



JUDICIARY OF
ENGLAND AND WALES

LEGAL AID AND THE COSTS REVIEW REFORMS

**A TALK BY LORD JUSTICE JACKSON TO THE CAMBRIDGE LAW
FACULTY**

5 SEPTEMBER 2011

INTRODUCTION

The Bill. The Government has recently published the Legal Aid, Sentencing and Punishment of Offenders Bill (“the Bill”). Part 1 of the Bill, in conjunction with schedules 1 to 3, makes reforms to legal aid, including cutbacks in civil legal aid as envisaged in the Ministry of Justice consultation paper CP 12/10 (November 2010). Part 2 of the Bill changes the law in respect costs and funding. Some of the provisions in Part 2 implement recommendations which I made in the Costs Review Final Report.¹ In particular, Part 2 ends the recoverability of success fees under conditional fee agreements (“CFAs”) and the recoverability of After-the-Event (“ATE”) insurance premiums. Part 3 deals with criminal law.

Law Society campaign. The Chief Executive of the Law Society recently wrote to many senior solicitors as follows:

“On Wednesday 29 June the government placed the Legal Aid, Sentencing and Punishment of the Offenders Bill before the House of Commons. I am therefore taking this opportunity to update you about the Law Society’s response to this and our campaign to maintain access to justice and address both the Jackson proposals and changes to legal aid.

I am sure that like me, you entered the legal profession out of a passionate belief in justice and the rule of law and, although individual careers may have taken different directions, amongst all solicitors that passion remains strong. Access to justice is vital because it is central to the Law Society’s public interest mission and our founding purpose of serving the law and justice, so that everyone can be equal under the law.

Legal aid clients are some of the most vulnerable in society and, as our President, Linda Lee says, ‘good legal representation where required is essential if they are to be able effectively to enforce and defend their rights. Without that ability, the rule of law is meaningless.’

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¹ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

As well, the development of law on protections, compensations and justice for victims of medical negligence and disasters will grind to a halt. Although only the poorest qualify for civil legal aid, the advances in case law have improved protections for everyone – legal aid was critical to the victims of the Hillsborough disaster, thalidomide, the Clapham rail crash, improving rented housing stock and the behaviours of ‘Rachman – style’ landlords and reducing medical negligence.

In the Bill the Government also confirms its plans to make sweeping changes to the way civil litigation is funded. The right to recover the solicitors’ success fees and ATE premiums from unsuccessful defendants is to be removed. This will mean that many victims who have been injured as a result of someone else’s negligence are likely to lose more than 25% of their compensation. This is unacceptable in a modern society.

The Law Society believes the government is making grave errors in these areas. That’s why we’ve mounted the high profile campaign ‘*Sound off for Justice*’, to make the government think again about their proposals before it is too late. We passionately believe that the cuts to legal aid and the proposed changes to litigation costs and funding will cause many unintended consequences to families, individuals and businesses in the UK. Moreover, we think they fail at a basic financial level, leading to extra costs to government in other departments.”

The letter then goes on to advise solicitors how to lobby MPs, download campaign material and so forth.

Comment. In this letter and in many other campaigning documents the proposed cuts in legal aid and the Jackson reforms are treated as if they are a composite package. This is not correct. It is true that the legal aid cuts and the Jackson reforms are being dealt with in the same Bill, but that is a matter of convenience. It is not because they form a composite package.

CUTBACKS IN LEGAL AID: PART 1 OF THE BILL

My views re legal aid. The extent of public funding which can be devoted to legal aid is of course a matter for Parliament, not for the judiciary to decide. Nevertheless, in order to dispel the confusion which has arisen, let me make it plain that the cutbacks in legal aid are contrary to the recommendations in my report. Discussion of legal aid is contained in chapter 12 of the Costs Review Preliminary Report² and chapter 7 of the Costs Review Final Report.³ In the Final Report I resisted the strong temptation to recommend that legal aid be restored to its scope pre-April 2000 (although many consultees urged me to make such a recommendation), because I recognised that such a proposal would be unrealistic and would stand no chance of implementation. I did, however, state as follows in chapter 4.2 of chapter 7:

“4.2 I do not make any recommendation in this chapter for the expansion or restoration of legal aid. I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility. The legal aid system plays a crucial role in promoting access to justice at proportionate costs in key areas. The statistics set out elsewhere in this report demonstrate that the overall costs of litigation on legal aid are substantially lower than the overall costs of litigation on conditional fee agreements. Since, in respect of a vast swathe of litigation, the costs of both sides are

² <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/jackson-vol1-low.pdf>

³ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

ultimately borne by the public, the maintenance of legal aid at no less than the present levels makes sound economic sense and is in the public interest.”

Decisions for Parliament. Parliament will make its own decisions about legal aid when Part 1 of the Bill comes to be debated. Parliament will take into account the economic circumstances of this country, which of course lay outside the purview of my inquiry. The only contribution which chapter 7 of my report can make to that debate is that it sets out what is desirable from the point of view of the civil justice system.

Importance of legal aid for clinical negligence. On the assumption that it is decided not to maintain civil legal aid at present levels, the question may possibly arise as to whether any particular area of civil legal aid is particularly important and should be salvaged from the present cuts. My answer to that question is that of all the proposed cutbacks in legal aid, the removal of legal aid from clinical negligence is the most unfortunate. For a fuller discussion of clinical negligence, see chapter 23 of the Final Report.

Reference should also be made to the Judiciary’s response to the Ministry of Justice Consultation paper on legal aid, dated 11th February 2011, which includes the following passage:

“37. The proposal to remove clinical negligence claims entirely from the scope of legal aid does not appear to us to be justified.

38. Although clinical negligence claims are essentially claims for damages for personal injury or death, there are fundamental differences deriving from the fact that almost invariably such claims involve criticism of members of the medical professions, ranging from nurses and health technicians to general medical practitioners and dentists and on to consultant surgeons and physicians. Unlike those who are injured in road accidents, accidents at work or play, and accidents arising from the defective state of premises or products, the victims of clinical negligence are almost always the vulnerable, from the unborn child to those who are physically or mentally ill or infirm, and whose vulnerability is usually the reason for the medical intervention (whether in the form of advice or treatment) which is criticised. The majority of claims involve allegations of a breach of a professional duty of care owed to patients in the provision of the state’s National Health Service (rather than the private sector).

39. As a result of the many special features of clinical negligence litigation, a separate body of legal principles and practice has developed over the last 50 years or so, leading to what is now sophisticated and complex litigation, quite beyond the ability of anyone to pursue as a litigant in person. In common with other negligence claims, clinical negligence claims depend for their success upon establishing breach of duty, damage and causation; however, all three limbs of the cause of action depend, individually, upon expert evidence, whereas in ordinary personal injury litigation it is usually only the issue of damages (and very occasionally, causation) that requires such input.”

LITIGATION FUNDING AND COSTS: PART 2 OF THE BILL

Whereas (for the reasons set out in my report) I do not welcome Part 1 of the Bill, I do warmly welcome (again for the reasons set out in my report) Part 2 of the Bill, in so far as it deals with civil justice issues.

Part 2 of the Bill brings to an end the regime of recoverable success fees and recoverable ATE premiums, which I shall refer to as “recoverability” for short.

The recoverability regime. The recoverability regime was introduced in April 2000 (when the scope of legal aid was being substantially reduced), principally as a device to fund personal injury litigation. For the reasons set out in chapters 9 and 10 of the Costs Review Final Report⁴ and amplified in my subsequent consultation response,⁵ this regime has substantially driven up costs and has imposed a much heavier burden on the public purse than the former legal aid scheme which it replaced.

Consequence in personal injury litigation. In the context of personal injury litigation, one consequence of the recoverability regime is that there is now far too much money swirling around in the system. This has led to a progressive escalation of the referral fees which lawyers pay to get a share of the business. Thus the beneficiaries are not the accident victims, but usually the referrers and (when no referral fee is paid) the lawyers. The referrers who benefit from this state of affairs are claims management companies, BTE insurers, trades unions and others. At the moment market forces compel personal injury solicitors to hand over a large part of the costs which they receive to claims management companies, BTE insurers etc in the form of referral fees. In other words, these middlemen who add no value to the process are the true beneficiaries of competition. In low value cases more than half the costs received sometimes go out in referral fees. In high value cases referral fees may be £10,000 or more. In my view such referral fees should be banned, as they were up until March 2004.

The House of Commons Transport Committee discussed this phenomenon in its recent report *The Cost of Motor Insurance*.⁶ The Committee expressed dismay at the substantial fees being paid to “insurance firms, vehicle repairers, rescue truck drivers, credit hire firms, claims and accident management firms, law firms and experts”. The Committee quoted a description of this practice as a “great merry-go-round”.⁷ Furthermore Mr Jack Straw MP (the former Lord Chancellor) has produced a detailed analysis of this problem in his paper dated 22nd June 2011, which has been widely reported in the press.

Litigation outside personal injury. The unintended consequences of the recoverability regime have caused serious problems in many areas of litigation outside personal injury. For example, businesses may use CFAs and ATE insurance in litigation against consumers, who then face the risk of a hugely inflated costs liability. In litigation between businesses one party (which may be either the richer or the poorer party) can have, in effect, a free ride while the other party faces paying up to four times the costs of the action. In libel cases the claimant might litigate at no personal risk as to costs, while the defendant is at risk of paying (i) its own costs + (ii) double the claimant’s costs (because of the 100% success fee) + (iii) an ATE premium amounting to 65% of the claimant’s costs. The unfortunate defendant in such proceedings could be a local newspaper or perhaps an academic who has published unwary comments. Furthermore, as several mediators have told me, the recoverability regime sometimes leads to the failure of mediations.

⁴ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

⁵ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jackson-lj-civil-lit-response.pdf>

⁶ HC 591, published on 11th March 2011.

⁷ See paragraph 24.

Overview. The recoverability regime imposes substantial and unnecessary costs on taxpayers, council tax payers, motorists and the public generally. For further details please see the documents cited above. It is perhaps unsurprising that no other country in the world has a recoverability regime like ours, even though many common law jurisdictions allow CFAs and have a normal costs recovery regime.

My task. The unenviable task which I was set by the previous Master of the Rolls two years ago was to find some way of tackling the present unacceptable level of litigation costs and promoting access to justice at proportionate cost.

My recommendations. The Costs Review Final Report makes 109 recommendations which are designed to bring down litigation costs and to promote access to justice for all participants. In relation to success fees and ATE premiums, I recommend (a) ending recoverability and (b) a package of measures to protect those claimants who merit protection.

In relation to personal injury litigation, I recommend (a) reverting to the form of CFAs which existed pre-April 2000 including the cap on success fees at 25% of damages,⁸ (b) increasing general damages by 10%, (c) enhancing damages by a further 10% as a reward for effective claimant offers, (d) introducing qualified one way costs shifting (using precisely the same form of words that successfully protects legally aided claimants against adverse costs), (e) banning referral fees. The cumulative effect of this package of reforms is that the great majority of personal injury claimants will be better off.⁹

It should also be noted that, even without elements (b), (c) and (d), the pre-April 2000 CFA regime (ie CFAs and ATE insurance without recoverability) was highly effective in promoting access to justice. This is confirmed by the evidence which the Association of Personal Injury Lawyers gave to Lord Woolf in 1995:

“More recently, in the final stages of the Inquiry, APIL has argued that the growing use of conditional fee agreements, since their introduction in August 1995, has provided access to justice in personal injury cases for those who previously did not litigate through fear of costs, and that there is no need for personal injury cases to be subject to the fast track since the desired increase in access to justice has been achieved. APIL contends that conditional fee agreements provide claimants with complete certainty as to costs, through the provision of insurance after the event since, if the client loses, the insurance pays all the defendant's costs and the claimant's solicitor must carry his own costs. If the claimant wins, as APIL suggests will happen in 95 per cent of personal injury cases, he/she will recover in the region of 85 per cent of his/her costs from the defendant. Successful claimants pay their own solicitor a success fee, which APIL suggests would normally be between 20 - 30 per cent of solicitor and own client costs. The Law Society recommends that, in any event, it should be no more than 25 per cent of the damages recovered.”¹⁰

The principle of full costs recovery is a recent myth. The above summary of APIL's evidence in 1995 neatly illustrates another important proposition. It has for many

⁸ Excluding damages in respect of future costs/losses

⁹ See Professor Fenn's calculations and the supporting analysis in Appendix 1 to my Response to MoJ Consultation Paper CP 13/10 (at pages 18-21):

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jackson-lj-civil-lit-response.pdf>

¹⁰ Lord Woolf's Final Report on Access to Justice, chapter 2, para 25

decades been accepted that a successful litigant does not recover all of his own costs from the other side. Thus throughout the twentieth century a successful claimant always expected to pay out some part of his damages to make up the shortfall in costs recovery. The fact that both parties will have some costs liability, even if they win, has long been accepted as imposing a necessary discipline in litigation. The ancient principle of restitution is, for good policy reasons, embedded in the law of damages but not in the law of costs. This fact does not feature in the Law Society's campaign material.¹¹

The Government's position. The Government has (subject to the approval of Parliament) accepted the recommendation to end recoverability and to put in place a package of measures to protect personal injury claimants, as outlined above.¹²

My view. For my part, subject to one caveat, I welcome that decision. The one caveat concerns clause 43 of the Bill, in so far as it relates to clinical negligence.

CLAUSE 43 OF THE BILL, IN SO FAR AS IT RELATES TO CLINICAL NEGLIGENCE

Principal effect of clause 43. The principal effect of clause 43 is to repeal section 29 of the Access to Justice Act 1999, under which ATE¹³ premiums are recoverable. This repeal is eminently sensible and accords with recommendation 7 of the Costs Review Final Report.¹⁴

Clause 43 achieves its primary objective by (a) repealing section 29 of the Access to Justice Act 1999¹⁵ and (b) inserting a new section 58C into the Courts and Legal Services Act 1990. Section 58C expressly provides in subsection (1):

“A costs order made in favour of a party to proceedings who has taken out a costs insurance policy may not include provision requiring the payment of an amount in respect of all or part of the premium of the policy ...”

The exception. There is, however, an exception to the provision that ATE premiums shall be irrecoverable. This exception is contained in subsections (2) to (5) of section 58C.¹⁶ The effect of these provisions is that an ATE premium in respect of the cost of expert reports in clinical negligence proceedings may be recovered under a costs order.

¹¹ This omission is surprising. At a well attended Law Society seminar on 23rd February 2010, specifically convened to discuss my report, the following question was considered: “As a matter of public policy should a successful claimant have his/her damages reduced in order to pay solicitor's costs incurred as a result of the negligence or other wrongdoing of a tortfeasor?” 58% of the audience voted yes.

¹² Save for the question of banning referral fees, which is still under consideration.

¹³ After-the Event

¹⁴ “Section 29 of the Access to Justice Act 1999 and all rules made pursuant to that provision should be repealed.” See recommendation 7 on page 463 of the report and chapters 9 – 10 for supporting reasoning.

¹⁵ See clause 43 (2) and (3).

¹⁶ Together with words of cross-reference in subsection (1).

In practice, this will mean¹⁷ that in any group of cases where claimants take advantage of section 58C (2) to (5), the defendants (usually the National Health Service Litigation Authority) will end up paying for the claimants' expert reports in every single case – regardless of which side wins.

The Government's policy decision. Section 58C (2) to (5) reflects a policy decision that in any viable clinical negligence case the costs of the claimant's expert reports should fall upon the public purse – regardless of whether the claimant finally wins or loses. This is a perfectly sensible policy decision, of which I make no criticism. Indeed this is currently the law, because legal aid is available for clinical negligence claims. Furthermore, in my response to the Government's consultation, I suggested that this position should be maintained.¹⁸

Four concerns about how the policy decision is being implemented. Although I make no criticism of the policy decision (that being entirely a matter for Government in the first instance and then for Parliament), I do have four concerns about the proposed means of achieving the desired result.

First there is practicality. I do wonder whether ATE insurers will be willing to provide insurance cover for the cost of expert reports in respect of viable cases on the terms envisaged in section 58C (2) to (5).¹⁹ The answer to this concern may turn out to be that they will be willing, provided that the price is right. Therefore my first concern may not turn out to be a fatal objection. However, if the first concern is not a fatal objection, the proviso which I have just mentioned certainly reinforces my second concern.

The second concern is cost. The procedure set out in section 58C (2) to (5) is the most expensive and inefficient mechanism which it is possible to devise in order to achieve the policy objective. This can be simply demonstrated. Take a cohort of 100 claims against the National Health Service Litigation Authority which are brought under section 58C (2) to (5) after the new Act comes into force. Some of those cases will be won and some will be lost. The ATE premiums (added on to normal costs recovery) paid out of the public purse in the "won" cases will have to cover the following:

- (a) the costs of the claimants' expert reports in each of those 100 cases (both the successful and the unsuccessful cases);
- (b) the administration costs of the ATE insurers in each of those 100 cases;
- (c) the profits of the ATE insurers;
- (d) the charges of insurance brokers and any other middlemen who succeed in becoming involved in the process;
- (e) insurance of the premium itself, because no ATE premium is payable up front and no ATE premium at all is payable in unsuccessful cases.

Furthermore there is currently no known mechanism for limiting recoverable ATE premiums to a level which ensures that ATE insurers' profits are no more than is reasonable. In those very few cases which go to detailed assessment, costs judges do

¹⁷ If the provision works and if ATE insurers co-operate as intended

¹⁸ See my Response to Ministry of Justice Consultation Paper at para 3.7:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jackson-lj-civil-lit-response.pdf>

¹⁹ And the regulations to be made thereunder.

not have either the tools or the information base which would enable them to achieve this.²⁰ Even the Personal Injuries Bar Association, which strongly opposes my reform proposals, accepts this point.²¹ Furthermore the Law Society, which is actively campaigning against my reform proposals, accepts this point. In its Response dated October 2010 to the Costs Review Final Report²² the Law Society writes:

“There can be no doubt that ATE premiums are a major contributor towards legal costs over which solicitors have no control. ... There appears to be a substantial lack of transparency in the ATE market” (page 21); “The price of ATE insurance is currently prohibitive.” (page 22)

The proposed section 58C empowers the Lord Chancellor to make regulations to control the level of recoverable ATE premiums. The draftsman of such regulations will have the difficult task of setting premiums at a level which will attract ATE insurers, but not permit undue rewards. Even if the regulations are drafted and regularly amended so as to achieve a perfect balance, the recoverable ATE premiums will still have built into them all the extra heads of costs referred to above.

The third concern is targeting. Whereas legal aid (as it now exists) is targeted upon those of limited means, the procedure set out in section 58C (2) to (5) is available for all to use – however wealthy they may be. This means, for example, that extremely wealthy overseas visitors who obtain medical treatment in this country can litigate on the basis that – whether they win or lose – the British taxpayer (or perhaps the private clinic which is being sued) will pay for their expert reports.

It will be recalled that one of the reasons why the Strasbourg Court²³ (in the context of publication proceedings) has held our recoverability regime to contravene the European Convention on Human Rights is that anyone, however wealthy, can benefit from it. The mechanism set out in section 58C (2) to (5) suffers from this very same vice.

The fourth concern is complexity. One of the drivers of high costs in litigation is the extreme and unnecessary complexity of our rules of procedure. I have therefore recommended that we should be aiming to simplify these procedural rules wherever possible.²⁴ One of the benefits of ending recoverability is that we can sweep away the complex edifice of rules governing recoverable success fees and recoverable ATE premiums. However, Section 58C (2) to (5) will mean that we retain such a complex edifice in respect of ATE premiums and add yet further complexity. The regulations to be made under subsection (2) will be far from simple and may require frequent amendment.

²⁰ See, for example, the comments in the Costs Review Final Report at chapter 9 para 3.7 (page 84), which were echoed by the Senior Costs Judge at chapter 10 para 2.15 (page 100).

²¹ See the Costs Review Final Report at chapter 9 para 3.4 (pages 83-84)

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

²² <http://www.lawsociety.org.uk/secure/file/188889/e/teamsite-deployed/documents/templatedata/Internet%20Documents/Non-government%20proposals/Documents/jackson-lsresponse131010.pdf>

²³ See *MGN Ltd v United Kingdom* [2011] ECHR 66 (18th January 2011). In that case the beneficiary of the recoverability regime was Naomi Campbell, a well-known model.

²⁴ see Costs Review Final Report, recommendation 2 on page 463 and the supporting reasoning in chapter 4: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>

Two other methods of achieving the policy objective. If the Government or Parliament sees force in the above comments and deletes section 58C (2) to (5),²⁵ the question will arise as to how the policy objective set out above should be achieved. There are two possible ways of doing this.

First method. The first possible approach would be to retain legal aid for clinical negligence cases generally. I have made out the best case that I can for such retention in my Final Report, but appreciate that the Government (which has to weigh up the competing claims of different public interests) has so far rejected that approach. I therefore say no more on this aspect, beyond (a) expressing my personal agreement with the Judiciary's view and the Law Society's view that clinical negligence should remain within the scope of legal aid and (b) commenting that this issue might possibly be reconsidered.

Second and alternative method. Let me now assume that the first solution is rejected, because Government has made a decision and Parliament will endorse that decision. I then come to the second possible course of action. Here one is on much stronger ground, because this approach will lead to considerable savings of public money. **The solution which I propose is that (a) section 58C (2) to (5) and the proposed regulations thereunder should be scrapped and (b) legal aid should be retained for clinical negligence but solely in respect of the costs of expert reports.**²⁶

Savings of public money which will be achieved. There are five reasons why this proposal will lead to a substantial saving of public money:

- (i) The taxpayer will only have to pay the costs of the expert reports. The taxpayer will not have to meet the administration costs and profits of ATE insurers or any of the other associated expenses.
- (ii) The Legal Services Commission ("LSC")²⁷ will recover the costs of expert reports in all cases which the claimant wins, because it has a first charge on moneys recovered.
- (iii) The LSC has mechanisms in place to control the fees of experts whom it instructs. Contrast this with the position of the NHSLA under section 58C (2) to (5) – the NHSLA has no means of controlling the fees of experts instructed by its opponents in litigation.
- (iv) Under the legal aid scheme the LSC only pays the costs of expert reports in cases where the claimant is of limited means. Again, contrast this with the position under section 58C (2) to (5) – where the taxpayer can be liable for the costs of the expert reports of a successful or unsuccessful claimant, however rich he or she may be.
- (v) I understand from discussions with the LSC earlier this year that the cost of retaining legal aid for expert reports only in clinical negligence cases would be about £6 million per year. The cost to the public purse of the mechanism proposed in section 58C (2) to (5) is bound to be substantially higher than that.

²⁵ Together with the words of cross-reference in subsection (1)

²⁶ This could be achieved by making amendments to Schedule 1 to the Bill.

²⁷ I use this term to include any successor body which takes over the functions of the LSC.

This suggested method of achieving the Government's policy objective has other advantages as well. First, the machinery already exists for assessing the means of clinical negligence claimants and applying a cost/benefit test to their proposed litigation.²⁸ Furthermore the LSC has staff experienced in performing this task and in authorising the instruction and remuneration of experts in clinical negligence litigation. On the other hand, if the Bill goes through without my suggested amendments, all that expertise and experience will be lost.

Secondly, if subsections (2) to (5) of section 58C are deleted and instead legal aid is retained on the very limited basis which I propose, the law will be substantially simplified (rather than made more complex, as is currently threatened).

CONCLUSION

There are three themes running through this talk.

First, every profession or organisation which provides a public service at public expense is quite properly and understandably pressing its own case in the present round of spending cuts. The Law Society and the judiciary quite properly press the case for retaining legal aid on the grounds of public interest. I have supported that case and continue to do so. It is the function of Government to listen to the arguments advanced by all the competing public interests and then to decide where the axe shall fall – hopefully in a manner which is least injurious to the public good. If the Government's decision is to cut back legal aid to the extent indicated in its Consultation Response dated June 2011, then so be it, although I regret the decision for the reasons mentioned above.

Secondly, the Law Society in running a single campaign against both the Legal Aid cuts and the Jackson proposals has created certain difficulties. It is right and proper that the Law Society should be campaigning to retain the present scope of legal aid. This case clearly rests on public interest grounds, even if the campaign ultimately fails because other public interests are deemed to be greater. However, the campaign against the Jackson proposals is not based upon the public interest at all. For the reasons set out above, this campaign is in my view inimical to the public interest – although it is very much in the interests of those groups who are making disproportionate profits out of the current arrangements. Indeed, to their credit, many lawyers publicly (and even more lawyers privately) recognise that the present rules re CFAs and ATE insurance are deeply flawed and require reform along the lines I propose.

The Law Society may wish to consider whether it is representing (a) the sectional interest and viewpoint²⁹ of CFA lawyers or (b) the wider public interest. Both roles are perfectly legitimate and I would not presume to criticise the Law Society, whichever decision it makes. I would, however, respectfully suggest that it may be inauspicious to combine both roles in a single campaign.

²⁸ See Costs Review Preliminary Report, chapter 12:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/jackson-vol1-low.pdf>

²⁹ I say “and viewpoint” because every group tends to perceive the public interest as coinciding with its own commercial interests.

Thirdly, the Government's approach in Part 2 of the Bill is to be commended and will, I hope, find favour with Parliament. There is, however, one caveat which needs to be stated. There is a real danger that subsections (2) to (5) of the proposed new section 58C will not achieve the desired objective. Moreover even if these provisions do achieve the desired objective, they will do so in an extremely expensive and inefficient manner. This is, of course, the prerogative of Parliament. Indeed that may not matter greatly if public funds are plentiful and expense is no object, which seemingly was the case when recoverability was introduced in 2000. However, this may not be the case now. Accordingly both the Government and Parliament may care to look again at section 58C (2) – (5) and to consider an obvious alternative means of achieving the same objective at much less cost to the public purse.

The above comments are offered in a constructive spirit. I shall not respond to any of the personal attacks which have been levelled against me in recent months, save to say this. I do not speak on behalf of any particular sector or vested interest. The views which I put forward reflect my conclusions (formed after many months of research, consultation and analysis) as to where the public interest lies. Furthermore, the recommendations contained in the Costs Review Final Report have been endorsed by the Judicial Executive Board³⁰ and the Judicial Steering Group.³¹

Rupert Jackson

5th September 2011

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³⁰ The Lord Chief Justice, the Master of the Rolls and all Heads of Division

³¹ Including the Master of the Rolls as Head of Civil Justice, the Vice-President of the Civil Division of the Court of Appeal and the Deputy Head of Civil Justice