Solicitors Regulation Authority

SRA response

"Regulating Damages-Based Agreements", Ministry of Justice consultation (CP 10/09)

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Preliminary comments

The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society of England and Wales. We regulate in the public interest individual solicitors, certain other lawyers and non lawyers with whom they practise, solicitors' firms and their staff. Our activities are increasingly overseen by the newly established Legal Services Board (LSB) [http://www.legalservicesboard.org.uk/] in accordance with the regulatory regime created by the Legal Services Act 2007 [https://www.sra.org.uk/sra/legal-services-act/] . We aim to regulate in the public interest in a comprehensive but flexible manner. We are open to proposals to modify regulation where change is desirable and justified.

In summary, although we welcome the opportunity to respond to the Ministry of Justice [http://www.justice.gov.uk/] 's consultation on proposals concerning the regulation of damages based agreements (DBAs) in (mainly) employment tribunals, we consider that these proposals are fundamentally flawed and we invite the government to reconsider their approach. We do not consider that the current approach complies with the principles which the government has approved that regulation should be proportionate, accountable, consistent, transparent and targeted.

We consider that a more appropriate and proportionate response to the issues which have been raised concerning solicitors' conduct in the research studies upon which the consultation relies, would be for the SRA, working closely with the LSB:

- to carry out a comprehensive review of the matters which have been flagged up in the research studies, including further research;
- to undertake a concerted monitoring and enforcement programme;
- in the light of feedback from those activities, to assess whether and if so what changes need to be made to the current regulatory provisions;
- to issue guidance to solicitors covering areas of concern and warnings as to the consequences of non compliance;
- to engage with consumers to raise awareness of the issues.

Parliament has put in place the Legal Services Act 2007 under which the LSB has been established to have oversight powers over the regulation of solicitors and others. We consider that it is, therefore, inappropriate to circumvent those newly created oversight arrangements by introducing legislative measures in the manner proposed.

Access to justice and the protection of clients' interests are our key concerns. We would applaud and welcome measures which improve protection afforded to solicitors' clients, but we do not believe that the government's proposals are likely to promote these aims.

We do not agree that there is, in the case of solicitors, a "regulatory gap" concerning DBAs to justify the government's proposal to introduce further statutory controls to regulate solicitors' conduct. Solicitors' conduct, including their agreements with their clients concerning the funding of cases, is already subject to statutory control by the regulator, including the provisions of the Solicitors' Code of Conduct 2007 [https://www.sra.org.uk/solicitors/handbook/code/] (the Code), and the oversight of the courts. Depending on the precise circumstances, solicitors' costs may be subject to scrutiny by the Solicitors Regulation Authority, the Solicitors Disciplinary Tribunal [http://www.solicitorstribunal.org.uk] , the Legal Complaints Service (LCS) and by the courts.

We fear that by attempting to regulate DBAs via the proposed detailed legislative measures, the government may be repeating the mistakes which were made concerning the regulation of conditional fee agreements (CFAs). It will be recalled that in the case of CFAs the detailed regulations made under statute were eventually abandoned in favour of regulation via the regulator's conduct rules and guidance. We, therefore, urge the government to avoid the legislative route to regulation of DBAs.

Rules and guidance need to be responsive to change (for example, changes in the marketplace or legislative changes) and be susceptible to amendment with reasonable speed as the need arises. For example, we are currently changing rule 2 (client relations) [https://www.sra.org.uk/rule2] and its guidance to reflect the legislative changes concerning remuneration certificates, and we are making extensive changes to the guidance to deal with some issues which have been the cause of concern. A legislative route along the lines proposed is likely to result in a rigid framework which cannot respond with adequate speed to pressures for improvement.

We are concerned that the government's proposal that DBAs which fail to comply with the legislative provisions outlined in the consultation will be rendered unenforceable. We fear that this may give rise to a new and

undesirable market in claims to establish such unenforceability.

Although we welcome the two research studies which have been undertaken, we do not agree that the conclusions of those studies support the measures which the government now proposes. For example, we note that the researchers recommend that **regulators** review the position regarding charges, the provision of information and the inclusion of certain clauses in agreements with clients, and we agree that this is the appropriate way forward; they do not recommend a legislative response. We also note that the government has chosen not to deal with other issues raised in the research studies, for example, tackling the issue choice and costs in connection with services offered to individuals by trades unions and legal expenses insurers, and would be interested to know the reason for this decision.

We have confined our comments to the regulation of solicitors. We are aware, however, that certain claims management companies (CMCs), which are subject to regulation by the Claims Management Regulator, are also permitted to bring proceedings in the employment tribunal. We suggest that any changes which are desirable in order to protect customers of CMCs should be made via the existing statutory regulatory structure which applies to that sector.

We will now respond to the questions set out in the consultation.

List of questions for response

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?

We do not agree that the present requirements on solicitors to provide information to consumers on costs are insufficient. On the contrary, we consider that these set a high standard of client protection.

Solicitors are required, by virtue both of their legal duties as fiduciaries and of their core professional duties (see rule 1.04 [https://www.sra.org.uk/rule1#r1-04] of the Code – one of the key conduct rules made under statute) to act in the best interests of each client. In addition to this fundamental duty, solicitors are subject to further statutory rules contained in the Code, which regulate their conduct. See in particular rule 2.03 [https://www.sra.org.uk/rule2#r2-03] *"Information about the cost"* which requires:

*"You must give your client the **best information possible*** [emphasis added] *about the likely overall cost of the matter both at the outset and, when appropriate, as the matter progresses."*

We attach rule 1 (core duties) and rule 2 (client relations) of the Code and supporting guidance [#extracts] . These set out the key professional conduct requirements on solicitors in connection with costs.

Note in particular the requirement in rule 2.03(1)(d) [https://www.sra.org.uk/rule2#r2-03] – that the solicitor must discuss with the client how the client will pay and whether the client's own costs are covered by insurance or may be paid by someone else, such as a trade union. Rule 2.03(5) [https://www.sra.org.uk/rule2#r2-03] requires that any information about the cost must be clear and confirmed to the client in writing, and rule 2.03(6) [https://www.sra.org.uk/rule2#r2-03] requires the solicitor to discuss with the client whether the risks of any legal case will justify the expense or risk involved. A solicitor who overcharges a client may be acting in breach of rule 1 [https://www.sra.org.uk/rule1] .

From time to time some solicitors act in breach of these requirements, but those who do are liable to regulatory action which may include, for example, a reprimand, fine, suspension or removal from the roll. The Solicitors Disciplinary Tribunal, for example, in the recent case of *Tilbury* (9880-2008) imposed a fine where a solicitor breached the duties owed to a client under rule 1 [https://www.sra.org.uk/rule1] by (*inter alia)* allowing an introducer to take a disproportionate share of a client's damages awarded by an employment tribunal.

The LCS reports that, historically, consumer complaints which arise from employment matters have been low, at under than 4% – but this figure may fluctuate from time to time. Of those complaints which are made, most concern failure to advise on alternative sources of funding (in breach of rule 2.03(1)(d) [https://www.sra.org.uk/rule2#r2-03-1-d]).

Up until recently the LCS has had the power to issue remuneration certificates in respect of non-contentious costs. This power has now been removed by the Legal Services Act 2007 [http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=legal+services+act&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=3423426&PageNumbe . However, the LCS retain their powers in respect of inadequate professional services (IPS) under the Solicitors Act 1974. The IPS powers permit the LCS to award financial compensation or bill reduction, and any direct financial loss to the complainant. So although their power to decide whether costs are fair and reasonable under the remuneration certificate system no longer exists, and the clients' only remedy in this respect would be to seek an assessment of costs by the court, the client still has an opportunity to obtain a repayment (and this can extend to the total of the solicitor's costs) from a solicitor where there has been an IPS.

This evidence, taking account of the current regulatory powers and the scale of complaints, does not suggest that there is a real need for additional, legislative measures of the kind being proposed in respect of solicitors. A more proportionate response would be for the SRA to launch a publicity/enforcement campaign – this might include publishing free-standing guidance [https://www.sra.org.uk/solicitors/guidance/] and a warning card alerting the regulated community to their obligations and the consequences of breach, and advising consumers of sources of help.

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

Solicitors' clients currently benefit from the availability of methods to challenge costs.

See the information above concerning the existing protection available to solicitors' clients via the LCS's IPS jurisdiction. The courts also have power to review "non-contentious business agreements". It should be noted that the LCS's IPS powers to award financial redress remain available in respect of work carried out under these agreements.

Note also that if a detailed assessment by the court reveals culpable overcharging this would be a matter for the SRA to consider in terms of a regulatory sanction.

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?

Yes – and we consider that the rules affecting solicitors already require this. See rule 2.03(1) [https://www.sra.org.uk/rule2#r2-03-1] , 2.03(5) [https://www.sra.org.uk/rule2#r2-03-5] (annexed) regarding information about the cost, and rule 7.02 [https://www.sra.org.uk/rule7#r7-02] (clarity as to charges) which states that:

"Any publicity relating to your, or your firm's, charges must be clearly expressed. In relation to practice from an office in England and Wales it must be clear whether disbursements and VAT are included."

As we have indicated earlier, we are happy to review rules and guidance if it is felt that the existing requirements concerning transparency and VAT are insufficient. We would also be happy to issue more detailed free-standing guidance [https://www.sra.org.uk/solicitors/guidance/] on what amounts to giving "the best information possible about the likely overall cost".

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

In respect of solicitors, we do not consider that an order is required and that the issues are adequately dealt with in the relevant rules and guidance mentioned above. If there are deficiencies these can be more appropriately addressed by making appropriate modifications to the statutory rules which comprise the Code [https://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/code-of-conduct] and to the supporting guidance [https://www.sra.org.uk/solicitors/guidance/] .

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?

Again, we consider that rule 2 [https://www.sra.org.uk/rule2] and its supporting guidance, along with the core duty on solicitors to act in the best interests of each client (rule 1.04 [https://www.sra.org.uk/rule1#r1-04]), deal adequately with the position regarding solicitors and others regulated by the SRA. See in particular rule 2.03(1)(d) [https://www.sra.org.uk/rule2#r2-03-1-d] which requires that a solicitor must discuss with the client how the client will pay, in particular:

"(i) whether the client may be eligible and should apply for public funding;

(ii) whether the client's own costs are covered by insurance or may be paid by someone else such an employer or trade union."

Rule 2.03(5) [https://www.sra.org.uk/rule2#r2-03-5] states:

"Any information about the cost must be clear and confirmed in writing."

Rule 2.03(6) [https://www.sra.org.uk/rule2#r2-03-6] states:

"You must discuss with your client whether the potential outcomes of any legal case will justify the expense or risk involved including, if relevant, the risk of having to pay an opponent's costs."

See also our earlier comments about issuing free-standing guidance, and publicity/education on access to justice. Claimants could be provided with information about the possibilities, if appropriate, of obtaining assistance from e.g. unions, advice centres, and other advisers and the possible range of charges.

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?

We do not consider that a cap is necessary or desirable for solicitors – the evidence does not suggest that there is a problem in respect of solicitors.

If any cap were set too low, this may have the effect of restricting access to justice. This is because solicitors are likely to be reluctant to take cases on since the fee may not reflect the risk and cost of undertaking a case which does not succeed. Another example of where a cap might be inappropriate would be where a client wants to

pursue a case with the main aim of protecting his reputation and in the knowledge that any monetary award may be very low in comparison with the work which the solicitor must undertake.

We would also have concerns that any maximum cap might become the norm, contrary to the best interests of all clients.

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?

Clarity and simplicity for clients is essential and we think it may be difficult to ensure the client understands a fee calculation which involves sliding scales.

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

We consider that, in the case of solicitors, settlement clauses are already regulated (see our earlier comments).

Solicitors owe duties to act in their clients' best interests and to act with integrity in accordance with rule 1 [https://www.sra.org.uk/rule1] and the extensive duties owed under rule 2 [https://www.sra.org.uk/rule2] (client relations) and rule 3 [https://www.sra.org.uk/rule3] (conflict of interests). Nonetheless, a solicitor has a legitimate interest in ensuring he is properly paid for the work which is properly undertaken. We consider that a solicitor is, therefore, entitled to include reasonable "settlement clauses", in an agreement.

We again suggest that the better course would be for the SRA to issue free-standing guidance to those whom we regulate.

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

See our response to question 2 [#q2] with regard to solicitors.

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.

N/A

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.

We welcome measures which enhance protections for clients, and we consider that the rules affecting solicitors contain appropriate client provisions for client protection. Proper client protection is likely to have a positive impact on equality groups. We recognise that discrimination cases are largely brought within the employment tribunal and are likely to be brought by people who are members of one or more equality group.

There are equality issues in employment cases in terms of access to justice by people who are sometimes vulnerable. Access to justice is a means to enforce equality rights. If these proposals resulted in a restriction of access to justice this would be a major concern.

Links to relevant parts of the Solicitors' Code of Conduct

Rule 1 – Core duties [https://www.sra.org.uk/rule1#rule-1]

Guidance to rule 1 – Core duties [https://www.sra.org.uk/rule1#guidance-1]

Rule 2 – Client relations [https://www.sra.org.uk/rule2#rule-2] (2.01 to 2.07)

Guidance to rule 2 – Client relations [https://www.sra.org.uk/rule2#guidance-2]