We understand that *Carver* has already been reversed. We agree that it needed to be.

Q27 Do you agree that there is merit in the alternative scheme based on a margin for negotiation as proposed by FOIL?

No. The FOIL proposal penalises claimants for rejecting an offer. This institutionalises undersettlement and further adds insult to injury by expressly penalising a claimant who refuses to accept an offer which is 10% lower than their legal entitlement. It has already been rejected by government in relation to the RTA Claims Process and is a proposal which goes further than the discredited *Carver* decision.

Section 2.5 – Qualified one way costs shifting

Q28 Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraph 135-137)?

No. The approach is far too vague. We refer to our comments in answer to Q11 about OCS.

Q29 Do you agree that QOCS would significantly reduce the claimant's need for ATE insurance?

No. It would only reduce the premium. Please see our responses to the ATE section questions above.

Q30 Do you agree that QOCS should be extended beyond personal injury?

Genuine OCS (or refined QOCS as outlined above) can apply to any case. This would include employees claiming against their employer where the relationship is asymmetrical – economically unequal.

Q31 What are the underlying principles which should determine whether QOCS should apply to a particular type of case?

We refer to our answer to Q30 above.

Q32 Do you consider that QOCS should apply to:
(i) claimants on CFAs only or
(ii) all claimants however funded?

Genuine OCS (or refined QOCS as outlined above) can apply to all claimants, except those with BTE funding.

Q33 Do you agree that QOCS should cover only claimants who are individuals?

Refined QOCS as outlined should primarily cover individuals but there may be situations where a small business finds itself in the same asymmetric position in litigation against a large company and could apply for refined QOCS to apply.

Q34 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?

Yes, for the reasons given above.

Q35 If you agree with Q34, do you agree with the proposals for a fixed amount of recoverable costs (paragraphs 143-146)?

No. There should be sufficient flexibility in refined QOCS to deter frivolous and vexatious cases.

"Having to hand over a chunk of my damages to my lawyer so that they can cover their costs would have added insult to injury."

Section 2.7 – Alternative recommendations on recoverability

Q36 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?

We do not agree with the question. The current legal process with some modifications as set out most effectively delivers access to justice at proportionate cost. **However, Alternative Package 1 is certainly the best alternative package** suggested when compared to the proposals of Jackson LJ to end all recoverability.

By allowing for a fixed recoverable success fee in all areas where CFAs are commonly used subject to the restrictions referred to and allowing for recovery of ATE premiums where indicated, Alternative Package 1 would penalise claimants less heavily than Jackson LJ's primary proposals, would enable insurers to make considerable savings and would encourage early settlement.

But as outlined in the response to Q13 above, other than reversing *Kilby -v- Gawith [2009] 1 WLR 853*, there is no need to make any changes in relation to alternative funding as this is already covered by existing case law. As indicated the consultation paper misunderstands the position in respect of union funding.

Q37 To what categories of case should fixed recoverable success fees be extended? Please explain your reasons.

Fixed recoverable success fees could be extended to all categories of case as long as they are fixed by mediation (see our response to Q2 above) rather than by an arbitrary process and only if 100% success fees remain recoverable for cases that succeed at trial as those cases must be accepted by the insurers to be at least 50/50 or they would not fight them to trial.

We would support extension of fixed recoverable success fees if the current model is applied.

Q38 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?

If recoverability of ATE remains then the same should apply to self insurance and if Alternative Package 1 is adopted self insurance should be treated in the same way as ATE and be recoverable in the same circumstances.

Self insurance has been established as an efficient, cost-effective means to provide cover at premiums which are, and by statute must be, lower than the equivalent ATE premium. In addition self insurance under s30 is not subject to indemnity limits which can leave the claimant without cover in complex or heavily contested multi track claims.

Section 30 funding has also been utilised in test cases where the membership organisation is prepared to take a considerable risk, taking into account the wider interests of its members. That is not the position with ATE which is entirely commercial.

Q39 Are there any elements of the alternative packages that you consider should not be implemented?

Success fees and ATE should continue to be recoverable during the protocol period so that the many pay for the few. This point was accepted by the House of Lords in *Callery -v- Gray [2002] UKHL 28*.

Non-recovery of success fees in low risk cases that settle quickly means there is less going into the fund to pay for investigation of the cases that do not proceed and the higher risk cases that do. This inevitably means that success fees should properly rise in those cases in order to continue to deliver costs neutrality.

ATE premiums would have to rise for the same reason. It is already the case that staged premiums are common – a lower premium is payable in cases that settle early. This provides an incentive for insurers to settle early but ensures the proper spreading of risk rather than concentrating that risk on the remaining cases which inevitably carry a higher risk in any event.

Increasing the success fees and ATE only in higher risk cases will lead to complaints based on proportionality in those cases. If Alternative Package 1 is to be implemented, there would need to be appropriate provision to ensure premiums and success fees remain fully recoverable in those cases.

"I'm worried that if people like me can no longer get a lawyer to take on their case then employers will stop caring about health and safety. It's bad enough already in the NHS."

Section 2.8 – Proportionality

Q40 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?

No. We strongly disagree with this.

We assume that this question refers only to multi-track cases because Jackson LJ's proposal was for costs to be fixed in fast track cases and a proportionality test cannot apply to fixed costs that are fixed by reference to value in any event. Jackson LJ has not proposed that a proportionality test apply to fast track cases.

The recommendations would seriously undermine access to justice.

References to proportionality tend to focus on a simple equation applying the ratio of damages to costs or vice versa and that bears no relation to CPR 1.1 (2) (c) which refers to:

c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved
(ii) to the importance of the case
(iii) to the complexity of the issues
(iv) to the financial position of each party.

As pointed out in response to Q2, Jackson LJ himself accepts that the claimant in a personal injury case is in an asymmetric relationship with the defendant and, in order to pursue the case and access to justice, needs to be able to recover the costs they properly and reasonably incur.

Despite acceptance of the lack of symmetry – point (iv) in CPR 1.1(2)(c) – the proposal is that only one limb of proportionality be considered, i.e. the proportionality of costs to the amount of money involved. This ignores:

- The importance of the case [CPR 1.1(2)(c)(ii)] and;
- The complexity of the issues [CPR 1.1(2)(c)(iii)]

The effect is that even where costs are necessary to pursue the case, they are not recoverable if they are not proportionate to the amount of money involved.

Jackson LJ and the consultation paper appears to countenance the prospect of leaving a claimant with a perfectly meritorious case where the damages are low in relation to the costs properly incurred with three options:

1. Withdraw the case.
2. Undersettle the case in the face of a low offer.
3. Continue with the case and have to pay non recoverable costs.

We cannot see how this is acceptable in a system that both recognises inequality between the parties and professes to address that whilst maintaining access to justice.

It is a denial of justice rather than access to justice and it conflicts with the established Court of Appeal authority in

Lowndes -v- Home Office [2002] EWCA Civ 365.

The reality is that costs are already proportionate in the vast majority of cases and that would continue to be the position in the fast track with the fixed costs proposed and in the multi track with the courts applying the Lowndes test in the few cases where proportionality is an issue.

Q41 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?

We have consistently set out a positive agenda for controlling costs by claimant and defendant representatives working together to achieve early offers of settlement.

We are committed to supporting pro-active reform of the legal process designed to improve that process for litigants including PI claimants that will deliver access to justice for injury victims at a reasonable and proportionate cost.

We welcome the approach of Zurich Insurance, with whom Thompsons settles more cases than with most other insurers put together. Zurich has adopted a far more reasonable position than the more "hawkish" insurance companies, based on the importance of adequate independent representation, early settlement and a pro-active approach to rehabilitation.

Zurich has played a leading role in ensuring that in recent years cross party agreement has been reached on a number of issues following constructive assistance and mediation facilitated by the Civil Justice Council (CJC).

The fact that the PI claims process has been undergoing constant reform in recent years means that it is important for this consultation to be mindful of and linked into those developments.

Neither Lord Jackson's LJ's report nor this consultation make much of the central role of the CJC in recent years in successfully facilitating industry wide agreements which have taken the heat out of the "costs war" waged by a number of insurers as a backlash against the introduction of the current recoverable CFA and ATE model.

When the MoJ took up the agenda of PI reform with the Claims Process consultation from 2006 to 2008, the CJC retained a central role and in 2009 secured a mediated agreement on the new Claims Process for RTAs.

This not only demonstrates the progress that continues to be made with the support of the CJC, but it also confirms that whilst some insurers will pursue an uncompromising line, sufficient insurers have been prepared to engage in constructive dialogue that all party agreement has been possible.

We would urge this consultation process to recognise and build on this. Jackson LJ and ministers have recognised the importance of conciliation, mediation and agreement and we agree.

"Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. He recommended a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring. And that small businesses in particular should be made aware of the benefits." (Chapter 6 Final Report).

Reviews are only ever a temporary process based on a snapshot at a particular time. Recommendations that emerge may or may not be taken up wholly or partly by the politicians of the day. Lasting reform almost always requires careful, ongoing and detailed work bringing together both sides of a debate. It is a vital role that standing bodies such as the CJC play well.

Our proposals below are based on years of experience in tens of thousands of cases, backed up by extensive statistics which we have shared when asked to do so with Jackson LJ and the CJC.

The ultimate key to ensuring proportionate costs is early settlement. Early settlement can be achieved in many more cases than at present if there are clear rules and proper enforcement of those rules. Every effort should be made to encourage and to incentivise early settlement to which the parties are then bound.

We propose:

- Compulsory pre-action settlement discussions;
- Claimants' Part 36 offers with teeth to include additional damages;
- Unambiguous rules to ensure compliance with pre-action protocols and to enable consistent enforcement of those rules by the courts;
- A reversal of the burden of proof where protocol response on liability is delayed;
- Measures to ensure conflict of interest is stripped out of the claims process and that claimants receive truly independent legal advice throughout;
- Streamlining the litigation process by simplifying the procedures for directions and witness statements;

"I looked into suing without a lawyer and then I went to several different lawyers asking if they would take on my case. They either gave me wrong information or they turned me away. It was incredibly stressful. I had been done an injustice, all I wanted was for that to be recognised. Then I went to Thompsons and it was a massive relief that someone was prepared to take the case on."

- Damages reform to ensure the Law Commission recommendations are fully implemented and that minor injury claims in particular are adequately compensated;
- Abolition of the indemnity principle to put an end to technical costs challenges.

The new Claims Process is aimed at the vast majority of personal injury claims i.e. those under £10,000. Again we say it should be allowed time to 'bed down' and its effectiveness reviewed before proposals that do not match costs recoverable in pursuing the claim to work required are allowed to distort the process and produce a fundamental inequality of arms.

Q42 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.

Our response would not change. The alternative recommendations may make the recommendations less damaging, but they are still a denial of access to justice.

Q43 Do you agree that revisions to the Costs Practice Direction, along the lines suggested (at para 219), would be helpful?

We do not agree with Sir Rupert's definition of proportionality and therefore that there is a need for revisions to the Costs Practice Direction. The key to ensuring proportionate costs is early settlement of cases rather than restricting the weaker party's ability to fight the claim. In our experience costs reflect the work done and are recovered only where reasonable and proportionate based on the current test of proportionality. If they aren't already proportionate defendants can, and do, challenge them.

Q44 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?

The current position on proportionality provides adequate protection to both sides. Defendants are able to challenge costs assessed on the basis of reasonableness. A court will decide on the appropriateness of that challenge, or not.

Even if the costs are reasonable they can be challenged on the basis of proportionality in which case the costs would have to be necessary. This achieves a fair balance between the parties and delivers access to justice.

In our experience, and in particular in relation to disease claims, proportionality issues will often arise due to damages being frequently low but costs invariably higher than in accident cases due to the complexities of the case.

The court should – and CPR 1.1 (2)(c) encourages this – properly take into account the wider considerations of a case when assessing damages. This is fundamental to access to justice. Such considerations might include the importance of exposing health and safety failures or establishing new law/liability in a test case.

Section 2.9 – Damages-Based Agreements

Q45 Do you agree that lawyers should be permitted to enter into damages-based agreements (DBAs) with their clients in civil litigation?

No.

Q46 Do you consider that DBAs should not be valid unless the claimant has received independent legal advice?

They should not be valid at all. If this is not accepted then, yes, one of the pre-requisites should be that the claimant has received independent legal advice.

Q47 Do you consider that DBAs need specific regulation?

Yes

If so, what should such regulation cover?

The rules governing solicitors operating DBAs need to set rigorous standards. The current Solicitors' Rules simply require cost information to be provided "at the outset". They do not set any standards for the content and quality of that information nor for that information to be provided before a DBA is entered into.

Solicitors should be obliged to provide, in plain English, transparent and detailed information about the terms of the DBA. It should be clearly explained to claimants what the solicitor's costs will be and what percentage deduction will be made from their damages, including all disbursements if they are deducted in addition.

If charges for disbursements over and above the percentage deduction from damages are to be permitted, there should be guidance as to the circumstances in which such additional charges can be made.

Solicitors must explain that the percentage deduction may be far more than if the claimants had opted for hourly advice. They must also explain, in plain English, whether the percentage includes VAT. Ideally this would be a simple tick box format that the legal representative is obliged to complete.

Solicitors should be professionally obliged to enquire if a claimant is a trade union member or has other legal cover and to tell union members that they are entitled to free, independent legal representation through their union. The solicitor should be required to make a file note of their enquiries and a file note of their advice to those who have alternative legal cover.

All this information should be provided before the claimant signs a DBA agreement together with full details of the arrangements for terminating the retainer early and those arrangements must be fair and transparent.

There must be established a system for claimants to be able to challenge overall costs under DBAs.

Q48 Do you agree that, if DBAs are allowed in litigation, costs recovery for DBA cases should be on the conventional basis (that is the opponent's costs liability should not be reference to the DBA)?

Yes.

Q49 Do you consider that where QOCS is introduced for claims under CFAs, it should apply to claims funded under DBAs?

Yes but we agree with neither QOCS as proposed, nor DBAs.

Claimants in claims funded by a DBA will often be in an equally asymmetrical relationship with the defendant as those on a CFA.

A claimant given the impression that pursuing a claim under a DBA presents no financial risk to them is under a misapprehension. The claimant will have to pay a charge for the cost of representation in terms of a percentage fee deducted from their damages and may have to meet the costs of additional expenditure such as disbursements.

Q50 Do you consider that the maximum fee lawyers can recover from damages awarded under a DBA in personal injury cases should be limited to:

(i) 25% of damages excluding any damages referable to future care or losses as proposed, or

(ii) Some other figure?

Please give reasons for your answer.

We do not agree with the question. We oppose deductions from damages under any system of funding and oppose the extension of DBAs to personal injury claims. If Jackson LJ's proposals are implemented why would a lawyer consider a DBA as a success fee would achieve the same financial outcome for the lawyer?

However we do believe that a general cap should be introduced in any case funded by a DBA. The Moorhead and Cummings research – *Something for Nothing? Employment Tribunal Claimants' perspectives on legal funding? (2009)* – suggested a cap of 25 to 30%.

This would go some way to protecting consumers against excessive and disproportionate charges by representatives.

The general cap should also be subject to the requirement that the total charges made should be proportionate, taking into account the particular circumstances of the claim. The factors which also should be taken into account would include the type of claim, the likely time involved, the likely level of expenses and the litigation risk.

We believe that the general cap should apply not only to the percentage deduction, but also to additional charges that may be levied on the claimant so as to provide an overall maximum of what the claimant may have to pay.

Q51 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?

No. We oppose DBAs and deductions from damages. We refer to our response to Q50.

Q52 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 it be different in different categories of case?

See our response to Q50.

Q53 How should disbursements be financed by claimants operating under DBAs?

See our response to Q50.

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?

We have no comment as we do not advocate litigants bringing civil proceedings without appropriate legal representation.

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)?

See response to Q54 above.

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

See response to Q54 above.

"The legal system makes it difficult enough already for people like me to get justice. The government seems only interested in saving businesses money, not in justice for people who have been injured."

Impact Assessments

Q 57 – Do you agree with our assessment of the competition impact of these proposals?

We do not agree with the impact assessment's conclusion that implementation of these proposals is likely to increase competition between legal firms. As said above, claimants are not in a position of strength to choose knowledgably between lawyers as if they were soap powders.

If a market does develop where claimants are able to compare prices between lawyers it will be a choice between cheap or no cost representation or a scale of deductions. These choices say nothing about the quality of the service but will simply be a rush to the bottom.

Many solicitor firms unable or unwilling to compete on that basis will go out of business. A particular impact will be on small businesses who will no longer be able to provide a viable personal injury service.

This will result in further restriction on access to justice.

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

It is not a question that the proposals "might" impact disproportionately on small legal firms or that they "could" face a reduced income if they are no longer able to charge 100% success fees in successful cases, as the impact assessment suggests. The proposals **will** impact disproportionately on small legal firms and they **will** face a significantly reduced income if success fees are no longer recoverable.

The impact assessment also states that small firms would benefit from the increase in hourly rates for litigants in person, and would be able to recover a significantly higher hourly rate for work done in preparing their case than is currently permitted. We do not accept this. A litigant acting in person, by definition, does not have a lawyer. So the fees recoverable by the litigant are not payable to any law firm, so there would be no benefit to a law firm.

If this is referring to the occasions when a law firm represents itself that is very rare in our experience and we are not aware of any cases in the last ten years where we have sought or recovered litigant in person hourly rates.

Q 59 – Do you have any evidence that any of these proposals will impact disproportionately on people depending on the following protected characteristics?

Disability
Sex
Gender Reassignment
Race
Religion or belief
Sexual Orientation
Pregnancy & Maternity
Age

These proposals are based on a report that was biased in favour of defendants and did not consider the impact on people with the above protected characteristics. Jackson LJ did not ask for data on the impact on people with the protected characteristics. It is not good enough for the impact assessment to say that it has been unable to assess the impact on these groups because interested parties have not provided data.

The MoJ has access to government data which breaks down occupations and average pay by gender and other characteristics. The Health and Safety Executive can provide statistics on injuries by occupation and sector. It should therefore be possible to draw conclusions about the type of people who are most likely to suffer injuries at work and so who will suffer the greatest impact from these proposals.

For example, and in our experience, many lower value claims are brought by women. This is a reflection of the type of occupations they are employed in. They are more likely to be in low paid caring professions and to suffer strain-type injuries in those jobs.

Further, as the impact is greater on the lower paid, and as women are paid on average less than men, the proposals will have a disproportionate impact on grounds of gender.

Restricting access to justice will also, of course, impact disproportionately on people with disabilities – disabled as a result of their accident.

We believe that the proposals will also have an adverse impact on young and older workers and those who do not have English as a first language.

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

The lack of evidence provided within the impact assessments is consistent with the conclusion by the Working Group on Civil Litigation Costs that the evidential base for such a radical reform as Jackson proposes is "entirely inadequate" (see page 1).

Neither is it clear that the proposals will result in any savings in public expenditure. The impact on state benefits payable (and also benefits reclaimable by CRU) and on VAT has already been highlighted. Further, if more claimants are turned away by lawyers due to the 75/25% requirement referred to, public bodies may be left defending claims against litigants in person with little prospect of recovering their costs in cases they successfully defend.

"This isn't about people mucking around. This is about people injured at work and having their lives changed."
