

# Developments in Collective Redress in the European Union and United Kingdom 2010

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## SUMMARY: EU

**Collective redress and litigation funding is firmly back on the Commission's agenda. But there is a significant policy shift towards ADR for dispute resolution. The UK is instituting major reform of the court rules on costs, and opening up funding options to include contingency fees and third party funding.**

In the light of a considerable political row following Commissioner Kroes' proposals for competition damages in the last days of the previous European Commission in 2009, President Barroso instructed his new Commissioners for Competition (Almunia), Consumer Affairs/Sanco (Dalli) and Justice (Reding) to agree a joint approach. The outcome has been their political agreement to proceed with the collective redress issue, covering court procedure but also safeguards, funding issues, and ADR solutions. A consultation is being issued to run until spring 2011, following which the Commissioners are likely to agree a general framework for collective redress comprising common principles and minimum standards. Sectoral legislative proposals can be expected to be proposed in late 2011 in the competition sector, and possibly for consumer redress and other areas, such as environment and employment. Activity can be anticipated on national implementing laws from 2012 for some years.

However, the consumer redress agenda has been significantly altered from its initial focus solely on court procedures, to encompass ADR solutions, ideally as a priority over court procedures. This policy has been influenced by academic work<sup>2</sup> and business advocacy. Indeed, ADR is now the favoured approach for consumer redress at EU level, with DG Sanco about to issue a separate consultation on consumer ADR with a view to preparing a legislative proposal for late 2011. ADR has emerged as a Cinderella technique, with research indicating a range of national techniques that are far more extensive than almost anyone had previously realised. The various ADR pathways range from ombudsmen to self-regulatory codes as well as more familiar sectoral compensation schemes and techniques such as mediation and arbitration. In two consultations issued in November, the UK government has declared a major policy shift for dispute resolution away from the courts and towards ADR (see below). A new law introduces ADR in Russia: Hungary is going in the opposite direction.

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<sup>2</sup> Summarised in C Hodges, 'Collective redress in Europe: The New Model' (2010) *Civil Justice Quarterly* 370.

Nationally, most countries have mostly refrained from pressing ahead with class action laws, pending decisions in Brussels. The main recent development has been a preliminary government paper in Lithuania, produced after detailed academic work, and an announcement that Malta is drafting a law. A proposal to introduce a class action for financial services cases in UK was dropped, whilst proposals to strengthen ADR and regulatory support for compensation in the sector were introduced.

Developments on costs and funding have taken place in several countries. Contingency fees and third party funding are on the agenda in England, and a 40% 'no cure no pay' fee was approved by the court in the Netherlands. Research has found that third party litigation funding exists in Germany, UK, Belgium and the Netherlands.<sup>3</sup> The Commissioners' note on collective redress specifically states that it will be necessary for effective funding arrangements to be specified for collective redress. Hence, further developments on contingency fees and third party funding should be anticipated across Europe.

### **European Commission moves towards political policy on collective redress**

After the significant political row at the end of the last Commission in 2009, President Barosso instructed his three Commissioners for justice (Reding), Competition (Almunia) and Consumer Affairs (Dalli) to collaborate in agreeing a joint policy. The three Commissioners issued a Note on 5 October 2010<sup>4</sup> stating that:

- They regarded collective redress as an instrument to strengthen the enforcement of EU law, notably within the more decentralised situation of enforcement that prevails.
- Collective redress is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation of harm caused by such practices.
- Collective redress is not a novel concept, and the existing mechanisms vary widely throughout the EU.
- The diversity and lack of a consistent approach may undermine the rights of citizens and businesses and give rise to uneven enforcement. The objective is to ensure from the outset that any future proposal of EU law fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU law. Stakeholders had warned against inconsistency between the different Commission initiatives.
- They identified a set of six core principles which could form part of a European framework for collective redress;

<sup>3</sup> CJS Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart Publishing, 2010).

<sup>4</sup> Renforcer la coherence de l'approche Européene en matière de recours collectif: Prochaines étapes, Note d'information de Mme Reding, M Almunia et M Dalli, 5 October 2010.

- Any EU initiative on compensatory collective redress should first and foremost ensure that any right of injured parties to compensation can be effectively and efficiently obtained.
- Parties should have the possibility to resort to a collective consensual resolution of their dispute, either by settling among themselves or using an Alternative Dispute resolution mechanism.
- The rules on European civil and procedural law should work efficiently for collective actions and judgments should be enforceable throughout the EU.
- Adequate means of financing should be available to allow citizens and businesses to have access to justice.
- Any European approach to collective redress would have to avoid from the outset the risk of abusive litigation. They firmly oppose introducing 'class actions' along the US model into the EU legal order.
- A European collective redress scheme should not give any economic incentives to bring abusive claims. Effective safeguards to avoid abusive collective actions should be defined.
- A consultation would be launched in November 2010 to identify which forms of collective redress could fit into the EU legal system, to run until February 2011.

In a speech on 15 October 2010, Commissioner Almunia said that the objective was to identify common standards and minimum requirements. Hence a general legal framework would be decided in Spring 2011, followed by specific legislative initiatives, including one on competition damages.

### **Collective enforcement proposal in Commission paper on data protection**

In a Communication issued on 4.11.10, in pursuance of a policy of strengthening individuals' rights under data protection legislation and principles, the Commission includes under the heading of 'Making remedies and sanctions more effective' proposals on both private and public enforcement:

- '- consider the possibility of **extending the power to bring an action before the national courts** to data protection authorities and to civil society associations, as well as to **other associations representing data subjects' interests**;
- assess the need for **strengthening the existing provisions on sanctions**, for example by explicitly including criminal sanctions in case of serious data protection violations, in order to make them more effective.' [Original emphases]

The reference to 'civil society organisations' would include consumer associations, trade associations and campaigning associations.

However, it also says: 'The Commission continues to consider that **self-regulatory initiatives** by data controllers can **contribute to a better enforcement of data protection rules**. The current provisions on self-regulation in the Data Protection Directive, namely the scope for drawing up Codes of Conduct, have rarely been used so far and are not considered satisfactory by private stakeholders.'

## **DG SANCO consultation on ADR**

As part of the above work on collective redress, DG Sanco is imminently to launch a consultation on ADR, and has formed an experts group.

## **European Investor Compensation Schemes**

The Commission issued in July a proposal to amend the Investor Compensation Schemes Directive (ICSD, Directive 97/9/EC) as part of a broader package on compensation and guarantee schemes.<sup>5</sup> The Commission said:

‘There is no concrete evidence to suggest that the financial crisis contributed to more compensation claims from schemes under the ICSD. However, in recent years, the Commission has recently received numerous investor complaints about the application of the ICSD in a number of important cases involving large investor losses. The complaints are principally related to the coverage and funding of schemes and delays in obtaining compensation.’

## **ADR in Russia<sup>6</sup>**

The Federal Law on Alternative Dispute Resolution Procedure with the Participation of an Intermediary (193-FZ) was passed on 30 July 2010 and will enter into force on 1 January 2011. It is partly based on the United Nations Commission on International Trade Law Model Law.

The new law sets out detailed legal steps to be followed for mediation, as well as several amendments and additions to the civil law, civil procedural law and arbitration procedural law. An agreement between the parties is required to initiate the mediation process. A mediator is requested to arrange joint or separate meetings with the parties to the dispute. The final stage is the conclusion of a mediation agreement, which can be in the form of an amicable agreement or other agreement settling the dispute.

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<sup>5</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 97/9/EC of the European Parliament and of the Council on investor compensation schemes, European Commission, COM(2010) 371 final, July 2010, available at [http://ec.europa.eu/internal\\_market/securities/docs/isd/dir-97-9/proposal-modification\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/isd/dir-97-9/proposal-modification_en.pdf)

<sup>6</sup> Information from CMS Cameron McKenna LLP.

Those participating in the process are not permitted to disclose any information on the proposals made to the respective parties to settle the dispute or on their intentions to do so. In addition, the participants are bound not to disclose the details of the arguments or proposals presented by the parties during the process, and are bound not to disclose information on the preparedness of the parties to accept the proposals.

The mediator is not authorized to provide the parties with legal advice or other legal assistance. A mediator and/or an organisation providing mediation services can not disclose any information on the mediation procedure if the parties to the dispute do not expressly permit a disclosure.

The law sets out requirements for the standard of mediation services as well as their procedure. The law also covers some areas of mediation during proceedings initiated in the arbitration tribunals and courts of general jurisdiction.

## UNITED KINGDOM

**Major developments are occurring in the UK on costs and funding, primarily associated with implementation of the *Jackson Costs Review*, and an associated shift in government policy away from courts towards ADR as part of the severe cuts in public finances and the government's 'Big Society' policy. Collective redress procedures are affected by that policy, with no discernable appetite for court procedures and instead development of non-court and regulatory techniques.**

### A. Collective Redress

#### **Previous government's withdrawal of proposed financial services class action procedure**

The Financial Services Bill introduced by the New Labour government in December 2009 included proposals to

- strengthen the power of the Financial Services Authority (FSA) to obtain compensation orders under s 404 of the Financial Services and Markets Act, and
- introduce a representative action procedure that looked similar to a US class action procedure.

After strenuous lobbying by business, it became clear that no political party supported the class action proposal, and almost the last act of the government before the general election was to withdraw it. In what emerged as the Financial Services Act 2010, the regulatory compensation order provision was passed (see next paragraph).

## **FSA issues rules for collective ‘consumer redress schemes’**

The FSA is authorised under s 404 of the Financial Services and Markets Act 2000 to order redress in certain circumstances. The power was extended under the Financial Services Act 2010 and the FSA issued its guidance in July on how it intends to make rules to establish a consumer redress scheme.<sup>7</sup> The guidance states that a consumer redress scheme is a set of rules under which a firm is required to take one or more of the following steps:

- investigate whether, on or after a specific date, it has failed to comply with particular requirements that are applicable to an activity it has been carrying on;
- determine whether the failure has caused (or may cause) loss or damage to consumers;
- determine what the redress should be in respect of the failure; and
- make the redress to the consumers.

Rules made by the FSA under this power will be subject to a formal consultation, including a cost-benefit analysis, which will normally take three months. The FSA will normally obtain advice from a Queen’s Counsel and may apply to the court. A scheme may only relate to situations where there has been breach of the law that gives rise to a right of action by a consumer. A scheme is subject to judicial review. The rules have been criticized as being far too cumbersome and slow to operate.

## **Government continues with consultation on the Consumer Advocate proposals**

The coalition government has continued with its predecessor’s policy on developing a new office of Consumer Advocate, which would operate as a long-stop mechanism for taking collective *consumer* claims to court in a collective procedure, instead of permitting wider rules on private collective actions. The outcome of the consultation is awaited: there is some risk that it may fall for lack of funding.

Consistent with this policy, the Court of Appeal dismissed an appeal to extend the existing representative action procedure for what would have been a collective claim against airlines.<sup>8</sup> It was held that the restriction in the traditional representative action rule that claims had to involve ‘the same interest’ was not wide enough to apply to claims that were not identical.

## **Surprising end to a major dispute: OD charges**

A length battle has raged over several years between banks and consumers over whether charges for unauthorised overdrawn accounts and related charges are fair and legal. The

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<sup>7</sup> Guidance note No 10 (2010), available at <http://www.fsa.gov.uk/Pages/Library/Policy/Guidance/index.shtml>.

<sup>8</sup> *Emerald Supplies Ltd and another v British Airways plc* [2010] EWCA Civ 1284; [2010] WLR (D) 294.

saga flooded the Financial Ombudsman Service and then the County Courts with claims before individual claims were frozen by what was in effect a test case of preliminary points of law that was set up between the Office of Fair Trading, the national consumer regulatory body, and the banks. After the OFT had won at first instance and in the Court of Appeal, the banks won a clear victory in the Supreme Court that their (differing) charges effectively could not be challenged.<sup>9</sup> The details will be reported in forthcoming research. The Group Litigation Order procedure, or any other procedure open to the civil courts, for formal coordination of the vast number of individual claims was not applicable, so a different procedural approach had to be invented.

Various other large financial services cases exist at different stages of development, and are being dealt with in different procedural ways. One of the largest relates to payment protection insurance.

## **B. ADR**

### **Dispute Resolution in London & the UK**

The report *Dispute Resolution in London & the UK 2010*<sup>10</sup> issued in September 2010 by TheCityUK focused on dispute resolution (DR) services other than litigation provided by organisations in the UK. It noted a surge in DR in the UK between 2007 and 2009, prompted by the economic recession and financial crisis; set out details of the main DR organisations and services in London and the UK; considered institutional DR and ad hoc DR; UK courts hearing international cases; UK expertise; the new legal framework for arbitration in Scotland; and sources of international disputes.

### **A Review of Consumer Complaints Procedures**

On 22 July 2010, the Office of Communications (Ofcom) announced its decision to establish a single mandatory Code of Practice setting out minimum standards for how communications providers must handle consumer complaints.<sup>11</sup> The Ofcom Code establishes a regulatory requirement for providers to resolve complaints in a "fair and timely manner" and outlines minimum expectations about the accessibility, transparency and effectiveness of providers' complaints handling procedures. The single Code of Practice will replace the current requirement for providers to seek Ofcom approval of their individual Codes of Practice, from 22 January 2011.

The new Ofcom Code of Practice also requires communications providers to provide additional information to consumers about their right to take unresolved complaints to

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<sup>9</sup> *Office of Fair Trading v Abbey National plc and others* [2009] UKSC 6, [2009] EWCA 116, [2008] EWHC 875 (Comm).

<sup>10</sup> available at <http://www.thecityuk.com/media/183858/dispute%20resolution%202010.pdf>

<sup>11</sup> The full text is available at [http://stakeholders.ofcom.org.uk/binaries/consultations/complaints\\_procedures/statement/statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/complaints_procedures/statement/statement.pdf)

Alternative Dispute Resolution. These requirements will not enter into force until 22 July 2011.

Nick Hutton, telecoms expert at Consumer Focus, issued a response to Ofcom's announcement of plans to make it easier for phone and broadband users to take their unresolved complaints to a free independent resolution service.<sup>12</sup>

## **OFT Review of Consumer Codes**

The Office of Fair Trading issued the latest in a long sequence of papers on self-regulation and its Consumer Code Approval Scheme.<sup>13</sup> It noted that 95 discrete schemes apply across 35 sectors, which provide dispute resolution pathways. More than half of the schemes offer conciliation and/or mediation. There are also a number of ombudsman schemes.

### **C. Costs and Funding**

#### **The Damages-Based Agreement Regulations 2010: 35% cap on employment contingency fees**

The (former) UK government introduced on 8 April 2010 a cap of 35% of the sum ultimately recovered for contingency fee agreements in employment law.<sup>14</sup> Such fee agreements are permitted, exceptionally, for claims in employment tribunals. The government has carefully avoided use of the expression 'contingency fee' and instead adopted the terminology of 'damages-based agreements'. The power to regulate by statutory instruments made by the Lord Chancellor is contained in s58AA of the Courts and Legal Services Act 1990, as amended by s 154 of the Coroners and Justice Act 2009.

However, the government dropped its proposal to reduce the cap on conditional fee agreements (CFAs) for defamation cases, which has long been lobbied for by media companies, from 100% to the mooted 10%.<sup>15</sup>

#### **The Young Report: *Common Sense, Common Safety***

The Jackson Costs Review was issued in January 2010, and made a large number of recommendations to cut or control what were seen as high and disproportionate costs of

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<sup>12</sup> Consumer Focus, 22/07/2010, available at <http://www.consumerfocus.org.uk/en/news/news/consumer-focus-response-to-ofcom-plans-for-phone-and-internet-complaints-handling>

<sup>13</sup> *Mapping UK consumer redress. A summary guide to dispute resolution systems*, May 2010 available at [http://www.offt.gov.uk/shared\\_offt/general\\_policy/OFT1267.pdf](http://www.offt.gov.uk/shared_offt/general_policy/OFT1267.pdf)

<sup>14</sup> The Damages-Based Agreement Regulations 2010/1206 at [http://www.opsi.gov.uk/si/si2010/pdf/ukdsi\\_20101206\\_en.pdf](http://www.opsi.gov.uk/si/si2010/pdf/ukdsi_20101206_en.pdf). See Practice Note at <http://www.lawsociety.org.uk/productsandservices/practicenotes/damagesbasedagreements> ... 28.5.2010.

<sup>15</sup> Consultation at [http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi\\_9780111496510\\_en.pdf](http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111496510_en.pdf).

the civil procedure system in England and Wales.<sup>16</sup> The government announced in July that it accepted the Jackson Review's central recommendation that cost shifting under the CFA regime is unsatisfactory and should be reformed.

In June the coalition government announced its intention to review UK Health and Safety laws.<sup>17</sup> Prime Minister Cameron had previously said the UK is "saturated" by such laws. The review was led by Lord Young of Graffham, a former trade and industry Secretary of State under Margaret Thatcher during the 1980s and Chairman of Cable & Wireless. Lord Young said that the system and the approach thereto has to be 'proportionate and not bureaucratic.' The review was met with some reluctance by trade unions, who warned against attacks on any legislation that protects staff at work. The review is expected to publish its findings in summer and will primarily investigate concerns over the 'application and perception' of health and safety legislation and its connections (if any) with the increasing 'compensation culture' in the United Kingdom, during the last decade.

Prime Minister Cameron said: "The rise of the compensation culture over the last 10 years is a real concern, as is the way health and safety rules are sometimes applied. We need a sensible new approach that makes clear these laws are intended to protect people, not overwhelm businesses with red tape. I look forward to receiving Lord Young's recommendations on how we can best achieve that."

Lord Young went on to state that "Health and safety regulation is essential in many industries but may well have been applied too generally and have become an unnecessary burden on firms, but also community organisations and public services. I hope my review will reintroduce an element of common sense and focus the regulation where it is most needed."

On 15 October 2010 Lord Young of Graffham issued his Report.<sup>18</sup> Although ostensibly a review of the operation of the health and safety laws, it also set out government policy on claims policy and implementation of the *Jackson Costs Review*. Lord Young sought to 'strengthen common sense' in H&S risk assessments and practice, reducing burdens on business and especially SMEs. He announced an intention to renegotiate various obligations in EU H&S legislation. The whole first chapter was taken up with attacking the operation of claims system and the perception of a 'compensation culture'. He recommended adopting the *Jackson Costs Review* in full. This is overall clearly a good thing, since much of *Jackson* is positive and balanced, but there had been considerable uncertainty over whether Jackson would simply sit on a shelf.

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<sup>16</sup> See CJS Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart Publishing, 2010).

<sup>17</sup> From LawNow 14.6.10

<sup>18</sup> *Common Sense Common Safety, A report by Lord Young of Graffham to the prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture.* (HM Government, 2010). Report at [http://www.number10.gov.uk/wp-content/uploads/402906\\_CommonSense\\_acc.pdf](http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf).

News item is at <http://www.number10.gov.uk/news/latest-news/2010/10/lord-young-report-55605>

The main points identified by *Young* are:

- Introducing a simplified claims procedure for personal injury claims, similar to the existing procedure for road accidents, under £10,000 on a fixed costs basis.
- Explore the possibility of extending the framework of such a scheme to cover low value medical negligence claims.
- Examine the option of extending the upper limit for road traffic personal accident personal injury claims to £25,000.
- Restrict the operation of referral agencies and personal injury lawyers and control the volume and type of advertising for litigation.
- Banning referral fees (which the Legal Services Board etc have spent some time arguing are no problem).
- Removing the shiftability (to the loser) of a CFA success fee and ATE insurance premium.
- Clarify that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part.

Although this is not mentioned, the items in the first two bullet points constitute a major move towards a German-style tariff cost system, and would provide greater transparency, predictability of costs - and lower costs. The government subsequently issued consultations on implementing these aspects (see below). However, Lord Young, who had been asked by the Prime Minister to supervise the implementation of his Report, was forced to resign in November after being quoted by a newspaper as making comments about the level of affluence of the population that were deemed to be politically embarrassing.

### **Developments prior to the *Young Report* on referral fees**

A Legal Services Consumer Panel report<sup>19</sup> focused on referral fee arrangements in conveyancing and personal injury and made recommendations aimed at tackling the following issues: closed bids and auction fees leading to work being referred to lawyers paying the highest fees rather than those of the highest quality; pressure selling tactics by estate agents and insurers to accept recommended lawyers; high levels of non-transparency by conveyancers and estate agents; and competition concerns caused by the trend for introducers to refer work to a small number of large law firms. The report makes 12 recommendations including: replacing the current rules with a consistent set of regulatory arrangements for lawyers and introducers; improving transparency requirements, including the possibility of consumers having to give written consent to being referred for a fee; and the use of mystery shoppers and enforcement action to tackle breaches of transparency rules.

The Advisory Committee on Civil Costs (ACCC) determined that there is no evidence that referral fees are too high, or that the profits of Claims Management Companies are

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<sup>19</sup>[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/ConsumerPanel\\_ReferralArrangementsReport\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_ReferralArrangementsReport_Final.pdf)

excessive. The Committee was set up to investigate the reason for the 20% - 35% difference between claimant and defendant expense rates in personal injury and clinical negligence cases. Although the ACCC concluded that the difference was almost entirely due to referral fees, it did not accept the contention of Association of British Insurers that the guideline hourly rates were too high and in need of downward adjustment, commensurate with rates charged by defendant solicitors.

A report prepared for the Legal Services Board (LSB) by Charles River Associates assessed the impact of referral fees on the legal services market.<sup>20</sup> The report examined three different parts of legal services: conveyancing; criminal advocacy; and personal injury. It concluded that law firms should require greater disclosure of referral fees or referral arrangements to Approved Regulators. The report acknowledged, however, that it is unclear whether information on referral fees alone would be sufficient since regulators would also need to understand the business model which the firms are using to see whether referral fees are linked to the level of services provided.

The Legal Services Board discussion paper of September 2010 *Referral fees, referral arrangements and fee sharing: Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing*<sup>21</sup> set out proposals for improving the regulation of referral fees and arrangements, but stopped short of an outright ban on these. The proposals recommended a detailed set of clear disclosure and transparency requirements for those who enter into these arrangements - designed both to give the consumer better awareness of the details behind the transactions and to secure a more consistent approach to transparency across the sector. Proposals included: having the same rules for different parts of the regulated legal markets so far as possible; that all agreements should be published by regulators; and requirements for lawyers to tell their clients to whom the referral fee is paid to and for what services, the value of the referral fee in pounds, and the consumer's right to shop around for an alternative provider. Responses will inform a final decision paper to be released in the second quarter of 2011.

### **Academic attack on the Jackson Costs Review**

In his editorial in the July edition of *Civil Justice Quarterly*, Professor Adrian Zuckerman, Professor of Civil Procedure at Oxford University, mounted a strong attack on Jackson LJ's proposals on costs management for higher claims.<sup>22</sup> He castigates the current English costs system as dysfunctional since transactional costs are 'out of all proportion' to the values of cases. He refers to the proportionality implicit within the far simpler German and US systems.

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<sup>20</sup> *Cost benefit analysis of policy options related to referral fees in legal services*, (Charles River Associates, May 2010), available at [http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/cra\\_impact\\_of\\_referral\\_arrangements\\_final\\_14may2010%28STC%29.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/cra_impact_of_referral_arrangements_final_14may2010%28STC%29.pdf)

<sup>21</sup> available at [http://www.legalservicesboard.org.uk/what\\_we\\_do/pdf/20100929\\_referral\\_fees.pdf](http://www.legalservicesboard.org.uk/what_we_do/pdf/20100929_referral_fees.pdf)

<sup>22</sup> AAS Zuckerman, 'Editor's Note. The Jackson Final Report on Costs – Plastering the Cracks to Shore up a Dysfunctional System' (2010) 29 *CJQ* 263

Zuckerman saw no rationale in Jackson's proposal to apply an exceptional one-way cost shift approach to personal injury cases. While welcoming the extension of fixed costs in smaller cases, Zuckerman said that the only reason why fixed costs have not been proposed for multi-track cases is to placate the vested interests of the legal profession. He considered that Jackson's proposed system of cost management as failing to identify what the costs will be before a case starts (or until judicial control at the end), and the system of judicial control of lawyers' budgeting as continuing to rely on the very intermediaries whose costs need to be controlled, coupled with a *post facto* attempt at control that itself enables satellite litigation without driving cost levels down.

Zuckerman finally considered that having a different costs regime for different types of proceedings or for different causes of action is a retrograde step (a Balkanization of civil procedure).

### **Green-light for contingency fees in tribunal cases?**

In *Tel-Ka Talk Limited –v- The Commissioners of HM Revenue and Customs (SCCO, June 2010)* Master Hurst, the senior costs judge, considered the legality of 'no win, no fee' fee agreements in tribunal cases. The solicitors agreed to act on a contingency fee basis and entered into a non-contentious business agreement enabling the company to continue with its claim and recover a VAT repayment owed.

In this case, where the Law Society intervened to argue in support the validity of contingency fees in tribunals, the Senior Costs Judge said that section 57 of the Solicitors Act 1974 clearly made contingency fee agreements lawful for non-contentious work. He also found the VAT and Duties Tribunal<sup>23</sup> was not a court within the meaning of section 87 of the SA 1974, and that therefore the business conducted by the solicitors was non-contentious. The judge specifically rejected the Commissioners' contentions that despite what is said in the SA 1974 contingency agreements are contrary to public policy, and that tribunal proceedings were contentious business.

### **Claims management regulation: Impact of regulation: Third year assessment**

A report for the Claims Management Unit of the Ministry of Justice considered the impact of claims management regulation on reducing malpractice and promoting access to justice.<sup>24</sup> The report also discusses the evolution of the claims management market and the regulatory regime since 2007, and highlights issues for future consideration by the regulator including: differentiating businesses; dealing with misleading information; the approach to authorisation; and the use of the expression "Regulated by the Ministry of Justice".

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<sup>23</sup> Note that The VAT and Duties Tribunal has since been abolished and its functions taken over by the Tax Chamber of the First-tier and Upper Tribunals which are 'courts' (section 3(5) TCE Act 2007).

<sup>24</sup> (Ministry of Justice, July 2010) available at <http://www.justice.gov.uk/cmnr-impact-assessment-0710.pdf>

## **Legal Expenses Insurance (LEI)**

On 19 July 2010, the FSA published a letter sent by Ken Hogg, FSA Insurance Sector Director, to insurers relating to legal expenses insurance.<sup>25</sup> In the letter, Mr Hogg explains that the European Commission is interested in understanding how the UK has transposed the Legal Expenses Insurance Directive (87/344/EEC) into national law, primarily in relation to the freedom to choose a lawyer provisions. The Commission is interested in this as a result of the decision of the European Court of Justice (ECJ), on 10 September 2009, in *Erhard Eschig v UNIQA Sachversicherung AG* (C-199/08). This decision made it clear that any provisions of a contract that detract from, or qualify in any way, the freedom to choose a lawyer, will not be compliant with the Directive.

## **Third Party Litigation Funding – Self-Regulation**

The Civil Justice Council issued on 26 July 2010 its consultation on a self-regulatory scheme for Litigation Funders.<sup>26</sup> The proposals were as anticipated from prior discussions. However, the issue is of considerable importance. Oxford and Lincoln Universities have been undertaking research into the industry, which is continuing.<sup>27</sup>

## **Government Proposals on Reform of Litigation Costs and Funding**

In November 2010 the UK government issued two important consultation papers as a prelude to introducing major legislative reforms in the funding and costs of litigation. In accordance with the government's overriding policy of reducing public expenditure, it proposes to take a further major step in deconstructing legal aid. Instead, it adopts two policies. First, people are to be encouraged to resolve disputes through alternative dispute resolution mechanisms – the full details of this are not yet available. Secondly, all available means of private funding for claims within the court system are to be encouraged, ranging from legal expenses insurance (LEI) to contingency fees (known as damages-based agreements) and third party funding. The experiment with conditional fee agreements (CFAs) and associated after-the-event (ATE) insurance is to be curtailed, implementing the recommendations of Lord Justice Jackson that CFA success fees and ATE premiums are no longer to be recoverable from opponents. Many other Jackson proposals are to be implemented, notably qualified one way cost shifting (QOCS) for personal injury and various other

<sup>25</sup> available at [http://www.fsa.gov.uk/pubs/other/lei\\_190710.pdf](http://www.fsa.gov.uk/pubs/other/lei_190710.pdf), subsequently revised on 12 August 2010 by the addition of two explanatory footnotes.

<sup>26</sup> *Consultation Paper. A Self Regulatory Code for Third Party Funding* (Civil Justice Council, 2010) at [http://www.civiljusticecouncil.gov.uk/files/TPF\\_consultation\\_paper\\_\(23.7.10\).pdf](http://www.civiljusticecouncil.gov.uk/files/TPF_consultation_paper_(23.7.10).pdf)

<sup>27</sup> A note of their conference of 19 May 2010 is at <http://www.csls.ox.ac.uk/documents/NoteoftheConferenceonLitigationCostsandFunding.doc> and a Report will be issued shortly.

types of claims, under which claimants would not have to pay opponents' costs unless they had appreciable assets or behaved badly in the litigation process.

The two consultations are on proposals for reform of legal aid,<sup>28</sup> and on implementation of Lord Justice Jackson's ('Jackson') recommendations.<sup>29</sup> An associated Report to the Prime Minister was published on 15 October 2010 by Lord Young of Graffham, primarily concerning reducing burdens on business of health and safety law, but containing a strong attack on a perceived 'compensation culture' and supporting the Jackson recommendations (see above).<sup>30</sup> The government announced that it is also working on a wider reform of the legal system, which will emphasise ADR: details are to be published in 2011.

## I. Funding of Litigation

### Restricting legal aid and encouraging ADR

The Legal Aid Consultation starts from the premise that legal aid is no longer a sustainable public expenditure programme in the current economic climate,<sup>31</sup> and that deep cuts need to be made. However, the Minister of Justice's Foreword notes not just a very large shift away from public funding of litigation<sup>32</sup> towards development of various types of private funding, but also a significant shift in emphasis towards ADR:

'I believe that this has encouraged people to bring their problems before the courts too readily, even sometimes when the courts are not well placed to provide the best solutions. This has led to the availability of taxpayer funding for unnecessary litigation. There is a compelling case for going back to first principles in reforming legal aid. ...

To continue like this is unsustainable, and I want to use these lessons as an opportunity for fundamental reform of the scheme. I want to discourage people from resorting to lawyers whenever they face a problem, and instead encourage them, wherever it is sensible to do so, to consider alternative methods of dispute resolution which may be more effective and suitable. I want to reserve taxpayer funding of legal advice and representation for serious issues which have sufficient priority to justify the use of public funds, subject to people's means and the merits of the case.'

<sup>28</sup> *Consultation paper, Proposals for Reform of Legal Aid in England and Wales*, November 2010, available at: <http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm>

<sup>29</sup> *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales. Implementation of Lord Justice Jackson's Recommendations*, Ministry of Justice, Consultation Paper CP 13/10, November 2010, available at <http://www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf>

<sup>30</sup> *Common Sense, Common Safety. A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*, (HM Government, 2010), available at [http://www.number10.gov.uk/wp-content/uploads/402906\\_CommonSense\\_acc.pdf](http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf). Lord Young resigned as the Prime Minister's advisor of business on 19 November 2010.

<sup>31</sup> The Ministry of Justice's target is a real reduction of 23% in its budget, worth nearly £2bn in 2012-15. Legal Aid Consultation, para 1.3.

<sup>32</sup> For many years, surveys have shown that the UK paid considerably more per capita in legal aid than any other EU state.

The objective is:

‘These proposals complement the wider programme of reform to move towards a simpler justice system: one which is more responsive to public needs, which allows people to resolve their issues out of court without recourse to public funds, using simpler, more informal, remedies where they are appropriate, and which encourages more efficient resolution of contested cases where necessary. But these legal aid proposals are not dependent on the implementation of those wider reforms.’<sup>33</sup>

The government states that ‘to help establish the right balance’ it has been guided by various considerations, beginning with:

‘the desire to stop the encroachment of unnecessary litigation into society by encouraging people to take greater personal responsibility for their problems, and to take advantage of alternative sources of help, advice or routes to resolution’<sup>34</sup>

### **Legal aid reform**

Many of the proposals concern criminal and family legal aid and other issues, and are not referred to here. The detailed proposals on civil legal aid are also not summarised: they broadly concern limiting scope,<sup>35</sup> eligibility<sup>36</sup> and remuneration of lawyers.<sup>37</sup>

Legal aid is to be restricted in scope to those cases where the litigant is at risk of very serious consequences. Such restrictions are based on various factors:<sup>38</sup>

- the objective importance of the issue, taking into account the matters at stake;
- the litigant’s ability to present their own case;
- the availability of alternative sources of funding; and
- the availability of other routes to resolution, and the advice and assistance available to individuals to help them achieve a resolution, including the extent to which the individual could be expected to work at resolving the issue themselves.

A significant reform is that disputes involving consumer law, breach of contract and tort claims are not considered to be of sufficient priority to justify publicly funded support.<sup>39</sup> The government notes the availability of alternative, non-court-based routes to resolution, such as the Financial Ombudsman’s Service (for financial disputes) or OTELO for complaints relating to telecommunications. CFAs will also often be available for cases involving damages. Legal aid will be refused for any individual case which is suitable for

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<sup>33</sup> Legal Aid Consultation, para 1.5.

<sup>34</sup> Legal Aid Consultation, para 2.11.

<sup>35</sup> Legal Aid Consultation, ch 4.

<sup>36</sup> Legal Aid Consultation, ch 5.

<sup>37</sup> Legal Aid Consultation, chs 6 and 7. All fees paid for civil work will be reduced by 10%.

<sup>38</sup> Legal Aid Consultation, paras 4.13-4.29.

<sup>39</sup> Legal Aid Consultation, paras 2.28, 4.171 and 4.243.

an alternative source of funding, such as a CFA. This would apply to all civil cases other than family cases.<sup>40</sup>

### **Diversity of litigation funding: SLAS, TPF and contingency fees**

The government proposes to raise fees from two sources in addition to general taxation:<sup>41</sup>

- securing the interest generated by monies that solicitors hold on behalf of clients in general client accounts, and
- a Supplementary Legal Aid Scheme (SLAS) in which a percentage of funds are recouped from cases where successful claims for damages have been made and the claimant was in receipt of legal aid, and uses those funds to supplement the legal aid costs of other cases. However, the government does not indicate whether the initial funding that would be required would be from public or private sources. It does propose that the percentage collected should only come from general and not special damages.

In relation to civil litigation, Jackson considered that litigants should have the choice of as many funding methods as possible and the freedom to choose the one that they believe is most appropriate for their case.<sup>42</sup> That policy of diversity is pursued in the government's proposals on supporting legal expenses insurance (LEI), Third part funding (TPF) and contingency fees (DBAs):

- The government supports the recommendations of Jackson and Lord Young that before-the-event (BTE) LEI should be encouraged, especially for housing and employment cases.<sup>43</sup>
- A voluntary code has been drawn up for providers of TPF, on which consultation closes on 3 December 2010.<sup>44</sup>

### **Damages based agreements [contingency fees]**

A damages-based agreement (DBA) is the UK statutory term for a regulated contingency fee.<sup>45</sup> These have historically been permitted in employment cases. They are similar to existing CFAs (see below) in permitting a regulated success fee, but different in that the

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<sup>40</sup> Legal Aid Consultation, para 4.265.

<sup>41</sup> Legal Aid Consultation, ch 9.

<sup>42</sup> Jackson Consultation, para 225.

<sup>43</sup> Jackson Consultation, para 265-267; Legal Aid Consultation, para 9.42.

<sup>44</sup> Jackson Consultation, para 270.

<sup>45</sup> 58AA of the Courts and Legal Services Act 1990, as amended by section 154 of the Coroners and Justice Act 2009.

success element is calculated by reference to the damages awarded. The government proposes to permit DBAs in general litigation.<sup>46</sup>

Jackson rejected the argument that DBAs create a greater threat of conflict of interest between lawyers and their clients than CFAs.<sup>47</sup> He recommended that DBAs

‘Under the regulations governing DBAs in the Employment Tribunal, the maximum percentage of damages that a representative may take as a fee is 35% (including VAT). In respect of CFAs, Sir Rupert proposes that in personal injury claims the maximum percentage of damages, excluding damages awarded for future care or losses, which can be payable as a success fee should be 25%. Sir Rupert says that the cap on deductions should be the same for DBAs. He recommends that no contingency fee deducted from damages under a DBA should exceed 25% of claimant’s damages, excluding damages referable to future care or losses.’<sup>48</sup>

‘Sir Rupert believes that solicitors should be entitled to charge a higher percentage fee under a DBA than they otherwise would if they accept the risk of liability for their client’s adverse costs in the event that the case is lost. He also believes that solicitors should be entitled to a higher percentage fee if they fund the client’s disbursements. If either is funded by the client the solicitor should be entitled to a lower percentage fee. The disbursements in DBAs could include counsel’s fees, or counsel could be allowed to act under a DBA and be entitled to a specified percentage of any sums recovered. If the latter is the case this must be clearly set out in the DBA itself.’<sup>49</sup>

Costs would be recovered from the opponent on a conventional basis, as on the Ontario model. Any excess over the sum recoverable on a normal hourly rate basis would be paid by the client.<sup>50</sup>

The government does not consider that a new approach towards regulation of DBAs is necessary:

‘... in principle there would be little difference between CFAs (as reformed) and DBAs if introduced on the basis proposed by Sir Rupert. The Government is therefore not convinced that, aside from a cap on damages in personal injury cases (as with CFAs), separate detailed regulation of DBAs would be necessary and that the existing requirements in the professional rules of conduct for solicitors, for example, could be extended to cover the use of DBAs in litigation.’<sup>51</sup>

## II. Implementing the Jackson Recommendations

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<sup>46</sup> Jackson Consultation, para

<sup>47</sup> Jackson Consultation, para 228.

<sup>48</sup> Jackson Consultation, para 232.

<sup>49</sup> Jackson Consultation, para 233.

<sup>50</sup> Jackson Consultation, para 234.

<sup>51</sup> Jackson Consultation, para 237.

In response to serious concern amongst the judiciary that the costs of litigation in England and Wales are too high and disproportionate to sums in dispute, Lord Justice Jackson carried out a detailed and extensive review in 2009, and made 109 recommendations in his *Costs Review*.<sup>52</sup> The government proposes to implement the main points of the Jackson Review.<sup>53</sup>

### **CFAs and ATE premiums no longer recoverable**

After legal aid was largely deconstructed in the 1990s, the government privatised litigation funding with Conditional Fee Agreements (CFAs) from 1995.<sup>54</sup> Claimants' exposure to potential liability for opponents' costs was covered by legal expenses insurance, either pre-existing policies or a new form of after-the-event (ATE) policy. From 1999,<sup>55</sup> the government made CFA success fees and ATE premiums recoverable from losing or settling defendants. Jackson found that the CFA recoverability regime was one of the major drivers of excessive costs.<sup>56</sup> The government proposes to make CFA success fees and ATE premiums irrecoverable. Claimants would in future have to deduct such costs from their damages recovered. This has been the position in Scotland, where it has not caused difficulty.<sup>57</sup>

In order to balance the diminution in value of claimants' damages that would be caused by having to pay for their lawyers' success fees and ATE premiums, Jackson proposed that general damages should rise by 10%. The government prefers to provide that the recoverable success fee element should be calculated as a sum equivalent to 10% of the general damages award in each case, rather than to introduce a general rise in general damages. That approach is intended to focus the provision on CFA cases.<sup>58</sup>

The government strongly believes that parties should attempt to reach an agreement to settle as early as possible.<sup>59</sup> Accordingly, it intends that claimants who obtain judgment that exceeds a previous settlement offer (CPR Part 36) should be rewarded by an extra 10% of damages, although the judge would be able to reduce the sum where there are good reasons to do so.<sup>60</sup> The government is considering an alternative rule: if the

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<sup>52</sup> *Review of Civil Costs: Final Report* (2010).

<sup>53</sup> The government prefers the radical recommendations set out above, but also consults on two alternative proposals put forward by Jackson.

<sup>54</sup> Under a CFA, there is a basic fee based on work done charged at an hourly rate, and a success fee based on a percentage of the basic fee. A proportion of the basic fee, subject to court control, is recoverable from a losing opponent. There are certain regulatory requirements governing CFAs, and success fees are capped at 100% of the basic fee.

<sup>55</sup> Access to Justice Act 1999.

<sup>56</sup> *Final Report*, para 3.26.

<sup>57</sup> Lord Gill's *Report of the Scottish Civil Courts Review* (2009), para 96.

<sup>58</sup> Jackson Consultation, para 100.

<sup>59</sup> Jackson Consultation, para 124.

<sup>60</sup> HMCS figures suggest that 2.5% of all fast and multi track claims are decided at trial, but this figure includes a large number of undefended money claims that proceed straight to judgment without a trial. Of claims that are defended in the fast and multi track, around 25% are decided at trial, but the percentage varies between different types of claim. Jackson Consultation, para 115.

damages exceeded the settlement offer but not by more than 10%, the claimant would receive costs to the date of the offer but each party would meet their own costs thereafter. The rationale would be that if the offer was so close, the parties should have reached agreement.

### **Qualified one way cost shifting**

The normal rule is ‘loser pays’ an amount regulated by the court. In order to protect claimants against adverse costs orders in certain types of case, qualified one way cost shifting (QOCS) should apply. Under QOCS:

- Losing claimants would pay their own costs and any success fee, but only the winner’s costs to the extent it was reasonable.
- Losing defendants would pay the winner’s costs.

The result would be ‘costs protection’ for certain claimants, in a way that was standard for the many claimants who qualified for legal aid under earlier regimes.<sup>61</sup> The aim of QOCS is to reduce the financial risk for the claimant, and hence reduce the need for ATE insurance.<sup>62</sup> Calculations predict that the regime would protect the vast majority of personal injury claimants, and cost less for claimants and defendants if ATE premiums were to remain recoverable.

The ‘costs protection’ would apply unless the claimant acts unreasonably (for example by bringing a frivolous or fraudulent claim, or in conducting the claim unreasonably or abusively) or if the claimant is sufficiently wealthy.<sup>63</sup> In order to provide certainty to parties, the government seeks views on providing that the presumption that the claimant would not be liable to pay defendants’ costs would apply unless the court orders at an early stage that the financial circumstances of the parties are such that the claimant should be liable for all or a fixed amount of defendants’ costs if the claim fails.<sup>64</sup>

The principal type of case that would be protected would be all personal injury claims (including clinical negligence) so as to preserve claimants’ damages being reduced by success fees and ATE premiums.<sup>65</sup> A background point noted by Jackson was that almost all personal injury claimants who bring individual claims have suffered injury and their cases have some merit. (Note that he did consider the position in collective claims.) Jackson also suggested that protection could apply in other types of cases: judicial review claims; defamation claims; housing disrepair claims; actions against the police; and professional negligence claims.<sup>66</sup> He considered that socio-political considerations justify the encouragement of such claims, in which there is often an imbalance of power and means between the parties that he considered should be made more balanced. Many such

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<sup>61</sup> Jackson Consultation, para 131.

<sup>62</sup> Jackson Consultation, paras 85 and 132.

<sup>63</sup> Jackson Consultation, para 136.

<sup>64</sup> Jackson Consultation, para 143.

<sup>65</sup> Jackson Consultation, para 153.

<sup>66</sup> Jackson Consultation, para 154.

cases are not funded on a CFA basis. In some cases, there are other controls on the claims that are brought, such as the necessity for the court's scrutiny of merits and approval in judicial review of government action.<sup>67</sup> The government proposes that a defendant of modest means faced with a wealthy claimant could apply at the beginning of a case for the cap on the claimant's costs recovery to be lifted altogether or increased.<sup>68</sup> There is also a suggestion from the environmental sector that an unsuccessful claimant should not be ordered to pay the costs of any other party save where the claimant has acted unreasonably in bringing or conducting the proceedings.<sup>69</sup>

The government has concerns about extending QOCS to (i) cases funded on a traditional hourly rates basis and (ii) to judicial review claims. If QOCS were to be introduced for these claims, the Government considers that it should apply only to individual claimants who should be liable to pay some costs (up to an appropriate limit) – which limit may vary depending on the type of case.<sup>70</sup>

QOCS would apply to individual only and not commercial organisations.<sup>71</sup> It is unclear whether it would apply to civil society bodies like consumer associations: the government notes that some NGOs have substantial assets and should not be afforded costs protection. The consultation does state that organisations would instead be able to apply, as now, for Protective Costs Orders,<sup>72</sup> but it seeks views on whether QOCS should apply to non-commercial organisations bringing claims in the public interest.<sup>73</sup>

Claimants would be able to take out ATE insurance if they chose and could afford it. Their lawyers would be permitted to fund disbursements in return for an increased success fee, subject to a 25% of damages cap in personal injury cases.

Trade unions and consumer associations are able to recover costs from opponents on a notionally self-insured basis: this would no longer be permitted.<sup>74</sup>

### **New test of proportionality of costs**

The government accepts Jackson's recommendation that a new test should be introduced that costs should be proportionate to the amount in dispute, which should dominate over

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<sup>67</sup> Immigration and asylum cases constitute by far the largest area of judicial claims. Over 90% of contested judicial review claims are not granted permission to proceed: National Audit Office Report HC 124 Session 2008-9. Figures provided by the UK Border Agency indicate that in around 50% of the 2,133 immigration and asylum claims in 2009 where permission was refused on the papers, the court found that the claim was 'abusive' or 'devoid of merit' and/or ordered that a renewed oral application for permission need not be a barrier to removal. Jackson Consultation, para 160.

<sup>68</sup> Jackson Consultation, para 164.

<sup>69</sup> Jackson Consultation, para 165.

<sup>70</sup> Jackson Consultation, para 169.

<sup>71</sup> Jackson Consultation, para 152.

<sup>72</sup> Jackson Consultation, para 165.

<sup>73</sup> Jackson Consultation, para 167.

<sup>74</sup> Jackson Consultation, para 94.

the tests of either reasonableness or necessity. He proposed a definition of proportionality as:<sup>75</sup>

*Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:*

- *the sums at issue in the proceedings;*
- *the value of any non-monetary relief in issue in the proceedings;*
- *the complexity of the litigation;*
- *any additional work generated by the conduct of the paying party; and*
- *any wider factors involved in the proceedings, such as reputation or public importance.*

The government notes that concerns have been raised that the definition of proportionality as suggested by Jackson may generate satellite litigation because of uncertainty as to when costs would be judged to be disproportionate. To avoid this difficulty, it might be helpful to emphasise in the Costs Practice Direction that the test is intended to be used in the small number of cases where costs assessed as reasonable are nevertheless disproportionate. The Costs Practice Direction might also set out examples of cases where it would generally be inappropriate for the paying party to seek to challenge costs assessed as reasonable on the basis of the proportionality principle.<sup>76</sup>

## **Other issues**

There are various other matters included in the Consultation. The most notable is that fixed recoverable costs should be introduced into certain categories of fast track claims linked to the stage at which the claim is resolved. This was initially proposed by Lord Woolf in 1995, has been strongly recommended by Lord Young of Graffham's Report, *Common Sense, Common Safety* in 2010, and would copy the position in Germany (although no official documents note that). The government aims to introduce a new regime for low value personal injury claims in road traffic cases by April 2012.

A working party is also considering making damages predictable. A pilot scheme will be developed by June 2011. The government does not consider that it is necessary to abolish the indemnity principle, which prevents a party recovering more by way of costs from an opponent than it is obliged to pay its own lawyers.<sup>77</sup> Consideration is being given to improving fact-finding in clinical negligence cases.

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<sup>75</sup> Final Report page 38, para 5.15

<sup>76</sup> Jackson Consultation, para 219.

<sup>77</sup> Jackson Consultation, para 276.