



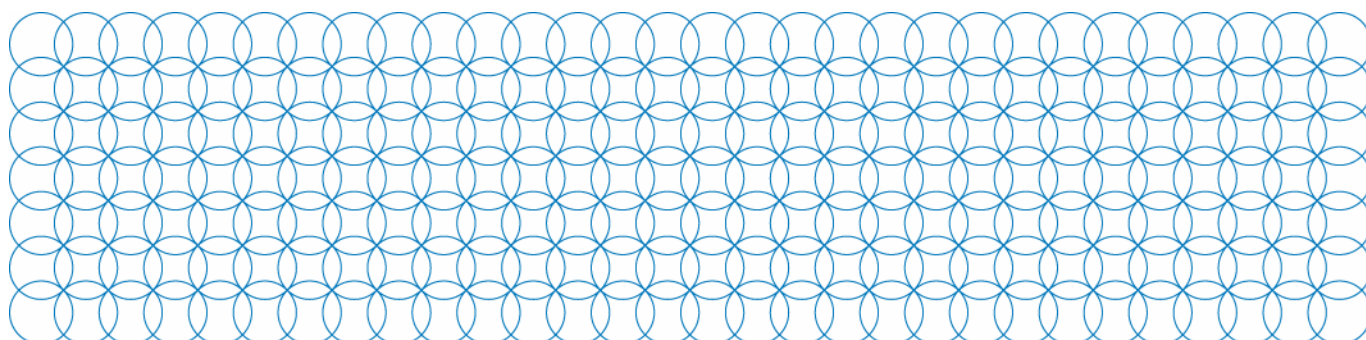
Ministry of
JUSTICE

Regulating Damages Based Agreements

Consultation Paper CP 10/09

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JUSTICE

Regulating Damages Based Agreements

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**This information is also available on the Ministry of Justice website:
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Executive summary

There is a clear and growing body of recent evidence that highlights concerns about consumer protection issues for claimants using Damages Based Agreements (DBAs). The research points to particular concerns about:

- (i) a failure to inform claimants of alternative methods of funding their claims; and
- (ii) a lack of clarity and understanding of fee arrangements and the likely costs which claimants have to pay.

The Government proposes to regulate to address these issues, and views are sought in this consultation. We believe that there is a strong case for taking these steps now. It is clear that a significant number of claimants in Employment Tribunal cases – many of whom are of modest means, and unfamiliar with legal proceedings – are not given proper information by their representatives. This prevents claimants from making the best decisions about the handling of their claims, and having a fuller understanding of the likely costs implications for them of pursuing a claim.

This consultation paper seeks your views on the requirements to be introduced for statutory regulation of DBAs (sometimes referred to as ‘contingency fees’). Under these agreements the fee which the person providing services under the agreement (the representative) receives is ‘contingent’ upon the success of a claim. The fee is payable only upon success and is calculated by reference to the damages awarded.

Unlike conditional fee agreements (CFAs), a similar form of contingency fee, DBAs are not regulated by statute. CFAs are used primarily in litigation where rights of audience and rights to conduct litigation are restricted to legal professionals. DBAs on the other hand are not permitted in litigation. However, their use developed in some tribunals, primarily in Employment Tribunals, but without the specific regulatory framework that Parliament provided for CFAs. DBAs are recognised by professional regulatory bodies such as the Law Society. As there are no restrictions on rights of audience and or the right to conduct litigation in the tribunals’ jurisdiction, persons other than legal professionals can also bring claims under DBAs. The use of the term ‘representative’ in relation to DBAs therefore covers solicitors, claims managers and others.

Concerns have been growing around the potential for consumer detriment in the absence of a statutory framework for regulating DBAs. There is evidence that many do not understand these fee arrangements which could sometimes include terms which might be unfair to consumers. The Government believes that a statutory framework for regulating these agreements would help provide a level playing field between consumers and representatives and remove the unfairness to consumers which can otherwise exist.

A new clause in the Coroners and Justice Bill, as introduced in the House of Lords on 1 July at Annex B, would provide the statutory framework for regulating DBAs. The clause would give the Lord Chancellor the power to make provisions in respect of these agreements, including the power to prescribe requirements which the agreements must meet in order to be enforceable. Any agreement which does not meet the specified criteria may be unenforceable.

This paper seeks views on the requirements to be prescribed in the first Order. The aim is to target those aspects of DBAs' current operation where there is most potential for consumer detriment. The initial Order could, subject to Parliamentary approval of the clause and subject to this consultation, introduce regulatory requirements in respect of the following aspects:

- A. the provision of clear and transparent information to consumers under DBAs, on all costs and expenses and alternative methods of funding;
- B. the maximum % of the damages that can be recovered in fees from the award; and
- C. the use of unfair terms and conditions (such as penalty/exit and settlement clauses).

At the same time as this recent evidence has been published, there is a growing interest in extending the use of DBAs more widely so that they can be used in proceedings other than in tribunals. This is being looked at by Lord Justice Jackson in his review of civil costs, which is due to report in December 2009. Extending DBAs to litigation would be a major step which raises a number of issues, not least costs shifting and the apportionment of costs between parties. We have no current plans to extend the use of DBAs more widely, but it makes sense to include a provision to allow for this should that be considered to be in the public interest. Any decision to extend the use of DBAs to litigation generally – or, perhaps more likely, to specific classes of litigation – would be preceded by full consultation and discussion, and would require the approval of both Houses of Parliament before it could be implemented. This paper therefore does not seek any views on extending the use of DBAs, but concentrates on how their existing use can be strengthened to protect the public.

Introduction

This paper sets out for consultation proposals to regulate damages based agreements. The consultation is aimed at, in particular, the legal profession, claims management businesses and others who undertake claims using these agreements in England and Wales, but also others with an interest in these funding agreements.

This consultation follows the Government Code of Practice on Consultation and falls within the scope of the Code. The consultation criteria, which are set out on page 43 have been followed.

An Impact Assessment has been completed for the consultation stage and indicates that representatives providing services under damages based agreements, and their clients mainly in the Employment Tribunals are likely to be particularly affected. Comments on the Impact Assessment and the specific questions it contains are particularly welcome. A full Impact Assessment will be produced with the response to this consultation.

Copies of the consultation paper are being sent to:

The Senior Judiciary through the Judicial Office of England and Wales

Association of Her Majesty's District Judges

Lord Justice Carnwath, Senior President of Tribunals

Judge David Latham, President of the Employment Tribunals

Master Hurst, Senior Costs Judge

Lord Justice Jackson

Advisory Committee on Civil Costs

Civil Justice Council

Law Society

Solicitors Regulation Authority

Legal Services Board

The General Council of the Bar

Bar Standards Board

Claims Standards Council

Institute of Legal Executives

Confederation of British Industry

Consumer representative bodies

Employment Lawyers' Association

TUC

Criminal Injuries Compensation Authority

Better Regulation Commission

Office of Fair Trading

Equality and Human Rights Commission

Other Government Departments

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposals

Overview

1. This consultation paper seeks your views on the requirements to be introduced for the statutory regulation of damages based agreements (sometimes referred to as 'contingency fees'). These are a type of 'no win no fee' agreement used to fund a range of claims before tribunals. They are not permitted in proceedings before the civil or criminal courts. Under these agreements the fee which the representative (solicitor or a claims manager for example) receives is 'contingent' upon the success of the claim. The fee is payable only if the claim is successful and is calculated by reference to the damages awarded. These agreements will be referred to in this paper as damages based agreements (DBAs).
2. DBAs should be distinguished from Conditional Fee Agreements (CFAs), also a type of 'no win no fee' agreement under which the representative (usually a solicitor) if successful will be able to claim an 'uplift' on his normal fees. CFAs are already regulated by statute and are permitted in litigation. A new clause (at Annex B) in the Coroners and Justice Bill will provide the statutory framework for regulating DBAs. The clause will enable the Lord Chancellor to make provisions in respect of DBAs, including the power to prescribe requirements which the agreements must meet. An agreement which does not meet the specified requirements may be unenforceable. This paper seeks views on the details of the requirements to be prescribed in the first Order.
3. DBAs have long played a role in access to justice by helping consumers in England and Wales to pursue claims in tribunals, principally in Employment Tribunals. Although Employment Tribunals are designed to be accessible to claimants without the need for professional legal advice, and many use the Employment Tribunal system without such representation, we recognise that some choose to engage lawyers (and others) to help them with their case. Legal aid for representation is not generally available in most tribunals because the process is inquisitorial and does not generally require professional legal advice. Therefore DBAs can play an important role, especially for those claimants on low incomes who are not covered by legal expenses insurance or trade union membership, by helping them to pursue a claim which, without legal representation, they might otherwise choose not to. The agreements have, however, continued without specific statutory regulation until now and concerns have been growing over allegations and the potential for abuse.
4. Delivering fair and simple routes to civil justice is one of the key objectives of the Ministry of Justice. Regulation of DBAs is necessary to ensure that safeguards are put in place to protect consumers from unfair or excessive costs, this is particularly so as the costs are paid from the damages awarded.

5. The Government believes that DBAs should continue to be available as a funding option where they are already in use, but that their operation should be properly regulated. Recent research supports this view.¹ The proposals in this paper will close the regulatory gap which currently exists, whereby DBAs are not specifically regulated by statute.
6. There is a great deal of interest in exploring different methods for funding representation in those claims where it is necessary. Considerable work is being taken forward elsewhere looking into the possibility of allowing DBAs in litigation. In particular, Lord Justice Jackson is considering 'contingency fees' in his review of civil costs² and we would wish to await his final report before considering the case for permitting DBAs in civil litigation.
7. The proposals in this paper are limited to consumer protection issues arising out of their existing use³ predominantly in Employment Tribunals and the Tax Chamber. Although the new clause in the Coroners and Justice Bill allows for the Lord Chancellor to restrict the use of DBAs in certain types of proceedings as well as extending their use in litigation, we have no current plans to change the cases or processes in which they can be used. This paper therefore does not invite views on making DBAs more widely available as an alternative method of funding litigation at this stage; instead your views are sought specifically on introducing requirements to regulate DBAs' existing use.

Background

8. The term 'Contingency Fees' has traditionally been used to describe all 'contingent fees' – private fee arrangements between representatives and claimants where the fee payable to the representative is dependent upon the outcome of the case. The term 'no win no fee' developed over time to describe 'conditional fee agreements (or CFAs) and contingency fee agreements, sometimes called Damages Based Contingency Fee Agreements (DBAs) – both are a type of 'contingent fee'.
9. In 1989, the Government examined the justification for easing the restrictions on the use of such private funding agreements and considered a number of options under which such agreements could be made enforceable under English law. The responses to that consultation were generally opposed to the introduction of a system of fees that gave claimants the option to offer lawyers a percentage of their damages if successful. There was, however, little objection in principle to clients being

¹ This consists of two studies – Moorhead and Cumming (2008) – *Damages Based Contingency Fees in Employment Cases: A Survey of Practitioners* <http://www.law.cf.ac.uk/research/pubs/repository/1996.pdf> and *Something for Nothing – Claimants' Perspective on Legal Funding and Employment Tribunal Cases* available at <http://www.berr.gov.uk/files/file51880.pdf>. The studies suggest that the relevant regulators should review the charging practices and use of settlement clauses under DBAs.

² http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm

³ Anecdotal evidence suggests that they are used in Employment Tribunals and the Tax Chamber

able to agree with their lawyers conditional fees on a 'speculative' basis already permitted in Scotland. This led to the introduction of CFAs as a slightly restricted form of 'contingent fee' on the basis that they would provide a greater range of choice to the consumer and improve access to justice.

Conditional Fee Agreements (CFAs)

10. The Courts and Legal Services Act 1990 (CLSA) allowed CFAs to be enforceable in England and Wales. Section 58 of the CLSA (as amended by section 27 of the Access to Justice Act 1999) set out the mandatory requirements for CFAs. The first Order in 1995⁴ made it possible for CFAs to be enforceable in personal injury claims, insolvency proceedings and applications before the European Court of Human Rights. In 1998⁵ this was extended to all types of case except criminal and family.
11. CFAs are used primarily in litigation before the courts, where rights of audience and rights to conduct litigation are restricted. CFAs operate on the principle that a solicitor or barrister ("lawyer") will act for a client if he thinks there are sufficient prospects of success. If the case is lost, then the lawyer will not be paid. If the case is successful, the lawyer will be able to claim an 'uplift' on his normal fees. This uplift is also known as the 'success fee'. This maximum permitted uplift that lawyers can charge their client is currently prescribed⁶ at 100%. An 'After the Event' Insurance (ATE) market has developed to protect claimants against the opponent's costs if the case was unsuccessful.
12. CFAs act as a mechanism for filtering out weak or unmeritorious claims. Before entering into a CFA a lawyer would assess the merits of a case, as they bear the risk of not being paid if the case is unsuccessful. This encourages lawyers to take on only those claims they think are meritorious and have a 50% or higher chance of success.
13. Under the scheme introduced in 1995, while the lawyers' normal fees could be recovered from the losing side, the claimant was responsible for paying the uplift and ATE insurance premiums which were usually met from the damages recovered. In April 2000, following the reforms under the Access to Justice Act 1999, the Government changed the way in which personal injury cases were funded: personal injury cases were removed from the scope of legal aid due to the availability of CFAs. At the same time, changes were introduced in respect of CFAs to make them attractive to lawyers in most categories of case including personal injury. CFAs played a role in access to justice by enabling meritorious claims to be funded. The reforms provided for the uplift and ATE insurance premiums to be recoverable from the unsuccessful party, in the same way as other costs. This encouraged lawyers to take more cases on under CFAs, as

⁴ The Conditional Fee Agreements Order 1995 (S.I 1995/1674)

⁵ Conditional Fee Agreements Order 1998 (c)

⁶ The Conditional Fee Agreements Order 2000 (SI 2000/823)

they no longer had to take their success fees from the client's damages. It also made CFAs available in cases where damages are not likely to be substantially more than the success fee.

14. If parties cannot agree on costs under CFAs, it is for the court to decide what a reasonable level of success fee that may be recovered from the unsuccessful party. In certain types of personal injury cases the recoverable success fee is fixed depending on the stage at which the case is concluded.⁷ For example, for a case which concludes before trial a recoverable uplift of 12.5% is set for Road Traffic Accident claims and 25% or 27% Employer's Liability Claims. The recoverability of success fees (up to 100%) from the other side has caused concerns in the public and private sector including in defamation and clinical negligence claims.
15. While CFAs are now frequently used in civil litigation, the costs regime differs between most courts and tribunals i.e. the general rule that the unsuccessful party will pay the costs of the successful party does not generally apply in tribunals. The fact that costs are rarely recovered from the unsuccessful party means that the claimant must pay the costs (including the success fee) from the damages awarded. CFAs are used less frequently in tribunals because DBAs have been available as an alternative funding option.

Damages Based Agreements (DBAs)

16. DBAs allow representatives to claim a proportion of a claimant's award of damages. In England and Wales DBAs are not permitted in litigation, that is proceedings before the courts. However, their use developed without any specific statutory regulation in tribunals and DBAs are known to fund a number of cases in the Employment Tribunals and the Tax Chamber. The last Survey of the Employment Tribunal Applications (SETA)⁸ conducted in 2003 suggests that DBAs funded 11% of the cases including discrimination, unfair dismissal and standard conciliation period cases. There is no specific data on the use of DBAs in other tribunals, although many do not have the power to order monetary awards.
17. The key feature of a DBA is that the persons using the agreements are not paid fees if they lose a case but are paid a percentage of the damages recovered if they win.⁹ In respect of their use in Employment Tribunals, there is currently no specific guidance on how that percentage is determined or is to be agreed between the client and representative.

⁷ RTA claims, Employers' Liability Accident claims and Employers' Liability Disease claims

⁸ See footnote 1: *A Survey of Practitioners*
<http://www.law.cf.ac.uk/research/pubs/repository/1996.pdf> at pg15

⁹ These agreements could also be structured so that fees are calculated by reference to certain financial awards e.g. in the case on reinstatement, by reference to a percentage of the client's salary on reinstatement

Who uses DBAs

Solicitors

18. Section 59 of the Solicitors Act 1974 prohibits solicitors from entering into contingency fee arrangements in relation to contentious¹⁰ business. The Solicitors' Conduct Rules 2007¹¹ define a 'Contingency Fee' as '*any sum (whether fixed or calculated as a percentage of the proceeds or otherwise) payable only in the event of success*'. The Solicitors Regulation Authority (SRA) prevents solicitors from undertaking contentious work by such funding. Rule 2.04 of the Solicitors' Code of Conduct 2007 provides:

2.04 Contingency fees

- (1) *You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of England and Wales, a British court martial or an arbitrator where the seat of the arbitration is in England and Wales, except as permitted by statute or the common law.*
- (2) *You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of an overseas jurisdiction or an arbitrator where the seat of the arbitration is overseas except to the extent that a lawyer of that jurisdiction would be permitted to do so.*

19. As a result of the Solicitors Act 1974, solicitors are able to use DBAs¹² in what is defined as 'non-contentious' business that is tribunals and other proceedings not categorised as litigation. While solicitors can in practice use CFAs in non-contentious business, DBAs are more frequent. Although there are no specific rules covering how solicitors operate using DBAs, they must have regard to their usual standards of conduct. There have been some concerns around the activities of some 'no win no fee' representatives dealing with equal pay claims in particular a lack of experience in Employment Law, lack of regulation of the costs charged and the failure of some to advise claimants of alternative methods of funding.¹³

Claims management businesses

20. 'Claims managers' is a term often used to describe non-qualified individuals involved in the handling of claims. Part 2 of the Compensation Act 2006 established the statutory framework for the regulation of claims

¹⁰ Conduct Rule 2.04 defines contentious business as: "business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court ..., not being business which falls within the definition of non-contentious..."

¹¹ [rule 24 \(Interpretation\)](#)

¹² Barristers on the other hand may not accept work on the basis of these agreements. See <http://www.barcouncil.org.uk/about/instructingbarrister/fees/>

¹³ *The Union Perspective on Equal Pay – 174 Equal Opportunities Review - by Bronwyn McKenna March 2008*

management services which is 'advice or service in relation to the making of a claim'. The term covers a wide range of services which claims managers undertake. In many areas they work as 'introducers' by referring claims to solicitors for a fee, for example in personal injury cases. They can also represent¹⁴ clients in Employment Tribunals, as can others because there are no restrictions on rights of audience before Employment Tribunals. The rules for authorised persons¹⁵ cover the use of the term 'no win no fee' to require claimants to be provided with clear and transparent information particularly on costs.

21. Over 300 claims management businesses are currently authorised to offer their services in the employment cases.¹⁶ Almost all the businesses are sole traders dealing with employment claims and do not operate in other sectors. A survey carried out by the Claims Management Regulator in 2008 of the business websites found 30% advertised employment related services.
22. When regulation was first introduced in April 2007, the general concerns over claims management businesses primarily related to potentially misleading marketing and inadequate information about costs and alternative options for bringing claims. A review conducted by the Claims Management Regulator of the contractual arrangements between the employment businesses and their clients found the contracts relating to employment cases to be of a better standard than those used in other claims for example those in respect of personal injury and financial products and services. Nonetheless there was evidence of the use of some unfair terms, including penalty/exit clauses.

The need to regulate

23. Recent research¹⁷ carried out by Professor Richard Moorhead,¹⁸ identified certain consumer protection issues around the use of DBAs in Employment Tribunals. The research showed that, whilst the availability of DBAs in Employment Tribunals plays a modest role in facilitating access to justice, clients have a poor understanding of DBAs and are often inadequately informed about the financial implications of entering into these arrangements. There are particular issues around the charging of VAT, and disbursements charged win or lose on top of percentage fees.

¹⁴ It should be noted that the Compensation Act does not give authorised persons any additional rights before tribunals

¹⁵ Persons authorised under the Compensation Act to provide regulated claims management services as defined under the Act which includes advice and representation before a tribunal

¹⁶ <http://www.claimsregulation.gov.uk/search.aspx?search=simple&business=&authID=&type=-1§or=3&county=-1®ion=-1&status=3>

¹⁷ This comprises of two studies - Moorhead and Cumming (2008) – *Damages Based Contingency Fees in Employment Cases: A Survey of Practitioners* <http://www.law.cf.ac.uk/research/pubs/repository/1996.pdf> and *Something for Nothing – Claimants' Perspective on Legal Funding and Employment Tribunal Cases* available at <http://www.berr.gov.uk/files/file51880.pdf>

¹⁸ Cardiff Law School

The research also raises concerns about: the use of unfair charges when clients wished to withdraw or decline advice to settle a case; representatives' failure to inform clients about alternative methods of funding; and poor standards of service.

24. Although Professor Moorhead notes the limitations of his research, the consumer protection issues it highlights need to be addressed. The report singles out the use of 'settlement clauses'. Settlement clauses cover the position where a person providing a service under a DBA advises the client to settle the claim, but the client refuses to do so. In such circumstances, the settlement clause can render the client liable for excessive costs. For example, if a client refuses to accept settlement advice the client may continue to instruct the representative and proceed with the claim but he may become liable for the hourly rate cost of work done by the solicitor. Professor Moorhead notes that such hourly charging clauses can be retrospective; meaning at the point at which settlement is rejected, the client becomes liable for all work to date.
25. Lord Justice Jackson's Preliminary Report¹⁹ published on 18 May 2009 also acknowledges that the unregulated use of 'contingency fee' agreements in Employment Tribunals jurisdiction is open to abuse.
26. We believe that the absence of specific statutory regulation in respect of DBAs poses a risk to consumers being exploited for commercial gain and raises concerns around unethical behaviour and poor standards of service. We believe that consumers should always be adequately informed about their funding arrangements and in particular their cost liabilities, irrespective of who provides the service. We consider that there is a strong case for proceeding quickly to ensure that appropriate protection for claimants is put in place.
27. The Government therefore aims to close the regulatory gap by seeking a power to regulate DBAs.²⁰ The new clause in the Coroners and Justice Bill provides the framework to regulate the current operation of DBAs and to expand or restrict their use in future should this be necessary. The provisions contained in the new clause would amend the Courts and Legal Services Act 1990 by inserting a new section, section 58AA, to give the Lord Chancellor the power to make provisions in respect of DBAs. This includes the power to prescribe certain requirements which DBAs must satisfy in order to be enforceable. It is intended that the initial requirements will be specified in a statutory instrument to be approved by both Houses of Parliament. The new requirements will apply to England and Wales only. A copy of clause (together with an explanatory note) as introduced in the House of Lords on 1 July is attached at Annex B.
28. As the current use of DBAs appears to be mainly in Employment Tribunals and the Tax Chamber, the proposals outlined in this paper will impact

¹⁹ Chapter 50, pg 515 at para 4.12

²⁰ <http://www.justice.gov.uk/news/newsrelease190509b.htm>

particularly on their current operation in these areas. Any further proposals aimed at restricting their use or making them more widely available as a method of funding would be subject to further consultation and Parliamentary approval. As indicated above, there are currently no plans to alter the existing arrangements for DBAs including those in respect of costs. This means that DBAs will continue to be available in 'non-contentious' business but their operation would become subject to specified requirements outlined below.

29. The clause provides the Lord Chancellor with the power to regulate DBAs by requiring them to meet certain requirements to be specified by an Order. The aim is to target those aspects of DBAs' current operation where there is most potential for consumer detriment. An impact assessment for the consultation stage is at the end of this paper.

30. The initial Order to be made could, subject to this consultation, introduce regulatory requirements in respect of the following elements:

A. The provision of clear and transparent advice and information provided to consumers, on:

- Costs;
- Other expenses (such as VAT, counsel's fees, expert reports etc);
- And other methods of funding available.

B. The maximum % of the damages that can be recovered in fees from the award; and

C. Controlling the use of unfair terms and conditions (such as penalty and settlement clauses).

These are discussed in more detailed below.

A. Provision of clear and transparent advice

31. Lack of information provided or available to claimants was identified by the research²¹ carried out by Professor Moorhead on the use of DBAs in Employment Tribunals. We believe that those taking cases on a DBA basis should provide clear and transparent information in writing to consumers on all costs and disbursements charged under these agreements. This relates to a number of aspects including:

(a) Costs

- (i) Solicitors are subject to their professional conduct rules about the information they must provide to their clients concerning alternative funding arrangements. Although there are no specific rules for DBAs, the SRA rules²² generally require solicitors to give their client the best

²¹ See footnote 1 – *something for nothing – Claimants' perspective on Legal Funding and Employment Tribunal cases*

²² SRA rule 2.03(1)

information about the overall cost they would be required to pay.

The Solicitors Code of Conduct Rule 2.03 (1) states:

“You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses”.

- (ii) The above Rule therefore obliges solicitors to provide clients with information on: their charges; any payments likely to be made to others; and any potential liability for the other party's costs. Information must be clear and in writing. Guidance on the rules states that its purpose is to ensure that the client is given relevant costs information and that this is clearly expressed.

32. Regulated claims management companies are also required to give consumers clear and transparent information including on costs. The Conduct of Authorised Persons Rules²³ set out a number of general principles with which authorised persons are required to comply. This includes the requirement to ensure that all information given to the client is clear, transparent, fair and not misleading. The rules also set out 'client specific' requirements when taking on business:

Rule 10

Before seeking to enter into a contract with a client a business must make reasonable enquiries as to whether the client has alternative mechanisms for pursuing a claim.

Rule 11

A business must provide the client with the following information in writing or electronically before a contract is agreed

(e) Any charge the business makes. Where this is a percentage of compensation payable the percentage must be indicated together with a typical example of the actual cost in pounds, or more than one example if the business makes differential charges.

Question 1: Research suggests that the present requirements for solicitors and claims managers to provide information to consumers on costs are insufficient. What additional requirements could be included to better protect consumers?

Question 2: Do you agree that claimants should be able to challenge the overall costs under DBAs and if so how?

(b) Other expenses – VAT and disbursements

33. The current fee structures vary between representatives. Some only charge their basic fees separately from other expenses (or disbursements

²³ [http://www.claimsregulation.gov.uk/_wysiwyg/UploadedFiles/File/MoJ%20Conduct%20of%20Authorised%20Persons%20Rules%202006\(1\).pdf](http://www.claimsregulation.gov.uk/_wysiwyg/UploadedFiles/File/MoJ%20Conduct%20of%20Authorised%20Persons%20Rules%202006(1).pdf)

such as barristers' fees, medical reports, travel costs etc) and VAT. Others only charge a fixed percentage which will cover their fee, disbursements and VAT. This is likely to give rise to confusion for clients, especially as barristers' fees for example may have to be paid separately regardless of whether a case is won or lost. In the absence of any regulation there is an inconsistency of approach to charging practices. Some may question whether representatives should be able to charge VAT in addition to their percentage fees. Professor Moorhead for example suggests that firms should bear these costs as part of their assessment of risk, especially if the claim was obtained on a 'no win no fee' basis. We believe the claimants should receive clear information about their liability for costs, and in particular VAT and disbursements, before they enter the agreement and your views are being sought on how the regulation can help achieve this.

Question 3: Do you agree that representatives should provide a clear indication of whether VAT is included or excluded from the percentage of damages to be charged in fees? How should this requirement be framed?

Question 4: How should the requirement to give clear information about other charges such as disbursements be framed in the Order?

(c) Alternative methods of funding

34. Aside from private payment and DBAs, many claimants have other alternative options for funding their claims, for example trade unions provide an important range of advice services in employment disputes. Additionally, legal expenses insurance, for example 'Before the Event' (BTE) insurance, generally covers a claimant's expenses such as solicitor's fees and any costs relating to the case. It is often sold as an add-on to motor and home insurance. In all instances of BTE insurance, the insurer will decide whether to take up a claim, and often require the policyholders to use a solicitor from their panel of solicitors at the start of their claim.
35. Representatives often do not advise their clients that if they are members of a union, or have legal expenses insurance then this would entitle them to free representation through the union or representation through their insurer at little or no cost. Solicitors are required to give this information to their claimants under the relevant professional rules. However, the evidence from Professor Moorhead's study is that the relevant rules have not had the desired effect, which was to help clients make an informed choice about funding their claim. Professor Moorhead concludes,²⁴ *"The solicitors' profession imposes obligations on its members to advise on*

²⁴ Moorhead and Cumming (2008) – *Damages Based Contingency Fees in Employment Cases: A Survey of Practitioners* – at pg 83

alternative funding arrangements but we found little evidence that these were honoured". In order to have the desired effect, this information should be provided before entering the agreement with a claimant. Your views are therefore sought on how the requirement on the advice about alternative methods of funding should be reflected in the Order and be better enforced.

Question 5: How could the requirement for representatives to inform the claimant about alternative options of funding before accepting a case and entering the agreement be better framed under the Order?

B Regulating the percentage to be taken from damages in fees

36. For CFAs, prior to the Access to Justice reforms²⁵, while solicitors' fees could be recovered from the unsuccessful side, the client was responsible for paying the 'uplift' or the success fee which usually came out of the damages award. To ensure that client damages were protected, the Law Society recommended a voluntary cap of 25%.
37. In respect of DBAs, the level of percentage charged tends to vary between 10%–50%. This is partly because some of the agreements include VAT while others charge VAT in addition to the basic percentage fees. Professor Moorhead's research indicates that the mean fee was between 31%–33%, with half the respondents to his survey saying VAT was included in the percentage and half saying that VAT was added on top. 33%, with VAT on top, when applied to a large damages award, could amount to a significant sum.²⁶ However, the sum may be more modest where the damages award is small. It is recognised that DBAs can be structured in a variety of ways, with a variable percentage of damages received by the claimant. The percentage could vary for example according to the stage of proceedings at which the damages award is received, the amount of damages awarded or both. Professor Moorhead's research indicated that a low value case would attract a higher percentage, this could mean that a claimant on low income receive a lower proportion of their already low damages.²⁷
38. To regulate the inconsistency in the percentage charges and to protect the claimant's damages award, a general cap could be introduced on the proportion of an award of damages²⁸ that can be taken under DBAs. Your views are sought on whether a general cap is necessary and if so what is

²⁵ Access to Justice Act 1999

²⁶ On a 33% fee, VAT (at 15%) on top adds a further 5.775% to the costs deducted from the damages

²⁷ A Survey of Practitioners, pg 43, para 108

²⁸ It is recognised that Employment Tribunals determine a remedy to put the claimant in the position they would have been had the breach not occurred. For example, in a case of unlawful deductions, the award may cover the amount unlawfully deducted, in unfair dismissal cases; the award may cover future earnings etc. The word damages therefore covers the sum awarded to the claimant whatever it constitutes.

the appropriate level at which such a cap could be set. For example, it may be that a lower general cap is more appropriate when a claim settles without a hearing. It is to be noted that although a cap could be introduced, this would be the maximum prescribed level. The percentage applied in individual cases should, in our view, still reflect the complexity, the length of time that a case is expected to take as well as the likely size of the award to ensure that any deduction from damages is fair and reasonable. Where a representative deals with mass or group litigation, the fee charged per case could reflect the work and risk actually involved in individual cases and a lower fee per case may be appropriate as the costs would be spread over a large number of cases.

Question 6: Do you think that a general cap should be introduced to limit the maximum level of the percentage that could be deducted from the damages? If so, what should the appropriate maximum limit be?

Question 7: Should there be a sliding scale subject to some limits (e.g. where the case was settled prior to a hearing) to reflect the complexity of the case, the work done and the likely level of damages awarded, including a proportionate reduction per case where the individual claim forms part of a large group?

C The use of unreasonable or unfair terms and conditions in agreements

39. We consider that there is merit in controlling the use of clauses designed to penalise claimants, for example where they wish to take their case to another representative (penalty or exit clauses), or where they refuse advice to settle the claim (settlement clauses). Penalty/exit clauses are said to be a common feature of DBAs. There is anecdotal evidence to suggest that some require a claimant who ends their agreement with their representative to pay a charge of up to £500 for every six months during which their file has been open regardless of the work carried out.²⁹ We believe that any charges imposed on claimants under these clauses should be reasonable and should reflect the amount of work carried out on the claim, and that claimants should be able to challenge the charges if considered unfair. Your views are sought on how this could be achieved.
40. Settlement clauses often represent the contractual arrangements by representatives to deal with claimants who reject advice to settle their claims. Professor Moorhead refers to these as ‘golden handcuff’ clauses. He points out that there are difficult issues involved in balancing the client’s interest in settlement and the representative’s reasonable interest in conducting cases reasonably. Professor Moorhead points out that claimants do not currently understand the settlement clauses in their agreements. He notes, “[settlement clauses] are potentially draconian and our research would suggest usually unnecessary....Regulators should

²⁹ See footnote 13

review the permissibility of such clauses".³⁰ Further, clients often struggle to understand and give informed consent to settlement agreements. On the other hand, representatives have an interest in protecting their financial interest and it is important for access to justice that representatives should be willing to bring cases. We consider that the use of these clauses should be regulated so to remove the unfairness to consumers. There are alternative approaches. Some firms offer clients a 'second opinion' on settlement advice at no cost to the client. Another approach would be to have a regulated standard settlement clause which fairly balances the interests of the client and the interests of the representative in obtaining a reasonable settlement. Such clauses might include a second opinion clause and limit the charges that can be incurred when clients reject settlement advice, to ensure they are not draconian. Your views are sought on how these clauses should be regulated.

Question 8: Research shows that the use of settlement clauses should be regulated, do you have any views how this could be done?

Question 9: Should clients be able to challenge the charges under penalty/exit clauses and if so, how?

Question 10: Are there any other aspects of DBAs that ought to be regulated? If so, please specify what they are and why they need to be regulated, providing relevant evidence as appropriate.

Other issues

DBAs – A funding option in litigation

41. Under the English legal system costs generally follow the event i.e. the loser pays the reasonable costs of the successful party. Within their current operation in the Employment Tribunal, with limited or no cost recovery, DBAs do not raise any particular issues in respect of costs. However, any proposals to extend their use in litigation (that is in cases before the courts) would require further more detailed consideration, including the cost arrangements. Some argue that the traditional view whereby DBAs were thought to be contrary to public policy has been somewhat eroded with the introduction of CFAs. With continued pressure on the legal aid budget and the criticism of high costs in CFAs, some argue that it is time to explore other methods of funding litigation to provide proportionate access to justice.
42. The Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Jackson to conduct a wide-ranging review of the civil costs system. The review covers consideration of alternative methods of funding litigation such as DBAs. He published his Preliminary Report on 8 May 2009³¹, and

³⁰ See 24 – at pg 83

³¹ http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm

is now engaged in wide-ranging discussions and consultation with stakeholders. The report indicates that in respect of DBAs the costs review will consider the following questions: (a) whether 'contingency' fees should be permitted in England and Wales; if so (b) whether any cost recovery should be assessed on the conventional basis or by reference to the 'contingency' fee; (c) how 'contingency' fee agreements (if permitted) should be regulated. His final report with recommendations is expected in December 2009. The Department will consider the report and in particular any recommendations in respect of the potential for extending the use of DBAs in litigation in England and Wales and how they should be regulated.

Annex A

History and development of DBAs

1. DBAs have been unenforceable at common law in England and Wales. In 1989, the Government published a consultation paper entitled *Contingency Fees*,³² a term then used to describe all 'contingent fees' i.e. where the fee payable is dependent upon the outcome of the case, examined the justification for easing the restrictions on the use of such and considered a number of options under which such agreements could be made enforceable under English law. This led to the introduction of CFAs as a slightly restricted form of 'contingent fee' on the basis that these would provide a greater range of choice to the consumer and enable litigants to obtain access to justice.
2. The Better Regulation Task Force (BRTF) in its report, *Better Routes to Redress*,³³ published in May 2004, recommended that the then Department for Constitutional Affairs should carry out research into the potential impact and effectiveness of contingency fees in securing access to justice in the UK. The recommendation was based on the BRTF's view that the Government needed to explore alternatives to CFAs, as at the time CFAs were the subject of much satellite litigation. The report suggested that contingency fees need not lead to an explosion in the 'compensation culture' if appropriate safeguards were in place, such as the cost shifting rule and juries not setting the damages.
3. The report also suggested that if contingency fees were introduced in litigation the percentage recoverable from the damages could be set as a maximum but providers could charge less if appropriate. The Department at the time rejected the extension of contingency fees in litigation arguing that CFAs should remain the principal form of private contingent funding. The response recognised that DBAs already played a role in helping people to bring claims before some tribunals where limited or no cost recovery is allowed but that contingency fees were not enforceable in 'contentious business'. The primary focus ought to remain on making CFAs work better rather than exploring the potential impact of allowing DBAs beyond their existing use.³⁴
4. A report by the Citizens Advice Bureau, *No Win No Fee, No Chance*,³⁵ published in December 2004, asked the Government to review funding options, including contingency fees as an alternative to CFAs. That report

³² 1989 cmd 571

³³ <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/betterroutes.pdf>

³⁴ <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/betterroutestoredress.doc>

³⁵ http://www.citizensadvice.org.uk/no_win_no_fee_no_chance-2

pointed out that contingency fees do not have built-in incentive for lawyers to inflate their costs unreasonably in order to earn higher success fees. The report favoured the potential development of contingency fees.

5. Professor Moorhead recently completed two studies.³⁶ *Damage-Based Contingency Fees in Employment Cases – A Survey of Practitioners*; and *Something for Nothing – Claimants’ Perspective on Legal Funding and Employment Tribunal Cases*, a qualitative study looking at the claimants’ perspectives of their funding arrangements. A Survey of Employment Tribunal Applications is currently being conducted by the British Market Research Bureau for the Department for Business Innovation and Skills and will produce data on claims, funding types and other information from the perspective of claimants and respondents. The results of this survey are expected shortly.
6. The Civil Justice Council published a research paper, *Contingency Fees – A Study of their operation in the United States of America*,³⁷ in November 2008. The paper considered alternatives to the current system of CFAs and the implications of adopting DBAs as an alternative should CFAs fail. The paper is based on detailed research undertaken by Senior Costs Judge Peter Hurst and Professor Richard Moorhead into the operation of ‘contingency fees’ in the USA. The research is intended to inform Lord Justice Jackson’s fundamental review of costs of civil litigation.
7. The Law Society Consultation Paper, *Litigation Funding*, published in January 2009, also sought views on issues around funding civil litigation and in particular ‘contingency’ fees. The paper acknowledged that there were arguments for and against permitting these agreements in litigation and invited views on the issue. The consultation closed on 31 March 2009.³⁸ The responses to the consultation will assist the Law Society to review its policies on costs, particularly contingency fees/DBAs.

³⁶ <http://www.law.cf.ac.uk/research/pubs/repository/1996.pdf> and <http://www.berr.gov.uk/files/file51880.pdf>

³⁷ <http://www.civiljusticecouncil.gov.uk/files/cjc-contingency-fees-report-11-11-08.pdf>

³⁸ <http://www.lawsociety.org.uk>

Annex B

Coroners and Justice Bill

“Damages-based agreements

- (1) The Courts and Legal Services Act 1990 (c. 41) is amended as follows.
- (2) After section 58A insert—

58AA Damages-based agreements

- (1) The Lord Chancellor may by order make provision about damages-based agreements.
- (2) For the purposes of this section, a “damages-based agreement” is an agreement with a person (“P”) providing advocacy services, litigation services or claims management services which provides that—
 - (a) a payment is to be made to P if a specified person obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
 - (b) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.
- (3) An order under subsection (1) may in particular—
 - (a) Provide that a damages-based agreement that satisfies prescribed requirements is not unenforceable by reason only of its being such as agreement;
 - (b) Provide that where a damages-based agreement satisfies some prescribed requirements but not others following matters are to be determined (in accordance with such provision as may be prescribed) by such court, tribunal or other person as may be prescribed -
 - (i) whether the agreement is unenforceable by reason of its being a damages-based agreement, and
 - (ii) in a case where the agreement is

enforceable, whether any payment provided for by the agreement is to be reduced and, if so, the amount by which it is to be reduced; or

- (c) provide that damages-based agreements, or damages-based agreements that do not satisfy prescribed requirements, are unenforceable.
- (4) The requirements which may be prescribed by virtue of subsection (3) include—
- (a) a requirement that the services provided under the agreement are, or are not, services of a prescribed description;
 - (b) a requirement that the person liable to make a payment under the agreement is of a prescribed description;
 - (c) a requirement that the agreement does not provide for a payment above a prescribed amount, or above an amount calculated in a prescribed manner;
 - (d) a requirement that the agreement contains, or does not contain, prescribed terms or conditions;
 - (e) a requirement that the person providing services under the agreement provided prescribed information before the agreement was made;
 - (f) a requirement that the agreement is in writing;

and different requirements may be prescribed in relation to different descriptions of damages-based agreements.

- (5) An order under subsection (1) may in particular also provide that a costs order made in any proceedings may, in prescribed circumstances and subject in the case of court proceedings to rules of court, include provision requiring the payment of an amount payable under a damages-based agreement.
- (6) Rules of court may make provision with respect to the assessment of any costs which include amounts payable under a damages-based agreement.
- (7) An order under subsection (1)—
 - (a) may not make provision in respect of

- agreements entered into before the order is made;
- (b) may make such amendments to section 57 of the Solicitors Act 1974 as the Lord Chancellor considers appropriate in consequence of any provision of such an order;
 - (c) may make provision about appeals in respect of determinations made in pursuance of provision made by virtue of subsection (3) (b)
- (8) Before making an order under subsection (1) the Lord Chancellor must consult—
- (a) the designated judges,
 - (b) the General Council of the Bar,
 - (c) the Law Society, and
 - (d) such other bodies as the Lord Chancellor considers appropriate.
- (9) In this section—
- (a) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated; and
 - (b) references to “advocacy services” or “litigation services” include a reference to services that it would be reasonable to expect a person who is acting (or contemplating acting) for another in relation to proceedings that do not take place in a court, to provide.
- (10) In this section—
- “claims management services” has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2)(b) of that Act);
- “payment” includes a transfer of assets and any other transfer of money’s worth (and the reference in subsection (4)(c) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);
- “prescribed” means prescribed by an order under subsection (1).”

- (3) In section 119 (interpretation) for the definition of “prescribed” substitute—

““prescribed” (except in section 58AA) means prescribed by regulations under this Act;”

- (3) In section 120(4) (regulations and orders) after “58(4),” insert “58AA(1),”.

Schedule 19

“Courts and Legal Services Act 1990 (c. 41)

86A (1) The Courts and Legal Services Act 1990 is amended as follows.

- (2) In section 58A (conditional fee agreements: supplementary) for subsection (4) substitute—

“(4) In section 58 and this section—

- (a) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated; and
- (b) references to “advocacy or litigation services” include a reference to services that it would be reasonable to expect a person who is acting (or contemplating acting) for another in relation to proceedings that do not take place in a court, to provide.”

- (3) In section 58B (litigation funding agreements) for subsection (6) substitute—

“(6) In this section—

- (a) “proceedings” includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated; and
- (b) references to “advocacy or litigation services” include a reference to services that it would be reasonable to expect a person who is acting (or contemplating acting) for another in relation to proceedings that do not take place in a court, to provide.”

Explanatory note

There is currently no statutory regulation of DBAs, and the Government does not believe that this is in the public interest. The clause therefore allows for the Lord Chancellor to regulate the operation of DBAs in the public interest and in particular to ensure consumer protection. The new clause will be inserted after section 58A of the Courts and Legal Services Act 1990, which concerns the regulation of Conditional Fee Agreements. Insofar as is possible the new clause is drafted along similar lines to that for CFA regulation.

(1) Allows the Lord Chancellor to make orders about DBAs. By an amendment to s. 120(4) of the Courts and Legal Services Act 1990, these will be required to be made subject to the affirmative Parliamentary procedure; that is, there will be debates in both Houses before the orders can have effect. This is to ensure consistency of approach with CFAs and to ensure Parliamentary scrutiny.

(2) Defines for the purposes of this section what a DBA is, that is an agreement with a representative which provides for a payment to be made to the representative if the client obtains a specified financial benefit, and that the amount of the payment is determined by reference to the amount of the financial benefit obtained (which is usually a percentage of damages awarded).

(3) Allows the Lord Chancellor's orders (under (1), above) to provide that DBAs which satisfy certain requirements set out in the orders are enforceable, but that other DBAs which do not satisfy the requirements are unenforceable (including making all DBAs unenforceable). The orders may also provide whether a DBA which does not meet all the criteria is enforceable, and, if so, how much of the fee the representative is to receive. This will put pressure on representatives to ensure that DBAs do comply, while preventing a minor technical breach which does not have a significant impact from rendering the agreement unenforceable meaning that the client has to pay nothing. This is to balance the interests of the client and the representative. There is also provision to set out the court, tribunal, or other prescribed person, who is to determine these issues.

(4) The requirements which may be included in the orders include (but are not limited to):

(a) the description of the services. This would cover the types of case (eg in a specified category of case, such as an employment case) and the forum where the case is brought (such as Tribunals generally, or specified courts or tribunals). This would allow DBAs to be extended to other forms of proceedings than where they currently exist, such as in litigation. The Government has no proposals to extend to litigation at this stage, and any such extension would be a major step and subject to further discussion and consultation and subject to the approval of both Houses.

(b) the description of the person who is liable to make a payment (eg a claimant in Employment Tribunal proceedings).

(c) a maximum level of deduction for payment – which is likely to be stated as the maximum percentage could vary for different proceedings, different stages in proceedings, and/or different levels of award.

(d) prescribed terms or conditions (eg that it states specifically whether VAT is to be added to the percentage deduction, or included within it; or that settlement clauses must be reasonable in accordance with regulations).

(e) prescribed information to be given before the agreement was made (eg the availability of other forms offending, such as insurance policies or union funding)

(f) that the agreement is in writing.

(5) In the event that DBAs are extended to any proceedings where costs shifting applies (or if the costs rules of any tribunals are amended to allow for costs shifting), this allows for the orders to deal with the amount payable under costs shifting. The general rule for costs in civil courts is that costs follow the event, that is that the loser pays the winner's costs as well as the loser's own costs. The general rule for tribunals is that each side bears their own costs, and that one side is not usually required to contribute to the other's costs. This also gives the Lord Chancellor the power to amend rules of court to enable courts to assess costs and make costs orders to include amounts payable under DBAs. The Government has no proposals to make any orders on this at this stage, but would need to at least consider making orders if DBAs are ever extended to litigation.

(6) Allows for rules of court to cover the assessment of any costs which include amounts payable under a DBA.

(7) Limits the DBAs affected by orders to those which come into force after the orders are made. It also allows for amendments to section 57 of the Solicitors Act 1974. Section 57 allows solicitors to enter DBAs for non-contentious business (which is interpreted to cover tribunals). If it were decided to restrict the operation of DBAs in specified tribunals, or in other non-contentious business (or to prohibit all DBAs), then section 57 would need to be amended accordingly. The Government has no proposals to restrict the proceedings in which DBAs may be used, and therefore has no current intention of amending section 57 of the Solicitors Act 1974. It also allows for provision to be made about appeals in relation to the enforceability of the agreement, and the amount to be paid (see (3), above).

(8) Before making any orders, the Lord Chancellor would first need to consult with the designated judges (the Lord Chief Justice, the Master of the Rolls, the President of the Queen's Bench Division, the President of the Family Division and the Chancellor of the High Court), the General Council of the Bar, the Law Society and such other bodies as considers appropriate.

(9) and (10) Concern definitions used in the new clause. 9) and (10) Concern definitions used in the new clause.

(Schedule 19) Amends sections 58A and 58B of the Courts and Legal Services Act 1990 (as set out in sections 27 and 29 of the Access to Justice Act respectively) so that the definitions of proceedings are consistent for both DBAs and CFAs, while recognising the distinctions: that CFAs are primarily used in litigation, where advocacy and litigation rights are restricted, whereas DBAs are currently primarily used before tribunals where rights are not so restricted, and where claims managers can bring claims. The definition of "advocacy or litigation services", in section 58A and 58B, is also amended to ensure consistency between DBAs and CFAs.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Question 1: Research suggests that the present requirements for solicitors and claims managers to provide information to consumers on costs are insufficient. What additional requirements could be included to better protect consumers?

Question 2: Do you agree that claimants should be able to challenge the overall costs under DBAs and if so how?

Question 3: Do you agree that representatives should provide a clear indication of whether VAT is included or excluded from the percentage of damages to be charged in fees? How should this requirement be framed?

Question 4: How should the requirement to give clear information about other charges such as disbursements be framed in the Order?

Question 5: How could the requirement for representatives to inform the claimant about alternative options of funding before accepting a case and entering the agreement be better framed in the Order?

Question 6: Do you think that a general cap should be introduced to limit the maximum level of the percentage that could be deducted from the damages? If so, what should the appropriate maximum limit be?

Question 7: Should there be a sliding scale subject to some limits (e.g. where the case was settled prior to a hearing) to reflect the complexity of the case, the work done and the likely level of damages awarded, including a proportionate reduction per case where the individual claim forms part of a large group?

Question 8: Research shows that the use of settlement clauses should be regulated, do you have any views how this could be done?

Question 9: Should clients be able to challenge the charges under penalty/exit clauses and if so, how?

Question 10: Are there any other aspects of DBAs that ought to be regulated? If so, please specify what they are and why they need to be regulated, providing relevant evidence as appropriate.

Question 11: Do you agree with our initial view that the proposed changes will have no equality impacts? If not, please detail what the impacts are and who they effect.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 25 September 2009 to:

Iram Akhtar
Ministry of Justice
Civil Legal Aid and Private Funding
Access to Justice policy Directorate
4th Floor, 102 Petty France
London SW1H 9AJ

Tel: 020 3334 4202

Fax: 020 3334 4295

Email: privatefundingbranch@justice.qsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from the Civil Legal Aid and Private Funding team on the above number.

Publication of response

A paper summarising the responses to this consultation will be published in the autumn, which as far as possible should be within three months of the closing date of the consultation. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as

confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

Impact Assessment

Summary: Intervention & Options		
Department /Agency: Ministry of Justice	Title: Impact Assessment of Regulating Damages Based Agreements	
Stage: Consultation	Version: 1	Date: 1 July 2009
Related Publications: Regulating Damages Based Agreements – A consultation Paper		

Available to view or download at:

<http://www.justice.gsi.gov.uk>

Contact for enquiries: Iram Akhtar

Telephone: 020 3334 4202

What is the problem under consideration? Why is government intervention necessary?

Damages Based Agreements (DBAs) are a type of 'no win no fee' which allow representatives to take a proportion of a claimant's award of damages. DBAs are known to fund a range of cases in Tribunals but have to date existed without any specific statutory regulation. Their unregulated use in Employment Tribunals is open to abuse and poses a potential risk to claimants. Government intervention is therefore necessary to close the regulatory gap and prescribe some statutory requirements in respect of these agreements to protect claimants from exploitation for commercial gain and to help improve their understanding of these funding arrangements and their cost liabilities.

What are the policy objectives and the intended effects?

The power to regulate (in the Coroners and Justice Bill) will provide the regulatory framework for DBAs which is currently absent. The regulatory requirements to be introduced under the power will help to clarify the deductions made from the claimant's award. It will do so by requiring representatives taking on cases under DBAs to provide clear and transparent information to clients on all costs and disbursements charged and other aspects of these agreements. This will help put in place protection for claimants against unfair or unreasonable agreements which could pose a risk in the absence of regulation.

What policy options have been considered? Please justify any preferred option.

Option 1 – Regulate the provision of information under DBAs – this option would prescribe requirements for representatives to provide clear and transparent information in respect of these agreements on all costs, alternative methods of funding, and any settlement or other clauses which might have adverse consequences for the claimant.

Option 2 – Regulate the provision of information as above and the percentage which representatives can deduct from the claimant's damages e.g. by prescribing a maximum.

Option 3 – Regulate the provision of information, the percentage and other terms and conditions e.g. settlement clauses. Our preferred option would be Option 3 as it would allow for all the key aspects of DBAs to be regulated and provide optimum protection for consumers.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The effectiveness of these proposals will be reviewed after one year as part of the wider consideration of private funding arrangements following the outcome of the Master of the Rolls Review of Costs.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Date: 26 June 2009

Summary: Analysis & Evidence

Policy Option: 1	Description: Regulate the provision of information to clients under DBAs
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' – N/A
	One-off (Transition)	Yrs	
	£	[Bar]	
	Average Annual Cost (excluding one-off)		
	£	[Bar]	
Total Cost (PV)			£ N/A
<p>Other key non-monetised costs by 'main affected groups'</p> <p>This option should not impose any direct costs. The representatives should already provide their clients clear and transparent information when providing a service for a fee including on costs. Making the requirements statutory will ensure that claimants receive this information when their case is taken on under these agreements.</p>			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' N/A
	One-off	Yrs	
	£	[Bar]	
	Average Annual Benefit (excluding one-off)		
	£	[Bar]	
Total Benefit (PV)			£
<p>Other key non-monetised benefits by 'main affected groups'</p> <p>This option would provide clarity of information for clients in respect of these agreements, in particular their cost liabilities. They may enable to understand their funding agreements better and this may help improve representative client relationship.</p>			

Key Assumptions/Sensitivities/Risks – regulating provision of advice under these agreements assumes that claimants would understand the agreements and would be able to make informed decisions. Of course in practice funding arrangements can be complex and the requirement to provide detailed information to claimants does not guarantee that the client has understood the information.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales		
On what date will the policy be implemented?		January 2010		
Which organisation(s) will enforce the policy?		Tribunals		
What is the total annual cost of enforcement for these organisations?		£ 0		
Does enforcement comply with Hampton principles?		Yes/No		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ N/A		
Will the proposal have a significant impact on competition?		No		
Annual cost (£–£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase – Decrease)		
Increase of £	Decrease of £	Net Impact	£	

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

Policy Option: 2	Description: Regulate the provision information as above and the percentage which representatives can deduct from the claimant's damages
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' N/A
	One-off (Transition)	Yrs	
	£		
	Average Annual Cost (excluding one-off)		
	£		
Total Cost (PV)			£
<p>Other key non-monetised costs by 'main affected groups' – Regulating the provision of information and advice should not impose any direct costs. However, regulating percentage that representatives can deduct would impact on the income businesses accrue from DBAs. The scale of the impact would vary according to the size of the business, the percentage currently charged, and the number of cases taken on under DBAs. The option may also require more time and effort in ensuring that the clients understood the information being provided.</p>			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£		
Total Benefit (PV)			£
<p>Other key non-monetised benefits by 'main affected groups' – The key benefit for claimants would be clarity of information in respect of these agreements. A cap may ensure that the fees claimants pay are proportionate to the claim. Claimants may have more confidence in the service being provided. Compliance with the regulatory requirements might improve the reputation of representatives.</p>			

Key Assumptions/Sensitivities/Risks – The option assumes that funding options other than DBAs would always be available to claimants, it could be that they have already been turned down by their union for example and pursuing a claim under a DBA might be their only option.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales		
On what date will the policy be implemented?		January 2010		
Which organisation(s) will enforce the policy?		Tribunals		
What is the total annual cost of enforcement for these organisations?		£ 0		
Does enforcement comply with Hampton principles?		Yes/No		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ N/A		
Will the proposal have a significant impact on competition?		No		
Annual cost (£–£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase – Decrease)		
Increase of £	Decrease of £	Net Impact		£

Key: Annual costs and benefits: Constant (Net) Present

Summary: Analysis & Evidence

Policy Option: 3	Description: Regulate the provision of information, the percentage and other terms and conditions such as settlement clauses.
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COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' –	
	One-off (Transition)	Yrs		
	£			
	Average Annual Cost (excluding one-off)			
	£		Total Cost (PV)	£ N/A
<p>Other key non-monetised costs by 'main affected groups'</p> <p>This option will impose costs on solicitors and claims managers operating in the Employment sector. The scale of these costs will vary according to the size on business, the current percentage they charge under these agreements and the number of case undertaken on DBAs, and how often settlement clauses are used in practice.</p>				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'	
	One-off	Yrs		
	£			
	Average Annual Benefit (excluding one-off)			
	£		Total Benefit (PV)	£ N/A
<p>Other key non-monetised benefits by 'main affected groups' – The regulatory requirements would help achieve a level playing field and remove the unfairness to consumers. Regulating the level of charges would help protect the damages award in particular for those consumers on low income.</p>				

Key Assumptions/Sensitivities/Risks – Unregulated DBAs raises concerns around the percentage of charges deducted from a claimant's compensation award. There is little data on charging practices, introducing a maximum cap in some cases may lead to the maximum being applied in all cases which might mean that more claimants may lose a higher proportion of their damages in fees.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £		
What is the geographic coverage of the policy/option?		England and Wales			
On what date will the policy be implemented?		January 2010			
Which organisation(s) will enforce the policy?		Courts and Tribunals			
What is the total annual cost of enforcement for these organisations?		£ 0			
Does enforcement comply with Hampton principles?		Yes/No			
Will implementation go beyond minimum EU requirements?		No			
What is the value of the proposed offsetting measure per year?		£ N/A			
What is the value of changes in greenhouse gas emissions?		£ N/A			
Will the proposal have a significant impact on competition?		No			
Annual cost (£–£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices)				(Increase – Decrease)	
Increase of £		Decrease of £		Net Impact £	

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

- 1.1 This Impact Assessment (IA) assesses the social costs and benefits of regulating Damages Based Agreements (DBAs), a type of 'no win no fee'. The power to regulate was introduced in the Coroners and Justice Bill ("the Bill"), and will enable the Lord Chancellor to make provisions in respect of DBAs including prescribing requirements which they must meet. The power would also allow the Lord Chancellor to restrict the use of these agreements in a particular type of case or extend their use in litigation (where it is currently prohibited) if necessary. This impact assessment relates to the consultation on the details of the initial regulatory requirements to be introduced under the new clause by secondary legislation to regulate the current use of DBAs primarily in Employment Tribunals. It does not cover the Lord Chancellor's power to restrict or extend DBAs as there are currently no plans to use this power.

Scope of the proposals

- 1.2 The clause in the Coroners and Justice Bill gives the Lord Chancellor the power to regulate DBAs by specifying certain requirements with which the agreements must comply.

The main proposals are:

- To specify certain requirements for those undertaking claims on the basis of DBAs to provide clear and transparent information to clients on all costs and additional charges to be made under these agreements, alternative methods of funding available to the claimant and any specific terms and conditions which could be disadvantageous to the client.
- Views are also sought on whether a cap is necessary to control the percentage which representatives can claim from the damages awarded and whether to regulate the use of certain clauses (for example settlement and or penalty/exit clauses) which are used by representatives to bind settlement advice or to penalise the change of representative.

Organisations in the scope of the Regulation

- 1.3 The regulation will affect solicitors, claim management businesses and others taking on cases on the basis of DBAs. These Groups will be required to comply with requirements which are being consulted on in the consultation paper, '*Regulating Damages Based Agreements*'.
- 1.4 The regulation will benefit consumers by ensuring that they receive clear and transparent information on costs, other expenses, alternative methods of funding their claim and the likely consequences e.g. where they wish to take their claim to another representative or refuse advice on settling the case. This would help ensure that consumers are better informed about their options and costs liabilities when entering into such agreements.

2. Rationale for Government Intervention

- 2.1 The term 'contingency fees' is used to describe all 'contingent fees' that is private funding agreements between representatives and their clients. The term 'no win no fee' has developed over time to describe both conditional fee agreements (CFAs) and damages based agreements (DBAs). CFAs are statutory and are regulated under the Courts and Legal Services Act 1990 (as amended by the Access to Justice Act 1999). DBAs on the other hand are non-statutory which allow representatives (solicitors and others such as claim managers) to claim a proportion of a claimant's damages if the case is successful as their fee for representing the claimant.
- 2.2 CFAs are permitted in litigation, that is proceedings before the courts, where they are used primarily by solicitors. In contrast, DBAs are prohibited in litigation but their use developed in Employment Tribunals and the Tax Chamber. This is because their use is recognised and to some

extent approved by some regulatory bodies. Solicitors for example under their professional rules can use DBAs but only in business other than that before a court. It is understood that barristers are prohibited from using DBAs.

- 2.3 The absence of specific statutory regulation of DBAs raises concerns over consumer protection who could lose a disproportionate (and unforeseen) amount of their damages award to their representatives as well as face other charges such as VAT and disbursements.³⁹ DBAs have to date existed without statutory regulation primarily in Employment Tribunals. However, we have collected enough evidence in the economic literature to justify the need for regulation. DBAs in Employment Tribunals play an important in providing access to justice and their regulation would help deliver fair and simple routes in civil justice. Appropriate regulation, without restricting the market, would: ensure proportionate access to justice; that claimants are given full and transparent information; control costs and frivolous claims. The reform of the CFAs regime acts as a good example of how regulating 'no win no fee' agreements can increase access to justice subject to some regulation.
- 2.4 There is significant information available on the history, development and general operation of DBAs. Research has also recently been conducted in this area ranging from a comparative analysis of DBAs under the UK and US legal systems to in-depth comprehensive analysis and recommendations by the Civil Justice Council under its series of reports on Improved Access to Justice – the Future Funding of Litigation. These reports highlight important trends, consumer protection concerns, and possible solutions and provide a justifiable evidential basis for bringing DBAs within statutory regulation. The rationale being, in the first instance, consumer protection, provision of clear and simple information to clients and improving access to justice. Lord Justice Jackson's wide-ranging review of civil litigation costs also recognises that the unregulated use of DBAs in Employment Tribunals where they are most common is open to abuse⁴⁰.
- 2.5 It is however, acknowledged that there is a lack of empirical data on the actual number of claims brought under such agreements, the specific amounts of compensation awarded, the number of claims settled out of court and the percentages deducted. This information has not been centrally collected.

3. Cost Benefit Analysis

- 3.1 This section sets out the potential costs and benefits of implementing the regulation of DBAs by introducing some regulatory requirements with which these agreements must comply. As stated above there is a lack of empirical data on DBAs. It is therefore difficult to specify the costs and benefits in detail. The consultation exercise may provide some information on this.

OPTION 1

Description

- 3.2 **Regulate the provision of information under DBAs** – this option would prescribe requirements for representatives to provide clear and transparent information on all costs (e.g. the percentage to be deducted in fees, VAT, disbursements and other additional costs); alternative methods of funding; and any settlement and or other clauses which might have adverse consequences for the claimant under DBAs.

Costs of Option 1

- 3.1 The proposals are directed at DBAs and the provision of service under these agreements. We do not envisage that the above requirements would impose any additional administrative or financial

³⁹ This comprises of two studies - Moorhead and Cumming (2008) – *Damages Based Contingency Fees in Employment Cases: A Survey of Practitioners* <http://www.law.cf.ac.uk/research/pubs/repository/1996.pdf> and *Something for Nothing – Claimants' Perspective on Legal Funding and Employment Tribunal Cases* available at <http://www.berr.gov.uk/files/file51880.pdf>

⁴⁰ Chapter 50, pg 515 at para 4.12

burdens on solicitors and others affected by the requirements. Solicitors, for example, are required to comply with a range of requirements when using CFAs and subjecting DBAs to similar requirements would not impose any additional costs or burdens. The proposals are not aimed at introducing additional burdens but to manage the existing operation of DBAs in the interest of better consumer protection. There may be some costs where, for example the current form used for these agreements does not specify the information which representatives may be required to provide under the new requirements once in force. However, we believe these costs would be negligible. We are seeking views and evidence in our consultation paper on how the proposals may impact on businesses and final requirements will reflect the issues and concerns raised in respect of those requirements.

Benefits of Option 1

- 3.2 This would close the regulatory gap whereby DBAs are not subject to any specific regulation. It would ensure that certain specified requirements are met, for example that the agreements are in writing and provide the specified level on information. The proposals for the requirements to be specified as set out in the consultation paper would help claimants to better understand their funding arrangements and be clear on what they are being asked to pay. It will also provide confidence to consumers of legal services when using or signing up to the agreements. Additionally it should also help improve the reputation of representative bringing claims under DBAs. We believe these benefits outweigh the minor costs outlined above.

OPTION 2

Description

- 3.1 In addition to regulating the provision of information to claimants outlined under option 1, to regulate the maximum percentage that can be deducted from the claimant's damages. In the review of the literature we have found many jurisdictions that allow contingent fees. Some have introduced regulatory caps on the proportion of damages which can be taken as fees but others have not. In general, it depends on the market environment. Where solicitors' firms operate in a less competitive market, for example when there are few firms offering services to uninformed clients, these caps tend to be justified. Otherwise, it tends to be better to give firms the freedom to set their own charges or percentages. The research conducted by Professor Moorhead found no evidence of overcharging based on the level of percentage set. He recommends analysis of the new datasets collected for BERR (now the Department for Business Innovation and Skills), and we may carry this out over the next few months should the consultation responses support a cap.

Costs of Option 2

- 3.3 This option is likely to impose some costs on businesses. It is important to note that the reference to costs does not imply costs for complying with the policy but the impact on the finances of those affected by regulation. Currently the charging practices under DBAs vary a great deal. The level of percentage of damages which representatives can charge could fall between 10%–50%. Indeed the percentage could be over 50% depending on the complexity or riskiness of the case. Due to the lack of specific data in this area, it is difficult to prescribe the appropriate maximum cap that would be applicable in all cases. Another variation which is relevant is the treatment of VAT: some stated percentages include VAT whereas in other cases the VAT is added on top resulting in a larger deduction from damages than might have been expected. We have, however, sought views and evidence in our consultation paper on whether a cap is necessary and how the proposals might impact on businesses.

Benefits of Option 2

- 3.4 The benefits outlined under option 1 are also relevant for this option. A cap limiting the level of percentage that can be deducted would ensure that the claimant ends up with reasonable benefit at the end of the claim. The current unregulated position allows for an unscrupulous representative to deduct a disproportionate and unforeseen amount from the damages.

OPTION 3

Description

- 3.5 This option includes regulating the provision of information to claimants outlined under options 1 and 2, as well the use of certain clauses, for example settlement and or penalty clauses. The option would put in place a comprehensive statutory framework for regulating DBAs.

Costs of Option 3

- 3.6 This option would have costs implications for businesses as it would regulate most aspects of DBAs where there is potential for concern. The costs in respect of regulating the percentage fees are outlined above. In addition, this option proposes regulating settlement clauses. The consultation paper sets out the proposals and the responses will provide information on the impact that regulation of these clauses would be likely to have on businesses. The clauses are designed to manage conflict with the client. There is some evidence⁴¹ to suggest that they are unevenly balanced in representatives' favour. However, whether regulating these clauses has any cost implications depends on how often representatives rely on them. We are told that they are used but not relied on very often.

Benefits of Option 3

- 3.7 This option would also deliver a range of benefits outlined above for options 1 and 2. In addition, it would protect claimants from clauses which are designed to tie them to any settlement advice that they receive such that failure to do so could seriously affect claimants' cost liabilities. The consultation paper is seeking views on whether these clauses are necessary and if they continue to be used then how they should be regulated. The regulation will ensure that the interests of both parties are properly balanced.

4. Enforcement and Implementation

- 4.1 Any DBA that does not comply with the requirements under these proposals may be unenforceable and open to challenge by the claimant. The Order will set out the details on this.

5. Competition Assessment

- 5.1 The main practitioners in this area are solicitors, claim management businesses and some other non-qualified persons. Both solicitors and claims management businesses are required to comply with the relevant rules in respect of provision of advice generally, although there is an absence of specific rules in respect of DBAs. According to the Employment Lawyers' Association, over 4800 practitioners operate in the Employment sector. The claims management regulation register of authorised persons indicates that over 300 claims managers or consultants offer their services in respect of Employment claims. It is difficult to know how widespread the use of DBAs is. The last Survey of Employment Applications (SETA) carried out in 2003 indicates that 11% of the then applications were funded under DBAs. A repeat of this survey is being conducted and will provide more up to date figures. The proposals aim to regulate the existing operation of DBAs with more emphasis on better informing the clients about cost liabilities. We do not believe the proposals under option 1 raise any issues regarding competition. However, both options 2 and 3 would have an impact on competition. A cap on the percentage that representatives can charge may affect the number of cases which representatives take on under these agreements. Views are sought in our consultation paper on whether a cap is needed and if so what are the appropriate levels are. The responses to the consultation will help inform whether this requirement is introduced at this stage.

⁴¹ Research conducted by Professor Moorhead referred to in the consultation paper

6. Small Firms Impact Assessment

- 6.1 The regulatory requirements will apply to those providing legal and representation services under these agreements, particularly in the Employment sector. Precisely what the impact would be depends on the final requirements which will be set out in an Order. The two main groups affected are solicitors and claims managers. The agreements are private funding arrangements between a representative and a client in an individual case. Whether any regulatory requirements in respect of these agreements would have an impact of the overall business of a small firm to which the practitioner belongs is difficult to predict at this stage, although it is unlikely to have a significant impact.
- 6.2 Option 1: Since these proposals are aimed at regulating the contractual arrangements between solicitors and client there would be no disproportionate impact on small firms as these cost are insignificant and contracting costs have constant returns to scale.
- 6.3 Option 2: The regulation of the percentage which representatives can charge may have an impact on small firms. A cap could affect small firms negatively as they will have less ability to spread the risk of a few costly cases (which they lose) amongst other more detailed ones (which they win).
- 6.4 Option 3: A cap on the percentage which representatives can charge could affect small firms negatively as under option 2. We expect that the regulation of certain terms and conditions such as settlement and penalty/exit clauses would have an impact although this would depend on the nature of the final requirements (if any) to be introduced on the use of these clauses.

7. Legal Aid and Justice Impact Test

- 7.1 The proposals do not impact on the legal aid fund as they relate primarily to private funding agreements in Employment Tribunals (and the Tax Chamber) where legal aid is not available for representation.

8. Equality Impact Assessment

- 8.1 The proposals are aimed at regulating the agreements for consumer protection. The proposals will affect all claimants, solicitors and others businesses involved in tribunal proceedings where damages are sought. However, the proposals should not have an adverse impact on any individual or group of people rather the regulations will safeguard consumer interest generally. An initial equality impact screening considered the impact on different groups in terms of: disability; gender; age; religion and belief or sexual orientation. We do not consider that these proposals would have any adverse impacts although we are aware that women are more likely to be involved in discrimination claims and so might benefit from the additional protection the regulation would provide. However, we have no information on whether any other groups are more likely to be involved in Employment Tribunal cases, although these are more likely to involve lower paid workers who may require additional protection. The consultation process may provide some information which could affect our assessment.

Question 11: Do you agree with our initial view that the proposed changes will have no equality impacts? If not, please detail what the impacts are and who they effect.

9. Human Rights

- 9.1 The proposals are compliant with the Human Rights Act.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	No	No
Rural Proofing	No	No

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 3334 4496, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Gabrielle Kann
Consultation Co-ordinator
Ministry of Justice
7th Floor
102 Petty France
London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 31.

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