

# LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 2: Litigation funding and costs**

##### **Payments for legal services in civil cases**

##### ***Section 44: Conditional fee agreements: success fees***

281. A conditional fee agreement (“CFA”) is a private funding agreement between a lawyer and a client under which the lawyer agrees to represent the client on a ‘no win, no fee’ basis. Under the agreement, the lawyer does not generally receive a fee from the client if the case is lost<sup>1</sup>. However, if the case is won, the lawyers’ costs (the ‘base costs’) are generally recoverable from the losing party. In these cases, the lawyer can charge an uplift on these base costs, which is currently recoverable from the losing party. This uplift is known as the ‘success fee’. The maximum success fee that may be charged under a CFA is prescribed by secondary legislation. In all cases, the current maximum uplift that may be charged is 100% of the base costs.
282. *Section 44* amends sections 58 and 58A of the Courts and Legal Services Act 1990, which currently make provision as regards the regulation of CFAs and the recoverability of success fees. The effect of the amendments is that a success fee under a CFA will no longer be recovered from a losing party in any proceedings. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will now be subject to further regulation.
283. *Subsection (2)* inserts new subsections (4A) and (4B) into section 58. New subsection (4A) provides that CFAs which provide for a success fee and relate to proceedings prescribed by the Lord Chancellor must comply with certain additional conditions in order to be enforceable. New subsection (4B) sets out those conditions. They require the CFA to cap the success fee at a percentage of certain damages awarded to the client if they win. The cap and the kinds of damages to which it applies are to be prescribed by the Lord Chancellor. These provisions will be of particular importance in personal injury claims, for example, where it is proposed to exclude damages for future care and loss from the calculation of any success fee.
284. By virtue of *subsection (5)*, orders made under new subsections (4A) and (4B) of section 58 will be subject to the affirmative resolution procedure.
285. *Subsection (3)* amends subsection (5) of section 58A, the effect of which is to require the Lord Chancellor to consult with designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate before making an order under new subsections (4A) and (4B).

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<sup>1</sup> A CFA can also be arranged on a ‘no win, low fee’ basis.

286. *Subsection (4)* inserts a new subsection (6) into section 58A, the effect of which is to prevent the recoverability of a success fee from a losing party under a court's costs order.
287. *Subsection (6)* contains a saving. It provides that a costs order made in proceedings about a matter may continue to provide for the recovery of a success fee from the losing party where the success fee is payable under a CFA entered into for the purposes of that matter before the day on which section 44(4) comes into force or where it is payable under a collective CFA under which advocacy or litigation services were provided to a person in respect of that matter before that day.

#### ***Section 45: Damages-based agreements***

288. Damages-based agreements (“DBAs”) are another type of ‘no win, no fee’ agreement under which a lawyer can recover a percentage of the client’s damages if the case is won, but will receive nothing if the case is lost. Currently, solicitors and barristers are not permitted to act under DBAs in civil litigation, but solicitors are permitted to act under DBAs in non-contentious business, including cases before employment tribunals.
289. **Section 45** amends section 58AA of the Courts and Legal Services Act 1990 (inserted by section 154 of the Coroners and Justice Act 2009), which currently provides that DBAs are enforceable only when they relate to employment matters. The effect of the amendments is to enable the use of DBAs in most civil litigation by persons providing advocacy services, litigation services or claims management services.
290. *Subsections (2) and (3)* omit references to employment matters, the effect of which is that a DBA need not relate to an employment matter in order to be enforceable.
291. *Subsection (5)* inserts new paragraph (aa) into subsection (4) of section 58AA, to provide that a DBA may not relate to proceedings which may not be the subject of an enforceable CFA under section 58A of the Courts and Legal Services Act 1990 (essentially criminal and family proceedings) or to proceedings of a description prescribed by the Lord Chancellor.
292. Section 58AA(4) also sets out other conditions that must be met for a DBA to be enforceable. The amendments made by *subsections (6) and (7)* of this section make clear that the Lord Chancellor may, but need not, prescribe the information which a legal representative must provide to a claimant prior to entering a DBA and the maximum amount which may be paid under the DBA from the claimant’s damages. Any regulations made under section 58AA(4) are subject to the affirmative resolution procedure (see *subsection (12)*).
293. *Subsection (8)* amends section 58AA to provide that rules of court may be made in respect of the assessment of costs in proceedings funded under DBAs. For the avoidance of doubt, *subsection (9)* inserts a definition of “proceedings” into section 58AA, which includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.
294. *Subsection (10)* further amends section 58AA to provide that, except where they relate to employment matters, non-contentious business agreements between solicitors and clients to which section 57 of the Solicitors Act 1974 applies will not be unenforceable by reason of the provisions of section 58AA.

#### ***Section 46: Recovery of insurance premiums by way of costs***

295. After the Event (“ATE”) insurance can be taken out by parties in a CFA-funded case to insure against the risk of having to pay their opponent’s costs and their own disbursements if they lose. Under the current arrangements, ATE insurance premiums are recoverable from the losing party. Currently, the recovery of such insurance premiums by way of costs is provided for by section 29 of the Access to Justice Act 1999.

296. **Section 46** repeals section 29 and makes new provision relating to the recoverability of insurance premiums from a losing party. The effect of the new provision is to provide that the cost of any insurance policy taken out by a party to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose cannot be recovered from a losing party except in certain limited circumstances.
297. *Subsection (1)* inserts a new section 58C into the Courts and Legal Services Act 1990. The effect of section 58C is to limit the recoverability of insurance premiums to certain clinical negligence proceedings and only allow recovery of the premium to the extent that it relates to the costs of an expert report or reports (section 58C(1) and (2)). This exception reflects concerns that expert reports in clinical negligence cases can often be very expensive. New section 58C enables the Lord Chancellor to make regulations to prescribe the circumstances in which the premium would be recoverable and the amount of the premium that may be recovered. The maximum amount may, in particular, be prescribed by specifying a percentage of the relevant part of the premium or an amount calculated in a prescribed manner (section 58C(4)).

***Section 47: Recovery where body undertakes to meet costs liabilities***

298. Certain bodies, such as trade unions and other membership organisations, often provide legal services to their members as a benefit of membership. Section 30 of the Access to Justice Act 1999 allows bodies that are approved by the Lord Chancellor to recover from a losing party the cost of insuring themselves against the risk of paying costs to another party in the event of losing a claim. The effect of section 46 is to prevent the recovery of these insurance premiums from a losing party.
299. *Subsection (1)* repeals section 30 of the Access to Justice Act 1999. Although similar in effect to section 48, section 49 does not provide for any exceptions to non-recoverability, since the circumstances which require specific provisions relating to expert reports in clinical negligence cases do not arise.
300. *Subsection (2)* contains a saving. It provides that a costs order made in favour of a member of a body in proceedings about a matter may provide for the recovery of a body's costs where the body gave a specific undertaking to the member to meet the costs of other parties to proceedings about that matter before the day on which section 47 comes into force.

***Section 48: Sections 44 and 46 and diffuse mesothelioma proceedings***

301. **Section 48** provides that sections 44 (abolition of recoverability of success fees) and 46 (abolition of recoverability of "ATE" insurance premiums) may not be commenced in respect of proceedings relating to claims for damages for diffuse mesothelioma until the Lord Chancellor has reviewed the likely impact of those sections on such claims and has published a report on the review's conclusions. This means that, until that time, successful claimants in these cases will continue to be able to recover success fees and ATE insurance premiums from losing defendants.
302. Diffuse mesothelioma is defined by reference to the Pneumoconiosis etc (Workers' Compensation) Act 1979<sup>2</sup>.

***Section 49: Divorce etc proceedings: orders for payment in respect of legal services***

303. Part II of the Matrimonial Causes Act 1973 ("the the 1973 Act") makes provision (mirrored for civil partnerships by Schedule 5 to the Civil Partnership Act 2004 ("the 2004 Act")) for the court's powers to make orders "for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation". The orders include orders that one party to the marriage makes periodical payments to

the other or for a child of the family; or that one party pays a lump sum to the other or for a child of the family. It is not possible to make an *interim* order for a lump sum, or periodical payments, by one party to the marriage to the other. Section 22, however, makes provision for *maintenance pending suit*, where the court may at any time in the proceedings make an order for one party to make to the other “such periodical payments for his or her maintenance ... as the court thinks reasonable”, and case law has developed in which the court has included an element to enable that other party to fund that party’s costs of pursuing the proceedings where he or she has insufficient immediately available resources to do so.<sup>3</sup>

304. Section 49 amends the the 1973 Act to confer a more general power, not limited to maintenance pending suit, for a court in divorce, nullity of marriage or judicial separation proceedings to order payment by one party to the other for the purpose of securing legal services.
305. Subsection (1) amends section 22 of the the 1973 Act to provide that the court cannot use its existing powers to use maintenance pending suit to cover payment for legal services, so that such payment will be covered by the new power alone.
306. Subsection (2) inserts into the the 1973 Act a new section 22ZA, which sets out the court’s power and the conditions for its exercise as well as the terms on which any order may be made. Subsections (1) and (2) of the new section make provision about the scope of the power and its purpose: the power may be exercised in proceedings for divorce, nullity of marriage or judicial separation (including ancillary relief proceedings), and is a power to make an order requiring one party to pay to the other (referred to as the applicant) an amount to enable the other to obtain legal services for the purposes of the proceedings.
307. Subsection (3) of the new section contains the test for making an order, which requires the court to be satisfied that without this money the applicant would not otherwise reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of them. This, by virtue of subsection (4) of the new section, includes being satisfied that the applicant could not obtain a loan or secure legal services with the promise of payment on conclusion of the proceedings and division of the assets.
308. Subsection (5) of the new section provides for flexibility in making an order. The court does not have to assess the likely need for legal services for the entire proceedings and make an order for a payment to cover that (although that is possible), but may order payment to cover specified services, services in a specified period or for a specified part of the proceedings, or a combination (“specified” being explained in subsection (11) of the new section as meaning specified by the court). Coupled with the ability to make more than one order, this enables the court, for example, to make an order for payment for services limited to addressing a specific issue or issues in the proceedings at an initial stage and to review the position at the conclusion of that stage.
309. Subsections (6) to (8) of the new section provide for additional flexibility, enabling the court to order payment to be made in instalments or for it (or any part of it) to be deferred, and to vary an order if there has been a material change of circumstances. Subsection (9) of the new section provides for the paying party to have credit for a payment made pursuant to an order under the section in that the amount paid will be set off, in the event of an order for costs as between the parties, against any costs which the applicant might be able to recover.
310. Subsection (10) of the new section defines “legal services” in a broad and flexible way which will cover disbursements as well as pure legal advice, so that, for example, if the court were satisfied that an initial report was necessary, it could order payment of an appropriate amount to cover the cost of that report as part of the legal services.

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<sup>3</sup> The leading case, which gives the history of the development of the case law in this respect and restates the principles governing the making of such orders, is the Court of Appeal case of *Currey v Currey* [2006] EWCA Civ 1338

***Section 50: Divorce etc proceedings: matters to be considered by court making legal services order***

311. **Section 50** inserts into the the 1973 Act a new section 22ZB, which provides for the matters the court must consider when deciding whether to make (or vary) an order under the new section 22ZA and the terms of any order so made or varied.
312. Subsection (1) of the new section 22ZB lists the matters to which the court must have regard. These include the overall financial position of both parties (as to which subsection (2) of the new section makes supplementary provision about the meaning of “earning capacity” of a party), what the main proceedings are about, whether the party who is being asked to pay already has legal representation, the behaviour of the applicant in the proceedings and the extent to which the party who is being asked to pay is reasonably able to do so (as to which subsection (3) of the new section requires the court to have regard in particular to whether the order is likely to cause undue hardship to the paying party, or to prevent the paying party from obtaining legal services for the purposes of the proceedings).
313. Subsection (4) of the new section provides for the Lord Chancellor to have power to amend the list of factors in subsection (1), and subsections (5) and (6) require such amendment to be by way of statutory instrument subject to affirmative resolution procedure. Subsection (7) of the new section provides for the term “legal services” in this new section to have the same meaning as in the new section 22ZA.

***Section 51: Divorce etc proceedings: orders for sale of property***

314. **Section 51** amends section 24A of the Matrimonial Causes Act 1973 so that the court’s power to order the sale of property in order to give effect to certain types of order extends also to the new type of order under the new section 22ZA. ‘Property’ could be assets such as a holiday home, shares or other illiquid assets.

***Section 52: Dissolution etc proceedings: orders for payment in respect of legal services***

***Section 53: Dissolution etc proceedings: matters to be considered by court making legal services order***

***Section 54: Dissolution etc proceedings: orders for sale of property***

315. **Sections 52 to 54** make provision in respect of civil partnership proceedings which mirrors that in sections 49 to 51.

**Offers to settle**

***Section 55: Payment of additional amount to successful claimant***

316. The costs sanctions against a defendant for failing to accept a claimant’s offer to settle generally amount to considerably less than the sanctions against a claimant for failing to beat a defendant’s offer to settle. Consequently, there is less incentive for a defendant to accept a reasonable offer from the claimant than for a claimant to accept a reasonable offer by the defendant.
317. **Section 55** enables rules of court to be made in relation to cases involving a claim for money which permit a court to order an additional amount to be paid to a claimant by a defendant who does not accept a claimant’s offer to settle where the court gives judgement for the claimant that is at least as advantageous as an offer the claimant made to settle the claim. It also confers power by order to provide that rules of court may provide that in non-monetary claims a defendant may be required to pay an amount to a claimant where the court gives judgment in favour of the claimant which is at least as advantageous as an offer the claimant made to settle the claim. These provisions will

be in addition to the current sanctions that the court may order and which are available under Part 36 of the Civil Procedure Rules (namely the payment of interest on damages, interest on costs and the payment of costs on an indemnity rather than a standard basis).

318. *Subsection (1)* makes provision for rules of court to be made in respect of monetary claims so that courts may order a defendant to pay an additional sum to a claimant where the court awards the claimant a benefit the value of which is at least as advantageous as an offer the claimant made to settle the claim, which the claimant has made in accordance with Part 36 of the Civil Procedure Rules. *Subsection (2)* provides that rules made under *subsection (1)* may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle.
319. The effect of *subsection (3)* is to enable the Lord Chancellor to prescribe, as a percentage of the value of the benefit awarded to the claimant, the maximum additional sum that the court may order. The Lord Chancellor may prescribe different percentage values for different values of claim (by virtue of *subsection (10)*).
320. *Subsection (4)* enables the Lord Chancellor to provide, by order, that rules of court may be made to enable a court to make an order in non-monetary claims (or mixed non-monetary and monetary claims) requiring a defendant to pay an amount to a claimant where the court gives judgment in favour of the claimant which is at least as advantageous as an offer the claimant made to settle the claim.
321. *Subsection (5)* provides that in claims to which *subsection (4)* applies, an order made by the Lord Chancellor must provide for the amount payable to be calculated in one or more of three specified ways, namely by reference to costs ordered to be paid to the claimant, or any amount of money that is awarded to the claimant in the proceedings, or the value of any non-monetary benefit awarded to the claimant.
322. *Subsection (6)* additionally requires that any order made under *subsection (4)* must provide that rules of court made under the order may include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle, and may provide that such rules may make provision as to the calculation of the value of any non-monetary benefit awarded to a claimant.
323. *Subsection (7)* provides that conditions prescribed by the Lord Chancellor which must be satisfied before an additional amount can be ordered to be paid may, in particular, relate to the nature of the claim, the amount of money awarded to the claimant and the value of the non-monetary benefit awarded to the claimant. The effect of *subsections (8) and (9)* is that any order made by the Lord Chancellor under this section must be made by statutory instrument subject to the negative resolution procedure.
324. *Subsection (10)* provides that rules of court made under section 55 may make different provision in relation to different cases.
325. *Subsection (11)* defines “civil proceedings”, for the purposes of this section as proceedings to which rules of court made under the Civil Procedure Act 1997 apply.

## **Referral fees**

### ***Section 56: Rules against referral fees***

326. **Section 56** prohibits the payment and receipt by “regulated persons” of referral fees in respect of claims for personal injury and death. In particular, section 56 makes provision to prevent the prohibition on the payment of referral fees in personal injury cases being avoided by presenting the referral fee as a payment for the referral of a connected claim (for example, in a road traffic accident, a credit hire claim or a claim for damage to other property), irrespective of when the referral of information relating to that connected claim occurs. “Regulated person” is defined in section 60 and includes claims management companies (“CMC”s), barristers and solicitors, as well as descriptions of authorised persons under the Financial Services and Markets

Act 2000 (such as insurers) if specified in regulations by the Treasury. The prohibition extends to the receipt of a referral fee by a regulated person from a party who, although not a regulated person, provides services to the regulated person's client in connection with their claim, for example a doctor who provides a medical report at the request of a solicitor and who pays the solicitor a fee for the referral. It also enables the Lord Chancellor to make regulations to extend the ban to other types of claim and legal services (defined in *subsection (6)*).

327. As regards the meaning of "referral", the effect of *subsection (5)* is to treat a referral as the provision by a person other than the client of information that a regulated person authorised to provide legal services would need to make an offer to the client to provide legal services.
328. *Subsection (8)* provides that a referral fee can be any form of consideration (which could, depending on the circumstances, include, for example, an offer by a solicitor to take on other work at a reduced rate or for no payment at all), other than normal hospitality, whether paid to the referrer directly or to a third party.

### ***Section 57: Effect of rules against referral fees***

329. **Section 57** requires relevant regulators to have arrangements in place to monitor and enforce the prohibition on the payment or receipt of referral fees. It also permits regulators to make rules and to use existing powers to enable them to monitor and enforce the prohibition. Under this section, some payments by or to a regulated person may be treated as a referral fee, unless the regulated person can show that the payment was for the provision of a particular service or another reason, and not for the referral – this might include, for example, the payment by a solicitor to a CMC for the obtaining of a medical report prior to the referral of a claim. The Lord Chancellor may make regulations specifying the maximum amount that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.
330. The provisions in section 57 referred to above do not apply where the Financial Services Authority (FSA), which is responsible for the regulation of insurers, and in respect of whom section 58 makes similar provision, is the relevant regulator. However, *subsection (5)*, which provides that a breach of the prohibition does not make a person guilty of an offence and does not give rise to a right of action for breach of statutory duty, and *subsection (6)*, which provides that a contract to make or pay for a referral or arrangement in breach of the prohibition is unenforceable, apply to all regulated persons.

### ***Section 58: Regulation by FSA***

331. **Section 58** enables the Treasury to make regulations which will enable the Financial Services Authority to monitor and enforce the prohibition on payment and receipt of referral fees in respect of those it regulates. As section 57 allows regulators to use existing powers to enforce the prohibition, so section 58 allows the Treasury to make regulations enabling the FSA to use existing provisions in the Financial Services and Markets Act 2000<sup>4</sup> for the same purpose. In addition, the regulations may make provisions similar to those under section 57 which require regulated persons to show that a particular payment is not a referral fee and to specify maximum amounts that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

### ***Section 59: Regulators and regulated persons***

332. **Section 59** lists both the "regulators" who are required to monitor and enforce the prohibition on the payment and receipt of referral fees in respect of personal injury

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claims (namely the FSA, the Claims Management Regulator (CMR), the General Council of the Bar and the Law Society or any other regulatory body specified in regulations by the Lord Chancellor) and the “regulated persons” who are subject to the prohibition (namely CMCs, barristers and solicitors, and insurers (see the note to section 58 above) and any person specified by the Lord Chancellor).

333. In addition, in respect of any other type of claim or the provision of legal services to which the prohibition might be extended by regulations under section 56(4)(c), section 59, *at subsection (2)*, lists those regulators who could be required to monitor and enforce the prohibition. Again the relevant regulators include both the FSA and the CMR, but *subsection (2)* also recognises that, in extending the prohibition, other providers of legal services, who are required to be regulated by other regulatory bodies, may be brought within the prohibition. The subsection has been drafted to ensure that all potential regulated persons and regulators, who are, in fact, identified in Part 3 of the Legal Services Act 2007<sup>5</sup>, can be made subject to the provisions in sections 56 and 57 should the need arise. Further, *subsection (2)* ensures that Alternative Business Structures (see Part 5 of that Act) can also be specified, by the Lord Chancellor, as regulated persons and be made subject to the prohibition as and when it becomes necessary to do so.

### ***Section 60: Referral fees: regulations***

334. **Section 60** provides that any regulations made under sections 56 to 59 will be made by statutory instrument, subject to the affirmative procedure.

### **Pro bono representation**

#### ***Section 61: Payments in respect of pro bono representation before the Supreme Court***

335. **Section 61** amends section 194 of the Legal Services Act 2007. The effect of the amendment will be to enable the Supreme Court to make an order for costs in those cases where a successful party is represented pro bono (i.e. free of charge), with the monies recovered going to a prescribed charity, currently the Access to Justice Foundation. Previously, section 194 only enabled the “civil courts” (the civil division of the Court of Appeal, the High Court and county courts) to make such orders.

### **Costs in criminal cases**

#### ***Section 62 and Schedules 7 and 8: Costs in criminal cases***

336. *Subsection (1)* gives effect to Schedule 7, which amends the Prosecution of Offences Act 1985 (“POA 1985”) by limiting the costs, including legal costs (that is, lawyers’ fees, charges and disbursements, including expert witness costs) that may be awarded as part of a “defendant’s costs order” (“DCO”). Schedule 7 also amends the Criminal Justice Act 1972, the Criminal Justice Act 1988 (“the 1988 Act”) and the Extradition Act 2003 by limiting the payment of legal costs in certain proceedings.
337. *Subsection (2)* gives effect to Schedule 8, which amends the Court Martial Appeals Act 1968 by making changes to the costs that may be awarded to successful appellants and others in the Court Martial Appeal Court and on appeal from that Court.