



LEGAL SERVICES  
**BOARD**

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

2 October 2009

Dear Mr Akhtar,

## **REGULATING DAMAGES BASED AGREEMENTS**

Thank you for the opportunity to respond to your consultation document **Regulating Damages Based Agreements**. I would also like thank you for the extension for submitting our response which was considered by our Board on Monday 28<sup>th</sup> September.

We share your objective of ensuring that consumers are fully protected in their pursuit of justice. Consumers must get the help and support that they need in ways that deliver high levels of consumer protection. This is particularly important in the legal services market, where consumers often have little or no experience on which to base their choice of legal support or to assess that they have received a good service.

The consultation document proposes an order-making power that will require the provision of transparent and comprehensible information about costs, expenses and alternative forms of funding; cap the percentage of damages that can be recovered in fees from the award; and prohibit the use of unfair contract terms and conditions in the agreement.

We believe that the content of the proposals addresses the key issues in ensuring that consumers are properly informed and hence that the market works more effectively. However, we believe that the means suggested for tackling them represents a move in the wrong direction because it gives the responsibility of regulation in this area directly to Government, rather than to independent regulators. The proposals also seek to prescribe rules at a time when the Legal Services Board is working with the approved regulators to develop a more outcomes focused, principles-based approach to regulation. This, we believe, will best ensure the delivery of behaviours that focus on professional standards and delivering consumer protection better and more quickly than separate requirements imposed via the lengthy process of consulting on and securing assent for both primary and secondary legislation.

Our analysis suggests that existing regulatory mechanisms already provide a framework for dealing with the consumer protection issues that have been identified. For example Rule 1.04 of the Solicitors Code of Conduct says that a solicitor must act in the best interests of a client. This means that a solicitor should not take advantage of a client and therefore any fees taken should be proportionate to the damages received. Should the solicitor take a disproportionate fee, under the current Code of Conduct they could be disciplined and redress provided to the client. The proposals are also designed to ensure that unfair terms forming part of the agreement between a

client and a lawyer can be struck down. Legislative provision already exists to deal with this issue in the form of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contract Regulations 2004. The fact that power to deal with the concerns raised already exist suggests that the focus should be on ensuring more effective compliance rather than making overlapping rules, which may unwittingly cast doubt on the breadth and efficacy of the current rules themselves.

There clearly is some evidence that consumers may currently be suffering as a consequence of actions by lawyers. We therefore believe that it is important that the LSB works closely with the Solicitors Regulatory Authority and others now to ensure that existing regulatory and legislative powers are used in a way that remedies abuse as soon as possible.

One way forward might be to set up a taskforce which could oversee a programme of swift, immediate action. Staff from Ministry of Justice, Legal Services Board, regulators such as SRA and Claims Management and the Office of Fair Trading could be involved, along with consumer representatives. Its remit might include

- to identify the scale of the problem in England and Wales;
- to identify effective monitoring and compliance solutions in this area;
- to identify the most effective ways of reminding lawyers of their duties with regard to their Codes of Conduct
- to work with OFT to identify the nature and extent of contract terms that are unfair
- to encourage Approved Regulators to assist in the education of consumers in these matters.

We believe that such a mechanism would be the best means of providing a sustainable solution to the issues you have identified.

I hope that you find this response helpful and we are happy to discuss it further with you. If you require any further information please contact Lesley Davies ([lesleydavies@legalservicesboard.org.uk](mailto:lesleydavies@legalservicesboard.org.uk) 020 7271 0071)

I am copying this letter to Elizabeth Gibby who heads our sponsor team in MoJ.

Yours sincerely



**Chris Kenny**  
Chief Executive

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