



**Bar Council response to the Ministry of Justice survey:  
'Part 2 of the LASPO Act: Litigation Funding and Costs'**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Ministry of Justice on-line survey 'Part 2 of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act: Litigation Funding and Costs.'<sup>1</sup>
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)
4. The on-line survey asks eight questions, which we have numbered for ease of reference in this submission, which is being made on-line and published on the Bar Council website.

**Question 1: What types of claims do you typically deal with?**

5. The changes introduced by Part 2 of LASPO Act had a particular effect upon personal injury work. Personal injury is a core practice area for many barristers. The specific interests of barristers specialising in personal injury are represented by the

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<sup>1</sup> [https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo-act-initial-assessment?utm\\_source=46bcca47-de1c-4f08-bd8d-24f370a1ad41&utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_content=immediate](https://www.gov.uk/government/publications/post-implementation-review-of-part-2-of-laspo-act-initial-assessment?utm_source=46bcca47-de1c-4f08-bd8d-24f370a1ad41&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate)

Personal Injuries Bar Association (PIBA) who can be further consulted by the Ministry for their specialist expertise in matters relating to personal injury law.

6. The Bar Council and PIBA represent a broad community of barristers undertaking personal injury work at all levels of value, for claimants and defendants, including but not limited to road traffic accident (RTA), employers' liability accident (ELA), public liability, industrial disease, and accidents abroad. Medical negligence is a specific category of work which encompasses aspects of both personal injury and professional negligence and the interest of barristers undertaking this work is represented by the Bar Council, PIBA, and the Professional Negligence Bar Association (PNBA).

**Question 2: How long have you been in that role/dealing with that type of claim?**

7. See above.

**Question 3: Section 44 abolished the recoverability of Conditional Fee Agreement success fees. In your experience what have been the impacts of this reform, and the regulations made under it?**

8. The experience of our members differs widely.

9. Most personal injury barristers work for both claimants and defendants, so the effect of the loss of recoverability does not have the same impact as it will have on solicitors' firms or those barristers undertaking only or predominantly claimant work.

10. Through its Remuneration Committee, the Bar Council works closely with PIBA in relation to personal injury work undertaken under Conditional Fee Agreements (CFAs), including providing guidance and technical assistance for barristers working under CFAs, including providing draft agreements.<sup>2</sup>

11. The Bar Council does not possess statistical evidence in relation to the impact of the loss of recoverability, but the feedback we have received from members and from discussions with representatives of PIBA and PNBA informs our understanding of the general position.

12. Prior to the implementation of LASPO it had been anticipated that competition would result in solicitors not seeking payment of success fees from the lay client, but by and large that has not been our experience. Generally, the usual position is that the solicitor claims a success fee from the client subject to the statutory cap.

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<sup>2</sup> <http://www.barcouncilethics.co.uk/subject/privately-funded-civil-litigation/>

13. Most PI and medical negligence work undertaken by barristers is under the APIL/PIBA agreement – currently APIL/PIBA 9.<sup>3</sup>

14. APIL/PIBA 9 provides an option for counsel to be paid a success fee or not. Anecdotal evidence provided to the Bar Council is that many, and probably most, solicitors do not agree for counsel to be paid a success fee.

15. A further provision of APIL/PIBA 9 provides that in the event of success, any of counsel's fees not recovered *inter partes* shall be paid by the solicitor. This clause is important as, in many cases, counsel's loss of success of fees is mitigated to some extent by the contractual right to recover base fees from the solicitor.<sup>4</sup> However, solicitors' practice differs widely in relation to this clause. The essential problem is that payment of any of counsel's unrecovered fees will have to come either out of solicitor's profit costs or the lay client's damages. An increasing number of solicitors do not accept a contractual obligation to pay counsel's unrecovered fees. In these circumstances, counsel's entitlement to costs is limited to *inter partes* costs recovery: "an eat what you kill agreement".

16. Anecdotal evidence provided to the Bar Council suggests a significant decline in income for barristers undertaking personal injury work. Measuring the effect of recoverability on income is problematic because of the impact of other reforms; in particular, the introduction of fixed fees in the fast track and the expansion of the portal which has resulted in a decline of work to the Bar particularly at the junior end.

**Question 4: Section 46 abolished the recoverability of after the event (ATE) insurance premiums (except in relation to clinical negligence expert reports). Qualified One Way Costs Shifting (QOCS) was introduced in its place in personal injury claims. In your experience what have been the impacts of this reform?**

17. Our experience is that After the Event Insurance is still widely used in PI cases, in particular, to cover the costs of disbursements.

18. Discussions with our members have revealed the following concerns about the current operation of QOCS:

- i.) There is a concern that allegations of fundamental dishonesty are being made in inappropriate cases, causing unnecessary additional time and expense in response.

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<sup>3</sup> <http://www.piba.org.uk/documents>

<sup>4</sup> APIL/PIBA 9 is a contract between solicitor and counsel following the introduction of standard contractual terms in January 2013. However, some solicitors, including some large claimant firms do not enter agreements on contractual terms and counsel does not have the right to enforce the contractual obligation for payment of fees.

- ii.) Interlocutory costs awarded against successful claimants can still be recovered by defendants. There is a concern that this is affecting behaviour. Claimant's representatives are unwilling or unlikely to make applications when there is a risk of defendants being awarded costs, as those costs will have to be met from the client's damages under the QOCS rules. Courts also have the jurisdiction to make orders for set off in respect of costs orders with the consequence that the adverse costs are paid, in effect, by the solicitor, out of profit costs. The result is that there can be some reluctance on the part of the claimant's representatives to make applications when an adverse cost order is likely, for example, to amend the particulars of claim.
- iii.) The judgment in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 (CA) is significant. The definitive ruling that in multiple defendant cases, a 'successful' defendant can recover its costs when the claimant succeeds against another defendant will have an impact on behaviour. The potential loss of the QOCS shield against a 'successful' defendant in multi-party cases is likely to have a significant impact on claimant behaviour, but the impact may be reduced by the use of Tomlin orders when the claim is settled against other defendants, or the use of *Sanderson* or *Bullock* letters pre-action.

**Question 5: Section 45 introduced Damages Based Agreements as a funding method for civil cases. In your experience what have been the impacts of this reform?**

- 19. There has been no real take-up of DBAs in personal injury and medical negligence work.
- 20. There is some very limited use of DBAs in commercial work, but a more common feature of chancery and commercial work where some form of contingency agreement is used is a 'discounted' CFA.
- 21. DBAs are widely used in employment cases, particularly by solicitors. The Bar's experience of DBAs in the employment field is varied: in some cases, counsel will also work under a DBA; in other cases, counsel will enter into a CFA or discounted CFA. In employment matters where there are very limited *inter partes* costs orders made, there is no risk of the DBA being challenged by the paying party as there is in non-employment matters. It is the threat of a legal challenge to the lawfulness/enforceability of the DBA which imposes a bar on most barristers otherwise willing to pursue claims under a DBA.
- 22. General uncertainty over the drafting of a DBA agreement under the Damages Based Agreement Regulations 2013 led the Bar Council to advise members that

particular care had to be taken in drafting a DBA Agreement.<sup>5</sup> As the impact of a finding of unenforceability is so dramatic (no costs at all are recoverable by the barrister) very few barristers are prepared to risk of entering into a DBA even if the case is deserving.

23. This is not an acceptable state of affairs. The Bar Council has been urging the government to undertake reform to this area ever since the DBA regulations were first promulgated. It is very disappointing that still no reform has come about. The message from the Bar Council, supported by the senior judiciary, in calling for reform has gone unanswered. Now is the time for the government to act and bring about speedy reform to this area.

24. It is vital for a system intending to provide wider access to justice that the tools enabling such wider access are workable and fit for purpose. The current DBA Regulations 2013 are not fit for purpose.

25. The Civil Justice Council report (2015)<sup>6</sup> highlights the areas of concern.

26. The Bar Council is willing to provide as much assistance as is necessary to ensure that the Regulations are amended in key areas to enable them to operate effectively.

27. Key areas include:

- a. Making it clear that inter partes costs can be recovered during the course of an action even if the claim subsequently fails – mirroring the operation of CFAs
- b. Allowing for some payment in lieu of work done in the event of client termination of the DBA
- c. Allowing for greater flexibility in the use of DBAs, modelling the CFA approach of discounted CFA agreements.

28. Particular concerns arise in relation to cases involving either CFA or DBA where counsel is instructed on a Direct Access basis and in July 2018, the Direct Access Panel published a notice on “CFAs and DBAs in Public Access Cases”.<sup>7</sup>

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<sup>5</sup> [http://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/201710\\_cfa\\_and\\_dba\\_faqs.pdf](http://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/201710_cfa_and_dba_faqs.pdf)

<sup>6</sup> <https://www.judiciary.uk/publications/the-damages-based-agreements-reform-project-drafting-and-policy-issues/>

<sup>7</sup> <http://www.barcouncilethics.co.uk/wp-content/uploads/2018/07/CFAs-and-DBAs-on-Public-Access.pdf>

**Question 6: Section 55 reformed Part 36 offers to settle. The statutory change introduced by LASPO Part 2 was primarily that where defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%. In your experience, what have been the impacts of this reform, and the regulations made under it?**

29. The Bar Council welcomes the change to Part 36.
30. Our experience is that the changes to Part 36 are widely used by claimants.
31. The changes to Part 36 have made the claimants' Part 36 offers a more potent tactic, and this has been increasingly recognised by the courts in applying the rules.

**Question 7: Sections 56-60 prohibited the payment of referral fees in personal injury cases. What have been the impacts of this reform?**

32. The Bar Council supports the abolition of the payment of referral fees but has no evidence to assist the evaluation of the impact of this reform.

**Question 8: Overall, what has been your experience of the combined impacts of the LASPO Part 2 reforms?**

33. The Bar Council is not able to provide statistically verifiable evidence that would effectively measure the effects of LASPO, however, the following general points can be made:
  1. The reform of success fees has largely resulted in a situation where counsel is working on a basis where he/she is not contractually entitled to recover success fees.
  2. The recoverability of counsel's base fees has also been affected by changes to the rules limiting recoverability and, in particular, the reality that unrecovered fees will have to be paid out of client's damages or the solicitor's profit costs.
  3. The global amount of work undertaken by the Bar in personal injury cases has also been affected by the introduction of fixed fees on the fast track and the expansion of the portal. This is a significant concern for the Bar Council and PIBA, particularly in relation to work to the junior Personal Injury Bar.
  4. The wider reforms to civil litigation mentioned at 3 above make it difficult to measure the specific effects of LASPO to counsel's experience or on access to justice.

5. A specific issue raised with the Bar Council by those representing asbestos victims is the possibility of reform to the current rules which allow for recovery of success fees in these cases. The Bar has historically opposed any change to the current law in relation to this specific practice area, and this remains the position of the Bar Council.
6. The Bar Council welcomes the opportunity to consult with the MoJ on changes to the regulations in relation to DBAs.
7. The Bar Council is concerned that the introduction of QOCS has had some unintended consequences driving unwelcome behaviour, in particular a concern that allegations of fundamental dishonesty are being made when it is inappropriate. The extent to which the introduction of QOCS interacts with established costs rules in relation to interlocutory costs orders and multiple defendants has created considerable uncertainty. There are considerable 'qualifications' to the QOCS shield that have been subject to litigation and may continue to cause uncertainty. These uncertainties could be alleviated through rule changes. The Bar Council is willing to assist further in that regard should that be considered desirable.

**Bar Council**  
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