

**COMMISSIONING NOTE TO CIVIL JUSTICE COUNCIL – IMPLEMENTATION OF
PART 2 OF THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS
ACT 2012: CIVIL LITIGATION FUNDING AND COSTS – ISSUES FOR FURTHER
CONSIDERATION BY THE CIVIL JUSTICE COUNCIL**

The Civil Justice Council (CJC) has already carried out considerable work to help develop practical proposals to assist with the implementation of secondary legislation (regulations and court rules) on: qualified one way costs shifting (QOCS); the additional sanction under Part 36 of the Civil Procedure Rules; and the new proportionality test.

In October 2011, the CJC working group held a successful experts' event, attended by a range of experienced practitioners (including claimant/defendant experts in all key civil law areas affected by the proposals such as personal injury, clinical negligence, housing, defamation, nuisance, actions against the police, judicial review). The purpose of the event was to provide feedback on the MoJ/CJC developed proposals.

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 received Royal Assent on 1 May 2012. There was discussion on some of these issues during the Parliamentary process of the Bill, and the MoJ has continued to engage with stakeholders. The MoJ has now issued a written ministerial statement, announcing the way forward.

The Ministry of Justice has commissioned further work from the CJC by the end of June 2012, in consultation with stakeholders, on qualified one way costs shifting as set out below.

Qualified one way costs shifting

As previously announced, a regime of qualified one way costs shifting (QOCS) is being introduced in personal injury cases. This was proposed in Lord Justice Jackson's report, and was covered in the MoJ's consultation on implementing the reforms. Further consultation and consideration took place under the auspices of the Civil Justice Council (CJC) and discussions have been ongoing with stakeholders. Following that work, the Government has made the following provisional decisions, with further work requested from the CJC as set out below.

QOCS will operate in all personal injury cases so that claimants are not generally at risk of having to pay the defendant's costs if the claim fails.

QOCS will apply to all claimants, however funded, and whatever their means; there will be no financial test of the claimant's means. The MoJ would welcome the CJC's further advice on whether there should be a requirement for a minimum payment by a losing claimant;

QOCS will not apply to fraudulent claims (for example involving a fraudulent means or device), or in claims which are struck out. The MoJ would welcome the CJC's

further advice on what behaviour should lose the protection of QOCS (including, for example, the making of unreasonable applications in the course of the claim), and how this should be defined and evidenced, particularly where dishonesty is involved (for example, through the use of a fraudulent means or device). The MoJ is particularly keen to discourage dishonest claims, in particular where the claim is exaggerated, either in terms of the injury sustained, or in the circumstances in which the injury was sustained. The MoJ considers that preventing QOCS applying in respect of all of a claim where there is dishonest exaggeration will allow honest claims to be pursued, while discouraging unmeritorious claims.

In mixed claims (combined claims covering personal injury and non-personal injury) QOCS will only apply to the whole claim if the claimant has an interest in the non-personal injury element of the claim, which is either integral or directly consequential to the personal injury claim. However, the MoJ is concerned to avoid a situation where the costs protection offered by QOCS is used for aspects of a claim in which, for example, insurers pursue a subrogated claim to recover insured losses. The MoJ would welcome the CJC's further advice on what is integral or directly consequential to a claim, and whether a workable distinction would be between claims for insured and uninsured losses.

If a claimant fails to beat a defendant's offer under Part 36 of the Civil Procedure Rules (CPR), the Part 36 principles will apply but only up to the level of damages recovered.

QOCS protection will be allowed in claims that are discontinued during proceedings and for appeal proceedings brought by defendants. The MoJ would welcome the further advice of the CJC in relation to whether there is a need for QOCS for claimant appeals, and in what circumstances (for example, in relation to permissions to appeal where there are significant issues at stake).

The CJC also looked at the following issues, on which the current position is set out below.

Sanction under Part 36 of the CPR

There is to be an additional sanction under Part 36 of the Civil Procedure Rules where a defendant fails to beat a claimant offer. The additional sanction will be calculated as 10% of the damages involved. However, if no damages are claimed, the sanction will be calculated as 10% of the costs assessed or agreed. There will be a cap of £75,000 (that is, the sanction will amount to no more than £75,000) with a taper being applied to claims between £500,000 and £1m.

The MoJ is not minded to seek further advice from the CJC on the sanction under Part 36 of the CPR.

Proportionality

Lord Justice Jackson's proposed rule on proportionality has been agreed by the Civil Procedure Rule Committee (CPRC). The test is intended to control the costs of activity that is clearly disproportionate to the value, complexity and importance of the claim.

The senior judiciary are considering revisions to the Costs Practice Direction to give effect to the new rule.

The MoJ is not minded to seek further advice from the CJC on proportionality.

Ministry of Justice
May 2012