

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

EXPLANATORY NOTES

COMMENTARY

Part 2: Litigation funding and costs

Payments for legal services in civil cases

Section 44: Conditional fee agreements: success fees

281. A conditional fee agreement (“CFA”) is a private funding agreement between a lawyer and a client under which the lawyer agrees to represent the client on a ‘no win, no fee’ basis. Under the agreement, the lawyer does not generally receive a fee from the client if the case is lost¹. However, if the case is won, the lawyers’ costs (the ‘base costs’) are generally recoverable from the losing party. In these cases, the lawyer can charge an uplift on these base costs, which is currently recoverable from the losing party. This uplift is known as the ‘success fee’. The maximum success fee that may be charged under a CFA is prescribed by secondary legislation. In all cases, the current maximum uplift that may be charged is 100% of the base costs.
282. *Section 44* amends sections 58 and 58A of the Courts and Legal Services Act 1990, which currently make provision as regards the regulation of CFAs and the recoverability of success fees. The effect of the amendments is that a success fee under a CFA will no longer be recovered from a losing party in any proceedings. A lawyer will still be able to recover a success fee from a client under a CFA, but how it is to be calculated in certain proceedings will now be subject to further regulation.
283. *Subsection (2)* inserts new subsections (4A) and (4B) into section 58. New subsection (4A) provides that CFAs which provide for a success fee and relate to proceedings prescribed by the Lord Chancellor must comply with certain additional conditions in order to be enforceable. New subsection (4B) sets out those conditions. They require the CFA to cap the success fee at a percentage of certain damages awarded to the client if they win. The cap and the kinds of damages to which it applies are to be prescribed by the Lord Chancellor. These provisions will be of particular importance in personal injury claims, for example, where it is proposed to exclude damages for future care and loss from the calculation of any success fee.
284. By virtue of *subsection (5)*, orders made under new subsections (4A) and (4B) of section 58 will be subject to the affirmative resolution procedure.
285. *Subsection (3)* amends subsection (5) of section 58A, the effect of which is to require the Lord Chancellor to consult with designated judges, the General Council of the Bar, the Law Society and such other bodies as he considers appropriate before making an order under new subsections (4A) and (4B).

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

These notes refer to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c.10) which received Royal Assent on 1 May 2012

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