



## **ALTERNATIVE METHOD FOR FUNDING MONEY DAMAGES CLAIMS**

### **Response of the Law Society of Northern Ireland**

*96 Victoria Street  
Belfast BT1 3GN  
Tel: 02890 23 1614  
Fax: 02890 232606  
Email: [info@lawsoc-ni.org](mailto:info@lawsoc-ni.org)  
Website: [www.lawsoc-ni.org](http://www.lawsoc-ni.org)*

## **Introduction**

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,700 solicitors working in approximately 530 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is well placed to assess the practical out workings of policy proposals.

**February 2016**

## *General Principles*

1. The Society has consistently stated that it is preferable that legal aid funding remains available for all 'money damages' claims and in particular those in respect of personal injury and clinical negligence litigation. Accordingly, we registered our serious concerns about the Minister's proposals in March 2015 to remove the majority of these cases from the scope of the legal aid scheme without introducing alternative funding arrangements. If the Department is committed to the removal of legal aid funding for these cases on grounds of budgetary pressures, it is imperative that a practical and sustainable set of alternative funding arrangements are put in place. This should both learn the lessons from approaches in other jurisdictions and recognise the particular circumstances of Northern Ireland.
  
2. The aim of such an arrangement should be to secure and promote effective access to justice which does not disadvantage those without the financial means to pursue meritorious actions. It is important to recognise that when set against the benefits provided by such actions, in 2013/2014 they cost the legal fund approximately £2.5 million against an overall spend of around £100 million. On that basis, it is at least welcome that the Department have reviewed their position in light of the Access to Justice II Report (ATJ II). The Society's opposition to the removal of 'money damages'/personal injury claims from the scope of legal aid reflects the social benefits which flow from this litigation:
  - Such actions provide benefits to injured parties who are seeking compensation to cover the expenses and loss which the negligent action of another has caused them. A payment of 'money damages' is not the equivalent of a lottery pay-out. It is compensation for loss already suffered and for the sufferers of such loss it is money that is needed to cover expenses and to assist the injured person in coping with any change in lifestyle or capabilities.
  - Recoverability of damages ensures a more accountable society. One might consider the increased safety standards which have been introduced in this jurisdiction on foot of litigation relating to hearing loss for example. Equally, broader health and safety improvements in the workplace flow from such accountability.
  - 'Money damages' actions bring benefits to the tax payer by way of recoupment through the Compensation Recovery Unit (CRU) of State Benefits paid and also hospital charges incurred. It also ensures recovery of wage loss for civil servants who are obliged under the terms of their Contracts of Employment to recover any wages paid in a successful claim arising out of a negligent accident.

3. We understand that the success rate for personal injuries claims has traditionally been much higher than the figure of 64% provided for 'money damages' in the ATJ II Report (Table 23.3). We would be grateful for clarification of these success rate figures over the last number of years and precisely what 'money damages' takes into account and over what period. We would emphasise the importance of recouping these costs for the budget and wider society.
4. In terms of the proposals outlined, the Society can see potential for a workable alternative within the broad parameters of the CFA model. However, a number of important changes would have to be made to the proposals within ATJ II before any such model could be introduced. For example, the Society remains of the view that the plaintiff should not suffer a diminution in their damages in order to put in place a secure funding framework for these actions. On that basis, the Society would state that success fees should be recoverable from unsuccessful defendants as a matter of fairness. Under the model proposed, a damages uplift would be required. We note the reasons advanced for the this model and will comment constructively on these.
5. The changes required would ensure a system which is commercially viable to operate and avoids creating a situation in which costs risks for the plaintiff effectively discourage meritorious claims. The current shape of the model as consulted upon in this Consultation does not meet these conditions and unpicks some of the key elements required for such a system to work. The Society's response will identify a number of shortcomings in the assumptions of the ATJ II model and its failure to recognise the interdependent nature of the key elements of the broad CFA system proposed. In doing so, it is hoped that the ingredients for a functioning model might be more clearly set out for further discussion.

### *The Stutt Model*

6. The Society notes the conclusions set out in the ATJ II Report and consulted upon in this Consultation Paper. We note from discussions with the Department that the principal aim of this Consultation is to replace funding arrangements in the area of personal injury litigation. If an alternative funding mechanism is to be introduced, the Society's preference is for a model of Conditional Fee Agreements (CFAs), success fees and qualified one-way costs shifting (QUOCS). In particular, the provision of success fees and protection against costs recognises that under the CFA model, the solicitor is taking on all of the risk in running an unsuccessful case. Accordingly, a system of cross-subsidy is required in which earnings from successful cases outweigh outlays incurred in unsuccessful cases. On that basis, success fees should be set at a level which provide adequate remuneration to compensate this risk, without eroding a client's award of damages.

7. We note that the Stutt model provides that success fees should be capped at 20% of all damages, in contrast to England and Wales where the cap has been operating at 25% of damages, other than those for future loss and care. This also differs from the Scottish model, in which success fees are capped at defined bands of total damages linked to the value of a claim, with set bands of 20%, 10% and 2.5% in order of increasing value. The Society believes there are principled reasons why recoverability of success fees can and should be ring-fenced to exclude future care, namely that clients should not have any uncertainty as to costs and that success fees should be a one-off deduction from damages. The proposal to recover a success fee from the totality of damages raises difficult issues of quantum and fairness, which will exacerbate difficulties between solicitors and clients. It is important in terms of ensuring trust and confidence in the solicitor-client relationship that fairness, transparency and certainty should be the guiding principles in terms of fees. This open and trusting relationship is critical to the success of a CFA model and recognises that the changes being proposed would fundamentally alter the nature of the solicitor-client relationship in civil litigation.
  
8. If future loss and care is appropriately ring-fenced, this eliminates the rationale put forward by the Report for setting the success fee at 20% instead of 25% as in England and Wales. Moreover, the Report acknowledges in Table 22.2 that the proposed cap of 20% may need to be increased in specific categories of case on grounds of fairness in any case, which would introduce additional complexity into the model. It is difficult to see how such a diverse model with differing tiers of success fees depending on the case is less complex than the alternative of making a calculation of future damages which are then protected from the success fee. The Society does accept however that guidance would need to be agreed in respect of dealing with appropriate ring-fencing of damages in cases which settle out of court. This will be an important issue for further discussions and again goes to the importance of clarity of client expectations and fairness.

#### *Level of Damages and Scope of CFAs*

9. The ATJ II Report claims at Para 22.37 that it is “widely acknowledged” damages for personal injury litigation are “significantly higher” in Northern Ireland than elsewhere in the UK. No evidence other than the assertions of insurers is provided to substantiate this claim and the Society does accept that this is “widely acknowledged”. The Report does not go on to set out and interrogate such figures, fatally undermining the credibility of this assertion. There is a problem of making direct comparisons, as the practice in England and Wales of accounting for damages separately and of claiming additional damages to the main award to cover special losses is not replicated in Northern Ireland. Accordingly, there are serious concerns that any figures being cited are making inappropriate comparisons and drawing inaccurate conclusions. The Society submits that these claims should be further interrogated and should not be uncritically accepted as a rationale for

proposing a model of CFAs which compares unfavourably with other jurisdictions.

10. In this respect the Society commends the remarks of the Rt. Hon Lord Dyson, Master of the Rolls in England and Wales, who recently spoke about the mistakes of litigation reforms based on anecdote and supposition:

“Absence of hard detailed evidence is problematic for two reasons. First, it undermines the case for reform. Without real data it is not possible, with any degree of confidence, to determine the nature and extent of any problem or to consider what might be causing it. ***Proposed solutions may therefore be directed at a problem which does not exist; or does not exist to a degree that warrants interference by reform; or does not exist in the precise form which the proposed reform assumes it to exist.***”<sup>1</sup>

A number of the aspects of the Stutt model fall foul of this criticism, which we will now address.

11. In addition, seemingly as another cost saving measure, the Stutt Report is proposing that success fees should not be available in any road traffic accident (RTA) litigation, irrespective of the complexity of the case or the scale of costs incurred. Para 22.33 of the Report states that the market alone will be insufficient to ensure success fees do not erode damages in more straightforward cases. The Society submits that this is a misapprehension of the relationships that will exist between clients and solicitors under the new regime. Given that success fees deductible from damages will be a marked departure from the status quo, it is highly likely that incentives to keep success fees as low as possible in more straightforward cases will be strong in order to maintain strong relationships with clients. Moreover, the Society notes that the system of scale costs within this jurisdiction prevents spiralling and disproportionate costs and that many of the issues giving rise to costs are unique to the conditions prevailing in civil litigation in England and Wales pre-Jackson.

12. The proposal to exclude RTAs from success fees appears to be premised on the belief that complexity is almost never an issue in RTA cases and that foreseeability of outcomes is much higher. The Society does not regard this as a sustainable proposition and rejects the notion that the mere classification of case as an RTA provides adequate indications of the complexity of the facts or issues engaged. In particular, the issue of establishing causation is becoming progressively more difficult in RTA cases and there may be issues of contributory negligence and pre-existing medical conditions which make these cases more complex. Whilst it is true to say that there a number of RTAs which are straightforward, there are equally a range of other RTAs

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<sup>1</sup> Lord Dyson, *The English Experience of Access to Justice Reform*, Jersey, 18 May 2015.

which involve significantly complex issues and there is no principled reason why these cases should not attract a success fee.

13. In any case, the framework of CFAs with success fees is based on the idea that successful cases subsidise unsuccessful actions. RTAs contribute to commercial risks for solicitors acting for plaintiffs and therefore it is unfair and illogical to ban the recovery of success fees in these cases. The Report itself acknowledges that RTA cases constitute around two thirds of civil actions for damages, reflecting the greatly increased commercial risks under a model which excludes these cases. In practical terms this reflects the importance of the wide availability of success fees in order to aid cash flow to fund disbursements in cases prior to their conclusion. The Society would caution that the proposed framework is predicated on the avoidance of a set of conditions in which unreasonable commercial risks impede access to justice. Accordingly, whilst the ATJ II Report lauds the potential of the proposals to extend such access overall, this must be understood as contingent on a set of interlocking elements which are vital to the success of a CFA framework in this jurisdiction.
  
14. This penalty on practitioners in Northern Ireland will filter through to the client, with solicitors adopting a more risk-averse position towards potentially meritorious cases. The risk levels for practitioners are further increased in Northern Ireland due to the absence of widespread provision of ATE insurance protection and this should be borne in mind by the Department when setting out final proposals for a CFA model. Overall, the current architecture of the model proposed in NI is significantly less attractive than that established in England and Wales and Scotland. The Society cautions that if this system was to be implemented as proposed in the Consultation Paper that effective access to justice would be impaired in this jurisdiction by concentrating too great a degree of risk on solicitors undertaking important litigation. This would undermine the advantage of expanding access to justice for the NIGELA group outlined in the ATJ II Report, a key strength of the CFA model.

### *Legislatively Capping Damages Awards*

15. Furthermore, the Society is opposed to the idea that there would be some attempt to legislatively cap the level of damages to be awarded, principally to prevent the judiciary increasing the level of awards to cushion the effect of success fees.<sup>2</sup> The Report refers to an “avoidance of doubt provision” (Para 22.38) being inserted in Regulations to state that the reforms do not alter the principles through which damages are calculated. The Society is unaware of any precedent for legislative fetters being placed on the discretion of judges to

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<sup>2</sup> See *Simmons v Castle* [2012] EWCA Civ 1039

set appropriate levels of damages commensurate with the circumstances of the case and would not support this approach.

16. In any case, as is stated above, the Society questions the claim that awards of damages in civil litigation in Northern Ireland are “significantly higher” than England and Wales, which appears to provide the rationale for this proposal. However, if it is the case that damages in Northern Ireland are set at a reasonable level when compared in context, it would be entirely reasonable for judges to continue to seek to restore successful plaintiffs to the position they were in previously. After all, the same conditions will apply to claimants as in other jurisdictions, namely that success fees will not be recoverable from losing defendants.
  
17. An illustration of the difficulties which can be caused with the success fees model is that they can be seen as unduly diminishing the award of damages, as in the case of *A and M V Royal Mail Group [2015] Ew Misc B24 (CC) (14 August 2015)*. That case involved two awards of modest damages to minors with significant deductions, raising the important issues of ensuring that damages are appropriately uplifted to offset the application of success fees and to avoid the creation of conflict between solicitor and client. Without sufficient ‘buy in’ from clients, satellite litigation and contests over fees would increase, to the detriment of all concerned. The Society submits that the judiciary may be uncomfortable with success fees without uplifts in many cases, for example due to the nature of the damage suffered and the involvement of minors etc. This supports the Society’s view that the model should be looked at globally to ensure it is both fair to plaintiffs and commercially viable in order to secure and extend access to justice. In addition, the remaining scope of legal aid should be seen as a mechanism to protect important classes of case which are not suitable for CFAs.

### *Limiting Success Fees*

18. The Stutt Report also suggests at Table 22.2 that limitations might be placed on the level of success fees which can be claimed, in addition to the proposed break on damages levels and exclusion of RTA actions from success fees. Given the earlier admission in the Report that the new model was unlikely to provoke significant amounts of litigation not currently proceeding through legal aid, this would represent a further erosion of the attractiveness of the model. Taken together with the proposed RTA exclusion, this would unfairly increase the commercial risks taken by plaintiff solicitors and the Society opposes such a move.

## QUOCS

19. The introduction of QUOCS under this model should help to extend access to justice by providing costs protection to a much larger group than those who would have been eligible for legal aid. The Society understand the view expressed in the ATJ II Report that there is no principled reason why QUOCS could not in principle extend to a wider range of litigation, including claims against public authorities and housing disrepair cases. However, the Society will confine our comments to the initial issue of personal injury litigation and would stress that any moves to extend such arrangements should be subject to further consultation. The important issue in respect of QUOCS will be to ensure that a clear and workable definition of fundamental dishonesty is outlined, avoiding expensive satellite litigation which can drive up overall costs and undermine access to justice.<sup>3</sup> The Civil Procedure Rules in England and Wales lacked such a definition and this would be a good opportunity to learn from the lessons of implementation there.<sup>4</sup>
20. If a situation is permitted in which uncertainty is created by a failure to specify and strictly limit the *conditions* under which costs protection is voided, there is a domino effect on the entire model. A scenario in which QUOCs becomes 'hollowed out' by uncertainty would represent a worse position than at present, whereby costs implications are relatively clear for clients in cases covered by County Court scale costs. Given the discussion above of the need to carefully steward the change of relationships which would be brought about if success fees are to be recovered from the plaintiff's damages, uncertain protection against the award of costs would render this impossible. Even in the rare event of available ATE insurance cover, this is voided in the event of fundamental dishonesty, further illustrating the need to guard against any attempts to artificially widen the circumstances in which the costs shield is lost.
21. The Society *would* refer the Department to the recent case of *Hayward v Zurich Insurance Company plc* [2015] EWCA Civ 327, which has set out the key elements of fundamental dishonesty as follows:
- i) *It is more than a simple definition of fraud*
  - ii) *It requires a fabrication or misrepresentation which goes to the root of a claim*
  - iii) *The dishonesty must be substantial and important*

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<sup>3</sup> See *Summers v Fairclough Homes Limited* [2012] UKSC 26, *Homes for Haringuey v Fari* [2013] EWHC 757 and *Gosling v Screwfix Direct Ltd and Anor* (Unreported, Cambridge County Court, 29 March 2014).

<sup>4</sup> The Civil Justice Council warned against vagueness and subjectivity in favour of a more stringent test, see Response to Ministry of Justice Commissioning Note entitled "*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*", June 2012.

- iv) *A dishonesty in relation to a minor or collateral part of the claim is unlikely to be caught by the rule*
- v) *Unless the evidence is very clear, further evidence/cross examination may be sought by the Court. This further enquiry may be pursued if a judge considers it just and proportionate in terms of cost.*

In particular the Society considers that Regulations may codify the key principles expressed and establish that proving fundamental dishonesty requires meeting a relatively high threshold. This is in order to deter unnecessary costs challenges, which would increase delay and costs of proceedings. In particular we should take care to avoid the situation where losing defendants make informal applications for relief from costs at the end of proceedings, without having formally pleaded the allegation of fundamental dishonesty.<sup>5</sup> Similarly, fundamental dishonesty must not become routinely pleaded as an expected means of voiding the costs shield and should be recognised as an exceptional provision likely to be present in only a small number of cases.

#### *Abolition of the Indemnity Principle*

22. The Society notes that the Consultation Paper makes no mention of the need to abolish the indemnity principle in order to introduce the CFA model. However, we understand from discussions with officials that the Department are aware of this and have mapped out the practical steps which would need to be taken in terms of legislation and changes to court rules necessary to facilitate the new model. This is critical as the Society is in agreement with the view expressed in the Stutt Report that any introduction of a CFA model should preferably precede or at the very least run in tandem with the removal from the scope of legal aid.
23. The Society is aware that in other jurisdictions the decision to run the two systems in parallel was effectively a means of piloting the new arrangements, as a mechanism to address any difficulties at an early stage and this makes good practical sense. The Society would welcome the Department setting out clearly how they propose to proceed in terms of the necessary legislative and administrative steps required for the reforms and an indicative timescale for completion. Whilst the Society appreciate the Consultation Paper is about the overarching principles of the model, further detail is required to assess the feasibility of any implementation plan.

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<sup>5</sup> *Oana v O'Duinn and Aviva, (Unreported, Northampton County Court, 2014).*

24. With regard to the indemnity principle, the Society considers that its abolition should be confined to personal injury proceedings in the first instance. Indeed, any legislative amendments should expressly stipulate that its abolition is appropriately limited to these cases and this should ease passage to the new model. We consider that the status of the indemnity principle in other civil proceedings requires to be considered on its own merits and would need to be subject to further consultation and discussions.

### *Costs Conventions*

25. Furthermore, the Society suggests that the Department codify costs conventions in line with a percentage of the County Court Scale (CCS) costs for cases which settle in advance of a hearing. This is currently paid at two thirds of the CCS, increasing to three quarters of the CCS for extra work prior to the issue of proceedings. In addition, there must be flexibility in place to provide for up to 100% of the CCS after proceedings are issued and a mandatory 100% fee when the Certificate of Readiness is delivered, with an appropriate fee also for the fixing of a date for trial. The Society submits that the guidance of the Belfast Solicitors Association on Costs should form the basis for the provisions. The Society would welcome the opportunity for further focused discussions with the Department on how to progress this matter. In particular, the drafting of the provisions to set general requirements with provision for flexibility is an important task. Whilst it is true that this is currently custom and practice across Northern Ireland, enshrining it in legislative form will set clear expectations for new insurers entering the jurisdiction.

### *Remaining Scope of Civil Legal Aid*

26. The recommended categories for retention within the scope of civil legal aid in 'money damages' cases are too narrow and restrictive. The suggested categories are necessary, but not sufficient protections for priority cases for legal aid funding. In particular the highly restrictive proposal to fund only clinical negligence cases for babies with severe neurological injuries is too limited and mirrors the provision in England and Wales. Clinical negligence cases often involve expert reports from England and Wales due to a more limited pool in Northern Ireland, meaning that high cost disbursements are incurred which solicitors will be unable to carry until the conclusion of the case. Dense bundles of evidence in respect of causation and contested points of law in situations of disputed liability add to the complexity of these cases. This goes back to the Society's initial point about the need to carefully craft a package which produces a commercially viable risk level for practitioners. This is key to the success of the new model and the draft proposals will require significant revision to achieve this.

27. The proposal on the scope of legal aid for ‘money damages’ claims seems to be much more restrictive than the Department’s initial proposals, which would have left “serious clinical negligence” cases in scope. Clearly, “serious” clinical negligence cases would include but would not be limited to cases involving babies with severe neurological injury. This is significant, as recent research has found that the narrow scope of clinical negligence actions eligible for legal aid in England and Wales has meant that there is a possible problem with access to justice for high value, high risk complex claims involving children which occur more than eight weeks after birth.<sup>6</sup> In addition, the removal of clinical negligence cases from scope in England and Wales has resulted in the introduction of Regulations to make provision for the recovery of ATE insurance premiums from defendants to cover high cost disbursements.
28. This raises familiar issues about the scope of the insurance market within Northern Ireland and the risks created of restricting access to justice by the limited number of cases which would remain eligible for legal aid. These risks highlight that a CFA regime may not fully cater for the range of cases which the Report proposes to remove from legal aid and accordingly the Society believes that it is critical that clinical negligence cases remain within the scope of legal aid. Given the commitment in the Report to the appropriate implementation of a CFA model to expand access to justice, the current proposals require revision to avoid undermining this aim.
29. Similarly, the Society considers that industrial disease cases fall into a similar category as medical negligence, given the interests involved, complexity of the evidence and the rights protected. Whilst the proposal to retain legal aid for diffuse mesothelioma cases is welcome, the Society submits that this should cover the full range of industrial disease cases including asbestosis. This approach would be more logical and consistent than the piecemeal approach suggested within the Report.

### *Partial Legal Aid Cover*

30. The Society considers that the recommendation at para 23.13 of the Report that legal aid for ‘money damages’ cases within scope should be limited to funding disbursements and investigative costs is a recipe for bureaucracy and disagreement over the appropriate boundaries of legal aid. It may create difficulties in terms of communicating with clients when CFAs take effect and uncertainty as to what precisely is covered by legal aid certificates. Furthermore, as discussed above, there may be difficulties in terms of relationships with clients and the recovery of success fees in serious clinical negligence cases which would increase the commercial risks of the Stutt

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<sup>6</sup> Nuffield Foundation, *Funding Clinical Negligence Cases: Access to Justice at Reasonable Cost?*, 2016, at p. 18.

model for firms. The Society supports the retention of all clinical negligence cases within the scope of civil legal aid for the entire case as a means of avoiding this.

### *Minimum Damages Thresholds*

31. The Society does not support the introduction of minimum damages thresholds for access to legal aid in 'money damages' cases. The value of the claim does not have any bearing on the principle that a loss has been suffered and in an accountable society under the rule of law, claimants should be put back into the position they were before the incident, insofar as this is possible. Moreover, taking the statistics in 2014 for example, just under 80% of all recorded civil bills for damages issues resulted in an award of under £5,000. This illustrates the volume of meritorious litigation which would be removed from legal aid under such an approach and this would detract from the commitment to access to justice outlined in the Report and Consultation. The application of merits criteria already act as a mechanism to filter meritorious claims and limit calls on the legal aid fund. In addition, many more straightforward cases already result in settlement and it is important to recognise that it is the presence of a valid legal aid certificate which focuses minds on settlement in such cases to avoid the disproportionate costs of litigation.

### *The Protection of Damages in the Event of the Plaintiff Failing to Beat a Lodgement Offer*

32. The Society agrees that there needs to be a mechanism to protect a defined portion of a plaintiff's damages where they fail to beat a defendant's offer and become liable for costs. It would not be fair to expose claimants to the risk of losing the entirety of their damages due to their liability for the defendant's costs. The potential for costs liability in such situations is intended to encourage reasonable settlement in appropriate cases; however, it should not be so punitive as completely eliminate damages which are justly awarded. Without this protection in place, the balance of pre-proceedings negotiations will be tipped in favour of defendants, as claimants will be aware of the costs risks of not accepting an offer. Accordingly, the proposal to ring-fence a specified proportion of damages strikes an important balance in this respect and preserves the integrity of settlement negotiations. The Society would welcome the opportunity to discuss proposals about the level at which this ring-fencing is struck.

## *Alternative Sources of Funding and Legal Aid Applications*

33. The Society noted in our response to the ATJ II Report that the possibility of alternative sources of funding is currently provided for in the application process for legal aid certificates. We would stress that such funding has to be credible and sustainable so as to constitute an effective alternative to legal aid funding. In particular highly costly, complex cases which can substantially inflate insurance premiums are unlikely to meet these conditions. Alternative funding sources require detailed examination in context prior to any policy decisions are taken in reliance upon them, as is demonstrated in the intricacies of the present proposals.

### *The 'Risk Rates' Proposal*

34. The Society opposes the proposal to reduce the level of payment for bona fide work undertaken in unsuccessful non-family civil legal aid cases, seemingly on the presumption that solicitors are currently pursuing cases without any realistic prospects for success. This is an erroneous assumption which ignores the protections built into the application process for legal aid in terms of assessing the merits of the application. It would also break the fundamental principle of fair remuneration for fair work undertaken and the proposal to set the rate "substantially below" (Para 24.26) that recoverable in successful cases is unfair. Firms would already be adjusting to new commercial risks under the CFA model and this proposal would only add to levels of risk and this would likely restrict access to justice.

### *Supplementary Legal Aid Scheme (SLAS) Levy on Damages*

The proposal to levy a legal aid client's damages is akin to the client entering into a CFA with the Legal Services Agency with the "SLAS payment", (Para 24.20 of the Report) operating as a success fee. As such, as with the Stutt model on CFAs the proposal does not sit well with an attempt to prevent a general increase in damages to offset this new liability. The principle remains that clients should not be put into a worse position than they are presently and any attempt to introduce a compulsory levy of this kind under the proposals would not be fair to plaintiffs who are awarded damages. The same issues of trust and relationships occur between the legal aid funder and the client who will struggle to understand why they are being penalised under the proposed arrangements

## *Review of the CFA Model*

The Society is content that the operation of the system should be reviewed, but would caution that we believe the alterations proposed in this response should form part of the model as introduced. It is crucial that the arrangements are allowed sufficient time to operate in advance of any review. Furthermore, the Society would welcome the opportunity to engage in constructive discussions with the Department about the terms of reference for the review. This would form part of ongoing dialogue about the operation of the system in advance.

## **Conclusion**

The Society welcomes the opportunity to submit a response in respect of the Consultation on “Alternative Methods for Funding Money Damages Claims”.

We trust our contribution is constructive and we are happy to meet with the DOJ to discuss any of the issues raised in our response.

We would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.