



# Legal Aid, Sentencing and Punishment of Offenders Act 2012

## 2012 CHAPTER 10

### PART 2

#### LITIGATION FUNDING AND COSTS

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

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

- (1) In section 58 of the Courts and Legal Services Act 1990 (conditional fee agreements), in subsection (2)—
- (a) omit “and” after paragraph (a), and
  - (b) after paragraph (b) insert “and
  - (c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase.”
- (2) After subsection (4) of that section insert—
- “(4A) The additional conditions are applicable to a conditional fee agreement which—
- (a) provides for a success fee, and
  - (b) relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.
- (4B) The additional conditions are that—
- (a) the agreement must provide that the success fee is subject to a maximum limit,
  - (b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,

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- (c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and
  - (d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings.”
- (3) In section 58A of that Act (conditional fee agreements: supplementary), in subsection (5) after “section 58(4)” insert “, (4A) or (4B) ”.
- (4) For subsection (6) of that section substitute—
- “(6) A costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement.”
- (5) In section 120(4) of that Act (regulations and orders subject to parliamentary approval) after “58(4),” insert “ (4A) or (4B), ”.
- (6) The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person (“P”) under a conditional fee agreement entered into before the day on which that subsection comes into force (“the commencement day”) if—
- (a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or
  - (b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day.

#### Commencement Information

- I1** S. 44 partly in force; s. 44 not in force at Royal Assent, see s. 151(1); s. 44 in force at 19.1.2013 for specified purposes and at 1.4.2013 except in relation to specified proceedings by [S.I. 2013/77](#), [arts. 2\(1\)\(a\), 3\(a\)](#) (with [art. 4](#))
- I2** S. 44 in force at 6.4.2016 in so far as not already in force except in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma and publication and privacy proceedings by [S.I. 2016/345](#), [art. 2](#)
- I3** S. 44 in force at 6.4.2019 in relation to publication and privacy proceedings by [S.I. 2018/1287](#), [art. 2](#)

## 45 Damages-based agreements

- (1) Section 58AA of the Courts and Legal Services Act 1990 (damages-based agreements) is amended as follows.
- (2) In subsection (1) omit “relates to an employment matter and”.
- (3) In subsection (2)—
  - (a) after “But” insert “ (subject to subsection (9)) ”, and
  - (b) omit “relates to an employment matter and”.
- (4) Omit subsection (3)(b).
- (5) After subsection (4)(a) insert—

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- “(aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;”.
- (6) In subsection (4)(b), at the beginning insert “ if regulations so provide, ”.
- (7) In subsection (4)(d) for “has provided prescribed information” substitute “ has complied with such requirements (if any) as may be prescribed as to the provision of information ”.
- (8) After subsection (6) insert—
- “(6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.”
- (9) After subsection (7) insert—
- “(7A) In this section (and in the definitions of “advocacy services” and “litigation services” as they apply for the purposes of this section) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.”
- (10) After subsection (8) insert—
- “(9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.
- (10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.”
- (11) In the heading of that section omit “relating to employment matters”.
- (12) In section 120(4) of that Act (regulations and orders subject to parliamentary approval) for “58AA” substitute “ 58AA(4) ”.
- (13) The amendments made by subsections (1) to (11) do not apply in relation to an agreement entered into before this section comes into force.

#### **Commencement Information**

- I4** S. 45 wholly in force at 1.4.2013; s. 45 not in force at Royal Assent, see s. 151(1); s. 45(1)(8) in force at 1.10.2012 by S.I. 2012/2412, art. 2(a); s. 45(2)-(7)(9)-(13) in force for specified purposes at 19.1.2013 and otherwise in force at 1.4.2013 by S.I. 2013/77, arts. 2(1)(b), 3(b)

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

- (1) In the Courts and Legal Services Act 1990, after section 58B insert—

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### **“58C Recovery of insurance premiums by way of costs**

- (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, unless such provision is permitted by regulations under subsection (2).
- (2) The Lord Chancellor may by regulations provide that a costs order may include provision requiring the payment of such an amount where—
  - (a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description,
  - (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks),
  - (c) the policy is of a prescribed description,
  - (d) the policy states how much of the premium relates to the liability to pay for an expert report or reports in respect of clinical negligence (“the relevant part of the premium”), and
  - (e) the amount is to be paid in respect of the relevant part of the premium.
- (3) Regulations under subsection (2) may include provision about the amount that may be required to be paid by the costs order, including provision that the amount must not exceed a prescribed maximum amount.
- (4) The regulations may prescribe a maximum amount, in particular, by specifying—
  - (a) a percentage of the relevant part of the premium;
  - (b) an amount calculated in a prescribed manner.
- (5) In this section—

“clinical negligence” means breach of a duty of care or trespass to the person committed in the course of the provision of clinical or medical services (including dental or nursing services);

“clinical negligence proceedings” means proceedings which include a claim for damages in respect of clinical negligence;

“costs insurance policy”, in relation to a party to proceedings, means a policy insuring against the risk of the party incurring a liability in those proceedings;

“expert report” means a report by a person qualified to give expert advice on all or most of the matters that are the subject of the report;

“proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in court), whether commenced or contemplated.”

- (2) In the Access to Justice Act 1999, omit section 29 (recovery of insurance premiums by way of costs).
- (3) The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force.

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#### Commencement Information

- 15** S. 46 partly in force; s. 46 not in force at Royal Assent, see s. 151(1); s. 46 in force at 19.1.2013 for specified purposes and at 1.4.2013 except in relation to specified proceedings by [S.I. 2013/77](#), [arts. 2\(1\)\(c\), 3\(c\)](#) (with [art. 4](#))
- 16** S. 46 in force at 6.4.2016 in so far as not already in force except in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma and publication and privacy proceedings by [S.I. 2016/345](#), [art. 2](#)

#### 47 Recovery where body undertakes to meet costs liabilities

- (1) In the Access to Justice Act 1999, omit section 30 (recovery where body undertakes to meet costs liabilities).
- (2) The repeal made by subsection (1) does not apply in relation to a costs order made in favour of a person to whom a body gave an undertaking before the day on which this section comes into force if the undertaking was given specifically in respect of the costs of other parties to proceedings relating to the matter which is the subject of the proceedings in which the costs order is made.

#### 48 Sections 44 and 46 and diffuse mesothelioma proceedings

- (1) Sections 44 and 46 may not be brought into force in relation to proceedings relating to a claim for damages in respect of diffuse mesothelioma until the Lord Chancellor has—
- carried out a review of the likely effect of those sections in relation to such proceedings, and
  - published a report of the conclusions of the review.
- (2) In this section “diffuse mesothelioma” has the same meaning as in the Pneumoconiosis etc (Workers' Compensation) Act 1979.

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

- (1) In section 22 of the Matrimonial Causes Act 1973 (maintenance pending suit)—
- number the existing provision subsection (1), and
  - after that subsection insert—
- “(2) An order under this section may not require a party to a marriage to pay to the other party any amount in respect of legal services for the purposes of the proceedings.
- (3) In subsection (2) “legal services” has the same meaning as in section 22ZA.”
- (2) After that section insert—

#### “22ZA Orders for payment in respect of legal services

- (1) In proceedings for divorce, nullity of marriage or judicial separation, the court may make an order or orders requiring one party to the marriage to pay to the

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other (“the applicant”) an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.

- (2) The court may also make such an order or orders in proceedings under this Part for financial relief in connection with proceedings for divorce, nullity of marriage or judicial separation.
- (3) The court must not make an order under this section unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.
- (4) For the purposes of subsection (3), the court must be satisfied, in particular, that—
  - (a) the applicant is not reasonably able to secure a loan to pay for the services, and
  - (b) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.
- (5) An order under this section may be made for the purpose of enabling the applicant to obtain legal services of a specified description, including legal services provided in a specified period or for the purposes of a specified part of the proceedings.
- (6) An order under this section may—
  - (a) provide for the payment of all or part of the amount by instalments of specified amounts, and
  - (b) require the instalments to be secured to the satisfaction of the court.
- (7) An order under this section may direct that payment of all or part of the amount is to be deferred.
- (8) The court may at any time in the proceedings vary an order made under this section if it considers that there has been a material change of circumstances since the order was made.
- (9) For the purposes of the assessment of costs in the proceedings, the applicant's costs are to be treated as reduced by any amount paid to the applicant pursuant to an order under this section for the purposes of those proceedings.
- (10) In this section “legal services”, in relation to proceedings, means the following types of services—
  - (a) providing advice as to how the law applies in the particular circumstances,
  - (b) providing advice and assistance in relation to the proceedings,
  - (c) providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings, and
  - (d) providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute,
 and they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation.
- (11) In subsections (5) and (6) “specified” means specified in the order concerned.”

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

After section 22ZA of the Matrimonial Causes Act 1973 insert—

### **“22ZB Matters to which court is to have regard in deciding how to exercise power under section 22ZA**

- (1) When considering whether to make or vary an order under section 22ZA, the court must have regard to—
  - (a) the income, earning capacity, property and other financial resources which each of the applicant and the paying party has or is likely to have in the foreseeable future,
  - (b) the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,
  - (c) the subject matter of the proceedings, including the matters in issue in them,
  - (d) whether the paying party is legally represented in the proceedings,
  - (e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,
  - (f) the applicant's conduct in relation to the proceedings,
  - (g) any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and
  - (h) the effect of the order or variation on the paying party.
- (2) In subsection (1)(a) “earning capacity”, in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.
- (3) For the purposes of subsection (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to—
  - (a) cause undue hardship to the paying party, or
  - (b) prevent the paying party from obtaining legal services for the purposes of the proceedings.
- (4) The Lord Chancellor may by order amend this section by adding to, omitting or varying the matters mentioned in subsections (1) to (3).
- (5) An order under subsection (4) must be made by statutory instrument.
- (6) A statutory instrument containing an order under subsection (4) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (7) In this section “legal services” has the same meaning as in section 22ZA.”

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

In section 24A(1) of the Matrimonial Causes Act 1973 (orders for sale of property), after “makes” insert “ an order under section 22ZA or makes ”.

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

- (1) Part 8 of Schedule 5 to the Civil Partnership Act 2004 (maintenance pending outcome of dissolution etc proceedings) is amended as follows.
- (2) In the heading of that Part after “Maintenance” insert “ and other payments ”.
- (3) Before paragraph 38 insert— “ Maintenance orders ”.
- (4) In that paragraph—
  - (a) number the existing provision sub-paragraph (1), and
  - (b) after that sub-paragraph insert—
    - “(2) An order under this paragraph may not require one civil partner to pay to the other any amount in respect of legal services for the purposes of the proceedings.
    - (3) In sub-paragraph (2) “legal services” has the same meaning as in paragraph 38A.”
- (5) After that paragraph insert—

### **38A “Orders in respect of legal services**

- (1) In proceedings for a dissolution, nullity or separation order, the court may make an order or orders requiring one civil partner to pay to the other (“the applicant”) an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.
- (2) The court may also make such an order or orders in proceedings under this Schedule for financial relief in connection with proceedings for a dissolution, nullity or separation order.
- (3) The court must not make an order under this paragraph unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.
- (4) For the purposes of sub-paragraph (3), the court must be satisfied, in particular, that—
  - (a) the applicant is not reasonably able to secure a loan to pay for the services, and
  - (b) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.
- (5) An order under this paragraph may be made for the purpose of enabling the applicant to obtain legal services of a specified description, including legal services provided in a specified period or for the purposes of a specified part of the proceedings.
- (6) An order under this paragraph may—
  - (a) provide for the payment of all or part of the amount by instalments of specified amounts, and
  - (b) require the instalments to be secured to the satisfaction of the court.



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- (7) An order under this paragraph may direct that payment of all or part of the amount is to be deferred.
- (8) The court may at any time in the proceedings vary an order made under this paragraph if it considers that there has been a material change of circumstances since the order was made.
- (9) For the purposes of the assessment of costs in the proceedings, the applicant's costs are to be treated as reduced by any amount paid to the applicant pursuant to an order under this section for the purposes of those proceedings.
- (10) In this paragraph “legal services”, in relation to proceedings, means the following types of services—
  - (a) providing advice as to how the law applies in the particular circumstances,
  - (b) providing advice and assistance in relation to the proceedings,
  - (c) providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings, and
  - (d) providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute,and they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation.
- (11) In sub-paragraphs (5) and (6) “specified” means specified in the order concerned.”

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

After paragraph 38A of Schedule 5 to the Civil Partnership Act 2004 insert—

- “38B (1) When considering whether to make or vary an order under paragraph 38A, the court must have regard to—
- (a) the income, earning capacity, property and other financial resources which each of the applicant and the paying party has or is likely to have in the foreseeable future,
  - (b) the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,
  - (c) the subject matter of the proceedings, including the matters in issue in them,
  - (d) whether the paying party is legally represented in the proceedings,
  - (e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,
  - (f) the applicant's conduct in relation to the proceedings,

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- (g) any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and
  - (h) the effect of the order or variation on the paying party.
- (2) In sub-paragraph (1)(a) “earning capacity”, in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.
- (3) For the purposes of sub-paragraph (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to—
- (a) cause undue hardship to the paying party, or
  - (b) prevent the paying party from obtaining legal services for the purposes of the proceedings.
- (4) The Lord Chancellor may by order amend this paragraph by adding to, omitting or varying the matters mentioned in sub-paragraphs (1) to (3).
- (5) An order under sub-paragraph (4) must be made by statutory instrument.
- (6) A statutory instrument containing an order under sub-paragraph (4) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (7) In this paragraph “legal services” has the same meaning as in paragraph 38A.”

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

- (1) Paragraph 10(1)(a) of Schedule 5 to the Civil Partnership Act 2004 (sale of property orders) is amended as follows.
- (2) Omit the “or” at the end of sub-paragraph (i).
- (3) After sub-paragraph (ii) insert—
  - “(iii) an order under paragraph 38A for a payment in respect of legal services, or”.

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**Changes to legislation:**

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