HOUSE OF LORDS

Merits of Statutory Instruments Committee

14th Report of Session 2009-10

Drawing special attention to:

Draft Damages-Based Agreements Regulations 2010

Draft Conditional Fee Agreements (Amendment) Order 2010

Education (Student Support) (European University Institute) Regulations 2010

Correspondence:

Post-Implementation Review Inquiry

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE
The Baroness Deech DBE
The Lord Hart of Chilton
The Lord James of Blackheath CBE
The Lord Lucas
The Lord Methuen
The Baroness Morris of Yardley
The Lord Norton of Louth
The Lord Rosser (*Chairman*)
The Lord Scott of Foscote
The Baroness Thomas of Winchester

Registered interests

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Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Fourteenth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

A. Draft Damages-Based Agreements Regulations 2010

Summary: A Damages-Based Agreement (DBA) is a private funding arrangement in which the representative's fee is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client. In relation to cases before employment tribunals only, these Regulations cap the fee the representative can charge at 35% including VAT. The Committee received a number of representations expressing concern about the proposal and the robustness of the evidence used to support a cap, including one from the author of research cited by the Department, Professor Moorhead. A number also expressed concern about the restrictions on terminating a DBA which deviated significantly from normal contract law. On the day of the Committee meeting a revised draft was laid (the 3rd version laid before the House), which addressed the conflict between this type of DBA and normal contract law. We had no opportunity to consider in any detail the effect of this change as, despite the Government having to correct errors and twice re-lay the Regulations, the Department wished to continue with the debate already scheduled for 18 March. The Committee suggests that the House will wish to consider further whether these latest revisions have adequately responded to the concerns expressed in the correspondence about the termination provision. A number of other issues also require further clarification, if reassurance is to be provided that the policy will not result in unintended consequences. The Committee would also wish to have seen stronger evidence to demonstrate that a cap is needed and that 35% is the appropriate level. Although the Ministry is acting with the objective of protecting the consumer and of balancing the rights of the consumer and the representative to fair payment, it is not yet clear that the current provisions will achieve that aim.

These Regulations are drawn to the special attention of the House on the grounds that they may imperfectly achieve their policy objective.

1. These Regulations are laid under sections 58AA(4) and 120(3) of the Courts and Legal Services Act 1990, together with an Explanatory Memorandum (EM) and an Impact Assessment (IA). The draft instrument laid on 16 March replaces the versions of 24 February and 1 March.

2. The Regulations set out the requirements with which a damages-based ("no win, no fee") agreement between a client and a representative must comply in order to be enforceable in a matter to be heard by an employment tribunal. A damages-based agreement is a private funding arrangement whereby the representative's fee is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client. The Regulations set out the information that must be given to the client before the agreement is signed and the form the agreement must take. They also limit the fee the representative may charge to 35%, including VAT, of

the sum received by the client, which the Department states is approximately the current market rate (paragraphs 8.3 of the EM and 2.19 -20 of the IA).

3. The Committee identified a number of concerns with the proposals at an earlier stage and they were withdrawn and re-laid with amendments. However, this did not sufficiently clarify the rationale behind the unusual termination provisions set out in regulation 6 which limit both the representative and the client's ability to terminate the contract close to the hearing date. The Department's clarification of its policy intention in doing this is set out in full in Appendix 1. The Department maintains that the key aim of the regulations is to protect consumers from unfair and unreasonable agreements in respect of employment matters, but says that arrangements are also needed to ensure that representatives are remunerated for the services that they have provided where the claim is successful.

Termination provisions

4. The Ministry of Justice states that the provisions in regulation 6 aim to protect both clients and representatives in a proportionate manner. It aims to prevent representatives locking clients into unsuitable agreements by the threat of excessive costs, and to prevent representatives from dropping a case if it became uneconomical to run. However we received representations from the Law Society, the Bar Council and Professor Moorhead of Cardiff University (see Appendix 1) which questioned both the effects of these provisions and the unintended consequences that they may have. In particular they set out a number of scenarios in which the parties wished to terminate the contract due to no fault on either side, for example if a witness or opponent changed their stance.[1] In the 3rd version re-laid on 16 March shortly before the Committee met, MOJ produced an amended regulation 6(5) which provides that these special provisions are without prejudice to any right of either party under the general law of contract to terminate the agreement. This change appears to meet many of the criticisms of the original regulation 6. However, we emphasise that we have not had the opportunity to seek further advice on the effect of the change, or to consider whether it meets all of the concerns expressed in the evidence we received about the original regulation 6. (For example, there was a concern that under regulation 6(4) a representative could terminate an agreement on the broadly expressed grounds that a client had "behaved unreasonably".)

Appropriate level for the cap

5. The representations also debate whether it is appropriate to fix a cap on the fee level at all. The Law Society argues that there should be some flexibility to allow for the different degrees of complexity that may arise in a case. While a cap may prevent excessive charging it may also result in representatives being reluctant to pursue cases on this basis, resulting in a reduced access for justice to poorer claimants.

6. The Ministry of Justice cite research into the matter by Professor Moorhead in support of the proposed 35% cap.

7. Professor Moorhead has written to the Committee to state that in his view the research did not support the view that contingency fees generally led to overcharging of clients, and states that the evidence suggested that

[1] The evidence received and printed in the report relates to the earlier versions of the Regulations, not the 3rd version currently before the House.

contingency fees were generally a better deal for clients than paying on a hourly basis. He goes on to question the justification for setting the cap at 35% on the basis of the evidence in his research, which found fees tended to fall into bands of 5-10%, 25-30% and 40-50% according to the complexity of the case. The 33% figure quoted was simply the average and he fears the consequence of a setting a cap at 35% will be that complex but meritorious cases will not be able to find a representative willing to take them on.

Conclusion

8. The 3rd version of these Regulations were laid just before the Committee met. We decided to consider them immediately as the change responded to concerns about regulation 6(5), and because we understood the MOJ wished to press ahead with a debate already scheduled for 18 March. **The Committee regrets that it was unable to complete more thorough scrutiny and suggests that the House may wish to consider whether these latest revisions have adequately responded to the concerns expressed in the correspondence.**

9. The proposals to clarify the contract terms are generally welcomed, particularly as they seek to bring to conformity when representatives come from a range of disciplines such as the legal professions, insurance companies and unions. However there are clear concerns that a cap set at 35% may operate to raise the general level of fees rather than limit them, and may restrict the access to justice of those with worthy but complex claims.

10. The House may think that a number of issues require further clarification to provide reassurance that the policy will not result in unintended consequences. The Committee also considers that stronger evidence is required to demonstrate that a cap is needed and that 35% is the appropriate level. Although the Ministry is acting with the objective of protecting the consumer and balancing the rights of the consumer and the representative to fair payment, it is not yet clear that the current provisions will achieve that aim. The legislation is therefore drawn to the special attention of the House on the grounds that it may imperfectly achieve its objective.

B. Draft Conditional Fee Agreements (Amendment) Order 2010

Summary: In defamation Conditional Fee Agreements (CFA) the lawyer has, until now, been awarded double his costs if the case is won (ie a 100% success fee, paid by the losing side) to offset the lost cases, for which the lawyer receives no payment from the client. There is some consensus that the costs are bearing unfairly on the losing party, so as an interim measure, the Department is proposing to reduce the success fee supplement to 10%. A number of representations have been sent to the Committee questioning the basis for and timing of this change. Some queried the reason for rushing this proposal through, ahead of a proper assessment of the proposals made in Lord Justice Jackson's recently published review of Civil Litigation Costs. Correspondents also questioned the evidence MOJ used, and would have liked to make their own assessment, but were constrained by the compressed 4 week consultation period. The policy objective is to reduce legal costs, and to reduce the risk of disproportionate costs unjustifiably restricting freedom of expression for the media and other publishers. The Order aims to do this by reducing the 100% uplift that is widely considered a disproportionate sanction on the unsuccessful defendant. However the House may wish to consider whether a 10% uplift swings the pendulum

too far the other way reducing poorer clients' ability to challenge misleading published information. We regret that insufficient time has been allowed to produce a solution based on more robust evidence or on which there is broad agreement, and that might seem more likely to achieve the policy objective without the potential side effects discussed in the correspondence.

The Order is drawn to the special attention of the House on the grounds that it may imperfectly achieve its objective.

11. The Ministry of Justice (MoJ) has laid this instrument under section 58 of the Courts and Legal Services Act 1990 along with an Explanatory Memorandum (EM) an Impact Assessment (IA). It is noted that, as with the Damages-Based Agreement Regulations 2010 reported on above, this Order has twice been withdrawn and relaid, in order to correct drafting defects.

12. This Order amends arrangements for "no win, no fee" agreements that relate to defamation cases including malicious falsehood and breach of confidence cases that involve material that has been published. This type of Conditional Fee Agreement (CFA) has been available for some years as an alternative to paying a legal representative by hourly fee according to the work done. In defamation CFAs the lawyer has, until now, been awarded double his costs if the case is won (i.e. a 100% success fee) but received no payment from the client if the case is lost. The underlying principle is that the successes offset the failures with the objective of improving access to justice for the client, particularly the poorer ones who might otherwise not be able to defend their reputation as legal aid is not normally available for defamation proceedings.

13. The Ministry of Justice say that there is evidence that the costs are bearing unfairly on the losing party and that more than half the defamation cases that are pursued are won, i.e. the lawyers are benefiting disproportionately from the current arrangements. So as an interim measure, pending the consideration of Lord Justice Jackson's wider review into Civil Litigation Costs, the Department is proposing to reduce the success fee to 10%. The Order was preceded by a short consultation exercise (from 19 January to 16 February 2010).

14. The Committee asked the Ministry why the Impact Assessment they provided only considered the one option and did not compare the costs and benefits of intermediate levels of success fee at say 25% or 50%. They responded (see Appendix 2) that general consultations had been going on since 2007, previous attempts had been made to construct a phased scheme but consensus could not be achieved. They argued that the majority of the respondents to the consultation exercise, even those who were against the reduction to 10%, conceded that the status quo was not sustainable and that change was necessary. A number of representations have been sent to the Committee questioning the basis for and timing of this change (see Appendix 2). Several respondents make reference to the "Theobalds Park Plus agreement" an example of which is attached to the Carter Ruck submission, which illustrates that other arrangements, staggering the fee uplift according to the amount of work done, are already in voluntary operation.

15. Some respondents queried the Department's use of figures on cases provided by the Media Lawyers' Association to Lord Justice Jackson's review; but said that the truncated consultation period had prevented further analysis of data. While accepting a need for change, most challenge the 10% figure as disproportionate. The conclusions of both Lord Justice Jackson and the

Commons' Culture Media and Sport Committee on this issue are mixed[2], and we were not convinced that there was a strong basis for choosing a 10% uplift over any other figure. In their response MOJ acknowledged that they do not have comprehensive statistics and were seeking additional data through the consultation exercise – it therefore seems difficult to justify the curtailment of the consultation period to 4 weeks.

16. Some responses query the reason for taking this interim proposal through when it is not consistent with the proposals made in Lord Justice Jackson's report, which suggests that the costs as well as the benefits of a "no win, no fee" CFAs should be borne by the client rather than by the unsuccessful defendant. MOJ state that Lord Justice Jackson's proposal will need extensive consultation with the industry and primary legislation. In their view the proposed cut to 10% provides a way forward in the interim.

17. The policy objective is to reduce legal costs, and to reduce the risk of disproportionate costs having the effect of unjustifiably restricting freedom of expression for the media and other publishers. The Order aims to do this by reducing the 100% uplift that is widely considered a disproportionate sanction on the unsuccessful defendant. Paragraphs 3.9-16 of the Impact Assessment set out the pros and cons of reducing the sanction, in the light of which the House may wish to consider whether a 10% uplift swings the pendulum too far the other way, reducing poorer clients' ability to challenge misleading published information. **We regret that insufficient time has been allowed to produce a solution based on more robust evidence or on which there is broad agreement, and that might seem more likely to achieve the policy objective without the potential side effects discussed in the correspondence.** We therefore draw the matter to the special attention of the House on the grounds that it may imperfectly achieve its objective.

C. Education (Student Support) (European University Institute) Regulations 2010 (SI 2010/447)

Summary: These Regulations provide support for a number of students taking designated postgraduate courses at the European University Institute (EUI) in Florence, Italy. They set out the eligibility criteria, living costs and other support available for eligible students for the academic year 2010/11. The Regulations also revoke an earlier set of regulations which also provided support for a number of students taking designated postgraduate courses at two other European institutions: the Bologna Center in Bologna; and the College of Europe (CoE) in either Bruges or Natolin (Poland). However, following representations, the Government now intend to reinstate half the number of scholarships at the CoE for this year, by a separate set of Regulations. The Department for Business, Innovation and Skills (BIS) explain that the budget for the CoE places is ring fenced, but due to an increase in fees and a poor exchange rate, the budget is not sufficient to fund the same number of students as in 2009/10. BIS explain that the policy objective for funding places at the three European institutions was to strengthen the representation of UK nationals in EU institutions. However, the SI has been developed without any consultation with key stakeholders and BIS have not presented any solid evidence to support the policy objectives of their funding decisions. The House may

[2] See their Report *"Press Standards, Privacy and Libel"* published 24 February 2010 *paras 286-309* http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362i.pdf

therefore wish to give some consideration as to whether the policy development processes for this SI have been sufficiently robust.

This instrument is drawn to the special attention of the House on the grounds that it gives rise to issues of public policy likely to be of interest to the House and may imperfectly achieve its policy objectives.

18. These Regulations provide support for a number of students taking designated postgraduate courses at the European University Institute (EUI) in Florence, Italy. They set out the eligibility criteria, amounts of living costs and other support available for new and returning eligible students for the academic year 2010/11. The Regulations also revoke an earlier set of regulations which also provided support for a number of students taking designated postgraduate courses at two other European institutions: the Bologna Center in Bologna; and the College of Europe (CoE) in either Bruges or Natolin (Poland).

19. The Explanatory Memorandum (EM) says that from academic year 2010/11 support fees, living and other costs are to be withdrawn for postgraduate students attending the Bologna Center and the CoE (page 7.1). In response to questioning from the Committee, the Department for Business, Innovation and Skills (BIS) have provided further information on the background to these Regulations (see Appendix 3). They explain that a limited number of scholarships will be reinstated for the CoE for this year and will shortly introduce a separate set of Regulations to that effect.

20. The numbers of places that have been funded by the Government at the three colleges are relatively small. BIS say that that in the 2009/10 academic year, there were 2 places at the Bologna Center, 22 places at the CoE, and 20 places at the EUI. Currently the maximum to be funded in 2010/11 (subject to parliamentary approval) will be 11 at CoE, 20 at EUI and no places at the Bologna Center. BIS explain that the budget[3] for the CoE places is ring fenced, and due to an increase in fees and a poor exchange rate, the budget is not sufficient to fund 22 students (see Appendix 3).

21. The EM says (paragraph 8) that no consultation was carried out on the SI. The Committee asked BIS why they considered this approach to be consistent with the Government's policy on consultation[4]. The response from BIS was that they had made the decision to withdraw funding known to the interested parties in the CoE and Bologna Center. But following representations, the decision was taken to reinstate funding for the CoE for one year (see Appendix 3).

22. The Committee questioned BIS over the policy objective behind the funding for the postgraduate places at the three European colleges. BIS said the original policy objective, following a 1990 Government review, was to strengthen the representation of UK nationals in the EU institutions. They said the policy objective for the reduction of the number of places at the CoE and the Bologna Center was that the Department does not generally fund postgraduate students or fund students studying outside the UK, and the existing funding was contrary to the policy objective of targeting support at

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[3] The total budget for CoE and Bologna Center was £279,000 for 2009/10: the budget for EUI was £174,000 for 2009/10 (Source: email from BIS to MSIC Secretariat 16 March 2010)

[4] HM Government, Code of Practice on Consultation (July 2008)

those accessing higher education for the first time. The continued funding at CoE will be for one year whilst other arrangements are being considered for funding to meet the Government's policy aim (see Appendix 3).

23. The effect of this SI is a reduction in the number of funded places at the three European institutions. The SI has been developed without any consultation with key stakeholders and BIS have not presented any solid evidence to support the policy objectives of their funding decisions. Although the Committee is appreciative of current budgetary constraints, the House may wish to give some consideration as to whether the policy aim of this SI is consistent with the Government's stated broader policy for the funding of postgraduate places at the three colleges, and whether recent policy development processes have been sufficiently robust to ensure that this SI will achieve its objectives.

OTHER INSTRUMENTS OF INTEREST

Draft Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010

Draft Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010

Draft Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010

24. These three draft Orders give effect to the devolution of policing and justice powers to the Northern Ireland Assembly ("the Assembly"). The Government set out its willingness in principle to devolve these matters in the Belfast (Good Friday) Agreement, the Joint Declaration of 2003 and the St Andrews Agreement of 2006. The devolution of the powers follows the Agreement at Hillsborough Castle on 5 February 2010 and a resolution of the Assembly to that effect on 9 March 2010. Specifically, the draft Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 ("the section 4 Order") provides for legislative powers for certain policing and justice matters to be transferred to the Assembly; and the draft Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 makes provisions which are consequential on, or otherwise give effect to, the section 4 Order. The draft Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010 abolishes the Northern Ireland Court Service and proposes to transfer its functions to the Department of Justice in Northern Ireland. Subject to Parliamentary approval, the three draft Orders are due to come into force on 12 April 2010.

Rail Vehicle Accessibility (Applications for Exemption Orders) Regulations 2010 (SI 2010/427)

Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010 (SI 2010/432)

25. The Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010 set accessibility standards for disabled persons for all passenger vehicles

used on light rail systems (that includes metro, underground and tram systems and some forms of guided transport). These standards already apply to mainline trains.[5] The Regulations further simplify the rules by making light rail subject to the same enforcement regime. In addition they extend the application of accessibility standards to pre-1999 vehicles when they are refurbished and require all light rail vehicles to be compliant by 1 January 2020 (unless an exemption order has been granted). This deadline was originally set by the Disability Discrimination Act 2005. The Equality Bill currently proceeding through Parliament would, on Royal Assent, repeal and replace the Disability Discrimination Acts 1995 and 2005, but it re-states the provisions of both Acts relating to rail vehicle accessibility without substantive amendment. The Rail Vehicle Accessibility (Applications for Exemption Orders) Regulations 2010 simply extend the scope of those who can apply for exemptions to include owners as well as operators; it does not change the basis for granting an exemption.

Travel Concessions (Eligibility) (England) Order 2010 (SI 2010/459)

26. The Travel Concessions (Eligibility) Act 2002 fixed the entitlement to travel concessions for older people at sixty years of age for both men and women. This Order uses the power in section 1(4) of that Act to redefine the age of eligibility for concessionary travel so that entitlement is instead linked to pensionable age. The Order substitutes for the reference to the age of 60 years -

    a) in the case of a woman, her pensionable age; and

    b) in the case of a man, the pensionable age of a woman born on the same day

    The difference between men and women in the state pension age is set to disappear between 2010 and 2020 as the pensionable age for women rises incrementally to 65 during this period. This Order allows the progressive re-alignment of the entitlement to travel concessions with the pensionable age that applies at the time.

South Downs National Park Authority (Establishment) Order 2010 (SI 2010/497)

27. This Order establishes the South Downs National Park Authority ("the Authority") as a special purpose authority to administer the new National Park coming into being on 31 March. The Authority will have the functions of a local planning authority for the area of the South Downs National Park together with certain other functions relating to the delivery of the statutory National Park purposes, including the duty to prepare a National Park Management Plan. The Authority will operate under the same legislative provisions which apply to existing English National Park authorities. As required, a consultation took place on the membership of the Authority and the Secretary of State for Environment, Food and Rural Affairs announced on 10 December that there would be a 27 seat Authority.

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[5] Railways (Interoperability) Regulations 2006 (SI 2006/397)

Jobseeker's Allowance (Sanctions for Failure to Attend) Regulations 2010 (SI 2010/509)

28. Currently, when a jobseeker fails to attend an appointment or interview without good reason, then their entitlement to claim Jobseeker's Allowance (JSA) is brought into question and their claim may be closed. Around 12,000 jobseekers have their JSA claims closed down each month under the current legislation (typically they only lose two days benefit) but this places an administrative burden on Jobcentre Plus in having to constantly close and re-open claims. These Regulations introduce benefit sanctions for those customers who fail to attend a mandatory appointment or interview within the jobseeker's regime and who return to Jobcentre Plus within a period of five working days, but are unable to provide a good reason for not attending. Entitlement to Jobseeker's Allowance will continue but the benefit will not be payable for a period of one week, or two weeks in subsequent instances of failing to attend during the same claim.

Census (England) Regulations 2010 (SI 2010/532)

29. These Regulations make provision for the operational arrangements and procedures necessary for the conduct of the 2011 Census, for example the distribution to and collection of the forms from each household. A specimen of the questionnaire is included in the schedules to the Regulations.

Veterinary Surgery (Vaccination of Badgers Against Tuberculosis) Order 2010 (SI 2010/580)

30. This Order forms part of the Government's plans to tackle bovine tuberculosis in Great Britain through a Badger Vaccine Deployment Project, the aim of which is to help address the problem of the disease being spread from badgers to cattle. The Order will allow an injectable BCG vaccine to be administered to badgers by persons other than veterinary surgeons ("lay vaccinators"), although the SI stipulates that the lay vaccinators must be "under the direction of a veterinary surgeon". The SI has been laid with an Impact Assessment (IA) which analyses the various options for vaccinating badgers. The IA also says that the lay vaccinators will need to be fully trained to trap and vaccinate badgers by the Food and Environment Research Agency (Fera). This will include training in: sett surveying and identification; siting; pre-baiting and setting traps; and handling, transporting and administering the vaccine.

Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593)

31. These Regulations implement the provisions of European Council Directive 2008/118/EC ("the Directive") concerning the general arrangements for excise duty, including the provisions relating to the holding and movement of excise goods (alcohol, oils and tobacco products) in duty suspension. Although the Directive reproduces some earlier provisions which have already been transposed in the UK, the Directive contains a number of new provisions. In particular, it provides the legal basis for the Excise Movement and Control System (EMCS), a computerised monitoring system, which replaces the earlier paper based system. HM Revenue and Customs expects one-off costs of £50.4 million for the implementation of EMCS, and businesses are expected to incur one-off costs for acquiring third party

software and training staff (Impact Assessment page 2). However, the IA also says that businesses are expected to experience administrative savings and estimates these at £20.7 million per annum (IA page 2).

POST IMPLEMENTATION REVIEW INQUIRY: CORRESPONDENCE

32. On 12 November 2009 the Committee published a report on the degree to which Government departments evaluate the effects of statutory instruments (30th Report, HL Paper 180, Session 2008-09). The Committee subsequently published the Government response to that report in their 8th Report of this Session (HL Paper 43) and the House debated both reports on 24 February. Lord Davies of Abersoch, Minister for Trade, Investment and Small Businesses, has since sent a letter to the Committee covering some of the key points brought up in the debate. This letter is printed at Appendix 4.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Draft Building Societies (Financial Assistance) Order 2010

Draft National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010

Draft National Assembly for Wales (Legislative Competence) (Transport) Order 2010

Draft Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010

Draft Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010

Draft Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010

Draft Occupational Pension Schemes (Levies) (Amendment) Regulations 2010

Draft Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010

Instruments requiring affirmative approval

Draft Funding Code: Criteria and Procedure

Instruments subject to annulment

SI 2010/333 Notification of Conventional Tower Cranes Regulations 2010

SI 2010/402 Railways (Public Service Obligations) Regulations 2010

SI 2010/404 Building (Local Authority Charges) Regulations 2010

SI 2010/408 Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2010

SI 2010/420 Fish Labelling (England) Regulations 2010

SI 2010/425 NHS Professionals Special Authority (Abolition) Order 2010

SI 2010/427 Rail Vehicle Accessibility (Applications for Exemption Orders) Regulations 2010

SI 2010/428 Welsh Ministers (Transfer of Fire and Rescue Service Equipment) Order 2010

SI 2010/432 Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010

SI 2010/433 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) (Amendment) Regulations 2010

SI 2010/434 Healthy Start Scheme and Welfare Food (Amendment) Regulations 2010

SI 2010/440 Registration of Civil Partnerships (Fees) (Amendment) Order 2010

SI 2010/441 Registration of Births, Deaths and Marriages (Fees) Order 2010

SI 2010/442 Social Security (Persons Serving a Sentence of Imprisonment Detained in Hospital) Regulations 2010

SI 2010/444 Social Security (Notification of Changes of Circumstances) Regulations 2010

SI 2010/445 Tobacco Advertising and Promotion (Display) (England) Regulations 2010

SI 2010/446 Tobacco Advertising and Promotion (Special Tobacconists) (England) Regulations 2010

SI 2010/448 Good Vehicles (Plating and Testing) (Amendment) Regulations 2010

SI 2010/449 Motor Vehicles (Tests) (Amendment) Regulations 2010

SI 2010/451 Road Vehicles (Registration and Licensing) (Amendment) Regulations 2010

SI 2010/452 Public Service Vehicles (Operators' Licences) (Amendment) Regulations 2010

SI 2010/454 Local Authorities (Capital Finance and Accounting) (Amendment) (England) Regulations 2010

SI 2010/455 Good Vehicles (Licensing of Operators) (Amendment) Regulations 2010

SI 2010/456 Central Rating List (England) (Amendment) Regulations 2010

SI 2010/457 Public Service Vehicles (Operators' Licences) (Fees) (Amendment) Regulations 2010

SI 2010/459 Travel Concessions (Eligibility) (England) Order 2010

SI 2010/464 Good Vehicles (Licensing of Operators) (Fees) (Amendment) Regulations 2010

SI 2010/465 Adoption Support Agencies (England) (Amendment) Regulations 2010

SI 2010/468 Social Security Pensions (Low Earnings Threshold) Order 2010

SI 2010/470 Social Security Revaluation of Earnings Factors Order 2010

SI 2010/471 Fire Safety (Employees' Capabilities) (England) Regulations 2010

SI 2010/474 General Medical Council (Constitution of Panels and Investigation Committee) (Amendment) Rules Order of Council 2010

SI 2010/475 General Medical Council (Applications for General Practice and Specialist Registration) Regulations Order of Council 2010

SI 2010/479 Health Professions Council (Registration and Fees) (Amendment) Rules Order of Council 2010

SI 2010/483 Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) (Amendment) Regulations 2010

SI 2010/492 National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2010

SI 2010/496 Care Quality Commission (Specified Organisations etc) Order 2010

SI 2010/497 South Downs National Park Authority (Establishment) Order 2010

SI 2010/498 Town and Country Planning (Blight Provisions) (Amendment) (England) Order 2010

SI 2010/499 Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2010

SI 2010/504 Lowestoft Sixth Form College (Incorporation) Order 2010

SI 2010/505 Lowestoft Sixth Form College (Government) Regulations 2010

SI 2010/506 Occupational Pension Schemes (Contracting-out) (Amount Required for Restoring State Scheme Rights) Amendment Regulations 201

SI 2010/508 Social Security (Claims and Information) (Amendment) Regulations 2010

SI 2010/509 Jobseeker's Allowance (Sanctions for Failure to Attend) Regulations 2010

SI 2010/510 Social Security (Miscellaneous Amendments) Regulations 2010

SI 2010/527 Qualifications and Curriculum Development Agency's Remit Order 2010

SI 2010/528 Local Government Pension Scheme (Amendment) Regulations 2010

SI 2010/532 Census (England) Regulations 2010

SI 2010/534 Food Hygiene (England) (Amendment) Regulations 2010

SI 2010/540 Common Agricultural Policy Single Payment and Support Schemes Regulations 2010

SI 2010/551 Medicines (Products for Human Use) (Fees) Regulations 2010

SI 2010/554 Blood Safety and Quality (Fees Amendment) Regulations 2010

SI 2010/557 Medical Devices (Fees Amendment) Regulations 2010

SI 2010/564 Coroners (Amendment) Rules 2010

SI 2010/573 Chief Executive of Skills Funding (Strategy for Greater Manchester) Order 2010

SI 2010/578 National Health Service (Primary Medical Services) (Miscellaneous Amendments) Regulations 2010

SI 2010/580 Veterinary Surgery (Vaccination of Badgers Against Tuberculosis) Order 2010

SI 2010/582 Child Trust Funds (Amendment) Regulations 2010

SI 2010/584 Football Spectators (Prescription) (Amendment) Order 2010

SI 2010/592 Excise Goods (Sales on Board Ships and Aircraft) (Amendment) Regulations 2010

SI 2010/593 Excise Goods (Holding, Movement and Duty Point) Regulations 2010

SI 2010/594 Channel Tunnel (Alcoholic Liquor and Tobacco Products) Order 2010

SI 2010/600 Sentencing Council for England and Wales (Supplementary Provisions) Order 2010

SI 2010/605 Magistrates' Courts (Foreign Travel Orders) (Amendment) Rules 2010

Instruments subject to annulment (Northern Ireland)

SR 2010/43 Police Service of Northern Ireland Pensions (Amendment) Regulations 2010

SR 2010/47 Police (Unsatisfactory Performance and Attendance) Regulations (Northern Ireland) 2010

SR 2010/46 Police and Criminal Evidence (Application to the Police Ombudsman) (Amendment) Order (Northern Ireland) 2010

SR 2010/49 Rules of the Court of Judicature (Northern Ireland) (Amendment) 2010

APPENDIX 1: DRAFT DAMAGES-BASED AGREEMENTS REGULATIONS 2010: EVIDENCE

Submission from the Ministry of Justice

Q1. *Why special arrangements are necessary to distinguish these contracts from any other sort of contract for services and why special conditions must apply?*

A1. Damages-based agreements (DBAs) are a type of 'no win no fee' agreement under which the representative takes a percentage of the damages recovered by the client if the claim is successful, but is not paid if the case fails. Research and the consultation responses show that DBAs are more commonly used by smaller firms and are associated with cases which may be less profitable and more risky for representatives (solicitors and claims management companies) to take on. DBAs are currently used as a means of funding cases before the Employment Tribunal. These Regulations will not extend the use of these agreements beyond Employment Tribunals.

The Committee should note that representatives would at all times be subject to the professional conduct rules and disciplinary processes of their respective regulatory bodies.

DBAs by their nature are different to other types of contract for the supply of legal services because the representative has a particularly direct financial interest in the outcome of the proceedings. In ordinary privately funded arrangements, a client may terminate his or her retainer with the representative at any point and pay the fees due for the work done so far. Regulation 6 does not prevent the client from terminating the agreement at any point and for any reason except at two stages of the claim.

DBAs provide for the representative to be paid from the damages recovered and not by an hourly rate (unless the agreement is terminated). It is in the nature of DBAs that those that lead to success (i.e. damages being awarded) may provide the representative with better returns than would have been obtained by charging an hourly rate. However, the 'better return' goes some way towards compensating representatives for those agreements that are unsuccessful and result in no payment whatsoever. The policy behind regulation 6 is intended to achieve a balance between protecting the interests of clients and representatives in a proportionate manner.

The key aim of the regulations is to protect consumers from unfair and unreasonable agreements in respect of employment matters. Special arrangements are therefore necessary to ensure that consumers are protected but also to ensure that representatives are remunerated for the services that they have provided where the claim is successful. This will help ensure that DBAs remain a viable means of funding cases before the Employment Tribunal.

Q2. *The intention of termination conditions at Regulations 6 and why may a client not dismiss a representative at any time if he/she is not satisfied with the service given?*

A2. The overarching aim of regulation 6 is to protect both clients and representatives in a proportionate manner. Regulation 6(2) makes it clear that if the agreement is ended then the representative cannot charge more than his or her reasonable costs and expenses for the work done in respect of the client's claim or proceedings. This condition was introduced as a result of concerns that some representatives were using the threat of excessive costs to 'lock' clients into agreements.

Regulation 6 (save for the circumstances in 6(3)) does not prevent the client from terminating the agreement if he or she believes that they are not receiving an adequate service or if they take the view that another representative could represent their interests better.

However, regulation 6(4) provides that a representative may only terminate a DBA and claim his or her reasonable costs and expenses if a client has behaved, or is behaving, unreasonably. This provision was drafted to prevent representatives from terminating the agreement if a client's case became too uneconomical to run (a concern highlighted by some respondents to our consultation). We take the view that the representative should bear this risk because it is the representative's expertise on which clients rely when they decide whether a claim is worth pursuing.

Regulation 6 provides that a client can terminate the agreement except in two circumstances specified in paragraph (3): (a) after settlement has been agreed; (b) within seven days before the start of the tribunal hearing. The intention behind this provision is to prevent the situation where the client can evade paying a percentage of his or her damages (i.e. the amount that they agreed) when the client knows that the claim will be settled or where all of the preparation work for a hearing has been completed. This provision was suggested by the Law Society, as they noted (and we agreed) that it would be unfair to allow clients to break the bargain they had struck with their representative at a late stage once most of the work had been done and the representative's end of the bargain fulfilled.

Without regulation 6(3) representatives would be under pressure to 'increase' their hourly rate in order to ensure that the client would not be better off by terminating and paying the hourly rate at any stage of the proceedings (that is to say, they would ensure that the hourly rate was set at a level that would always ensure that the amount of damages awarded would be less than the costs of the work done). If this were to occur it would be to the detriment of the majority of other clients as this would effectively prevent them from terminating agreements because the amount that they would have to pay to their representative would be prohibitive.

In practice it is highly unlikely that a representative would provide poor service at the stages stated in regulation 6(3) because this would be likely to affect either the amount of settlement or the amount that the tribunal awards, and as a result the amount that the representative receives.

We believe that the current provisions of regulation 6 will help reduce the potential for abuse of these agreements and strike the right balance between protecting the representatives' and clients' interests.

The Committee may also wish to note that the conditions in respect of termination were included as a result of consultation on the regulations. Some respondents, including the Law Society, were very concerned that without the restrictions on termination there would be potential for abuse by clients who appear to be able to terminate at any time for any reason thus allowing the matter, in effect, to revert to a private hourly rate retainer and depriving the representative of the agreed percentage of damages (which may well be greater). Regulation 6 helps to ensure that the regulations do not impact disproportionately upon representatives and so helps to ensure that DBAs remain a viable means of funding cases before the Employment Tribunal, whilst protecting the interests of clients.

Q3. *Reference to the law of misrepresentation?*

A3. The reference to the law of misrepresentation was added to clear a potential conflict with the Misrepresentation Act. As far as we are aware, there is no conflict between regulation 6 and other 'normal contractual legislation'.

12 March 2010

Submission from the Law Society

Summary

These Regulations prescribe the requirements with which an agreement between a client and his or her representative must comply so as to enable it to be a damages-based agreement relating to an employment matter under section 58AA of the Courts and Legal Services Act 1990. Section 58A was inserted by section 154 of the Coroners and Justice Act 2009

The Law Society is deeply concerned that there has been insufficient consultation with stakeholders on these Regulations and, more seriously, that if they come into force these Regulations will cause significant difficulties without properly addressing the problems that the Government perceives to exist.

The Law Society believes that this issue needs to be the subject of further detailed consultation. The Law Society would prefer to see these Regulations abandoned altogether pending the implementation of Lord Justice Jackson's review into Civil Court Costs together with a full consultation with stakeholders regarding the problems identified by the Government.

However, if Parliament considers that there is a pressing need to approve these Regulations, the Law Society believes that it needs to distinguish between providers whose regulatory arrangements are such that they can deal with the concerns, and those who are unregulated.

Background

There are many ways of funding legal work:

- Privately;
- Through Legal Expenses Insurance;
- Through 3rd party funding (e.g. a trade union);
- By a conditional fee agreement (CFA) whereby the lawyer will not charge a fee if the case fails, but will be able to charge a significant uplift on their normal fee if it succeeds;
- By a contingency fee (described by the Government as a "damages based agreement" or DBA) whereby the lawyer will not charge if the case fails but will take a proportion of the damages received on success.

CFAs and DBAs are often popularly referred to as "no win, no fee" agreements. However, it is important to remember that this can be a misnomer – a consumer may well have to pay counsel's fees and other expenses, depending on the agreement. Until 1995, such agreements were considered to be contrary to public policy in contentious work and were treated as being unenforceable by the courts.

CFAs were introduced in 1995 for a limited number of cases and extended in 2000 following the abolition of legal aid for many civil cases. At that time, the uplift became payable by the losing side in litigation. Although they remain controversial with some, they do provide significantly improved access to justice and consumer choice for those impecunious clients with strong claims.

The regime for CFAs provided that the agreements would continue to be unenforceable unless they complied with Regulations, which are similar to those proposed for DBAs. This resulted in considerable satellite litigation as insurers sought to avoid paying the other side's costs. Solicitors often found themselves having succeeded in proper claims but at risk of losing their fee for what were frequently technical arguments about the contents

of the agreements where there was no public interest in the outcome. These cases brought CFAs into substantial disrepute in the early years of this century as a result of the approach taken.

DBAs have been available for many years in non-contentious work. They are not permitted in court-based litigation here (though they are the normal means of funding litigation in the US). They are, however, available for tribunal cases (which, perhaps surprisingly, are classed as "non-contentious" work). They are particularly suitable for employment and tax cases because it is very rare for the losing side to be liable for the other side's costs.

Where CFAs (or DBAs) are entered into with solicitors, barristers and other regulated legal professionals, consumers naturally benefit from the regulatory requirements and consumer complaints provisions provided by the legal regulatory bodies. There are, however, a number of other legal advisers, particularly employment consultants and claims handlers who are not regulated to the same level.

Issues surrounding DBAs

DBAs have an important part to play, particularly in the employment sector, because they provide consumers with a way of financing claims while limiting the risk to them. Indeed with the solicitor effectively taking the risk on the action, there is a strong identity of interest in achieving the best result for the client. They represent an essential part of the justice system and were particularly important in enabling women to challenge inadequate equal pay agreements to achieve a just result.

However, it is recognised that some concerns have been expressed about them. In particular:

- Some argue that there is an incentive on an adviser to reach a settlement at an early stage and so there is a danger of under-settlement – there is no evidence to suggest that this is actually happening. Indeed, it is in the interests of the lawyer that the client obtains the maximum recompense achievable: but equally it is in the interests of both client and lawyer that a reasonable settlement is accepted, rather than running the risk of losing a contested case and recovering nothing.
- There is some research to suggest that consumers do not understand all the funding options available to them and that some solicitors and advisers are not providing advice about these options;
- There is currently no specific regulation of the percentage of the damages that can be taken – though, equally there is no research to suggest that the percentages are unreasonably high, and where lawyers are involved the fees will be subject to the general regulatory precisions concerning lawyer's fees.
- There may be some "unfair" exit clauses which will have the effect of inducing clients to accept settlements or otherwise pay for the entire case – though research suggests that these are rarely invoked, and again in the case of lawyers would be subject to regulation through the legal regulatory arrangements.

The Government's Proposals

The Government's proposals appear to be based on some limited research into the field. DBAs will be unenforceable unless they comply with the proposed Regulations.

The Law Society's view

The Law Society has the following concerns about these Regulations.

Process:

The general proposals were announced by the Lord Chancellor at the end of May 2009. They are apparently thought to be justified by research by Professor Moorhead at Cardiff University.

That research considered a very small sample of cases and, while there is no criticism of the work or its methodology, the Society does not believe that it is sufficient to legislate simply on that basis – indeed, the research makes no recommendation for legislation.

While there has been consultation over how the powers should be exercised there has been no consultation about whether the proposals are a good idea. The Law Society has made it clear that it does not consider the proposed Regulations to be an appropriate response, but Government has failed to address these concerns.

Lord Justice Jackson's review of costs has only recently been published and it would be preferable for the issues around DBAs to be considered in tandem with the review.

Government has indicated that there is an urgent need for reform here. This is backed purely by research. These agreements have been used for many years. There is little evidence of consumer detriment or complaints arising out of them. There is no need to rush.

Substance:

There are the following concerns about the substance of the Regulations.

Agreements which do not comply with the Regulations will be unenforceable. This would mean that consumers who wish to challenge will have to take legal action to establish whether their agreements comply with the Regulations or not. First, consumers are not likely to be aware of whether an agreement complies or not and, secondly, they will be unwilling to litigate further. If they do, there will inevitably be expensive satellite litigation of the sort seen around CFAs. This cannot be in the public interest. Government has suggested that satellite litigation is unlikely because there will be no third party involved in paying the costs. This is surely wrong because it is not clear what other method would be open to a client than to take legal action. Otherwise, Government is saying that this legislation will not provide redress for consumers.

This is, in fact, a very old-fashioned, blunt approach to the problem. It could lead to lawyers undertaking substantial and successful work for a consumer and then finding that they could not be paid because of some technical breach of the rules. All of the concerns about DBAs can be addressed either by improved regulation or improved enforcement of the existing rules. The Law Society urges Government to work with the SRA, and other regulators to seek a regulatory solution to any perceived problem. Greater education for consumers about their options would help too.

The Society is also concerned that the provision which prohibits claimants from terminating the agreement after liability has been admitted has been removed. This is unacceptable in that it allows clients to avoid paying a percentage when it is virtually certain that they have won and after most of the work has been done even if the quantum of damages has not been agreed. The effect will be either grossly unfair on solicitors or will simply mean they may be unwilling to undertake such work.

As the Solicitors Regulation Authority has made clear, it has the powers to deal with concerns about solicitors. They should be allowed to do so. If it is felt that the powers of regulators of those who are not solicitors are insufficient, then this approach should apply only to them.

Regulating the level of percentage that lawyers can charge

It is unacceptable for the Government to regulate the level of percentage that lawyers can charge. Many of these lawyers will be acting against Government or their agencies and this

would give Government a power to influence whether it was economic to take on these cases or not. If it is thought right to control prices, then this power should rest with independent regulators.

While the Society has a number of concerns about the general policy behind the proposals, the Society is particularly concerned about the proposals in the regulations to specifically limit the percentage of the damages that can be paid to the adviser to 35%, which should include VAT. This amounts, in effect, to price fixing at a level where it may well be uneconomic for solicitors to provide services that are needed by the public. The Society thinks this could well be anti-competitive. The Society also does not believe that there has been sufficient research to justify this percentage in policy terms and the Society believes that people with complex cases or more evenly balanced ones may be unable to find a solicitor to take the case on this basis

The Society is also deeply concerned that the percentage prescribed by these draft regulations will have significant effects on access to justice and may well cause problems for those bringing actions for discrimination. The Society has these concerns for the following reasons:

- The value of decisions in Employment Tribunals can vary from the very low to very significant awards indeed. Many claimants will be unable to finance their actions by any other means than a damages-based agreement of this sort;
- For many claimants, the impetus for the action will be that they seek a vindication that they have been unfairly treated rather than for any specific monetary compensation;
- In many cases there is an irreducible amount of work that needs to be undertaken. In smaller value cases, solicitors may well find it uneconomic to take cases on this percentage;
- There has been no formal research on the impact on competition on access to justice of this. The only research that has been undertaken has been some qualitative interviews of a number of claimants. The Society does not believe that this provides an adequate basis for assessing that 35% is sufficient to guarantee access to justice;
- A substantial number of people who seek remedies in employment cases have suffered discrimination on the basis of gender, race, or one of the other protected grounds and it is possible that some of these may not be able to bring such actions. The Society is deeply concerned that the impact assessment made under these regulations does not appear to reflect this.

Summary

It is time that Government recognised that this is a complex area that needs detailed thought and adequate consultation. There is no urgency for this.

DBAs are an important option available to consumers to fund legal action and Government should be cautious before taking steps which might affect their availability. The Law Society accepts that there may be problems with the way in which a few lawyers as well as other providers act in respect of such agreements, but these can be addressed by proper guidance and enforcement of the regulations, and through effective regulation of non-solicitors through the Claims Management Regulator.

It is unacceptable for Government to have a power to price-fix or regulate the level of fees that can be charged in cases where the lawyer may be acting against Government.

The Law Society would prefer to see these Regulations abandoned altogether pending the implementation of the Jackson review and full consultation about the problems and a

proportionate way of addressing them. For these reasons it respectfully asks the Merits Committee to draw special attention to these Regulations.

March 2010

Submission from Professor Moorhead of Cardiff University

By way of background, as a law professor interested in access to justice issues, I have taken a considerable interest in the regulation of Contingency Fee Agreements and Conditional Fee Agreements. In relation to the former, I was the author of two studies on the use of contingency fees in employment tribunals with a colleague, Rebecca Cumming (referred to below as 'the contingency fee research'). In relation to Conditional Fee Agreements, and defamation proceedings, I was lead author of a scoping study commissioned by the Ministry of Justice into no win no free agreements including defamation proceedings (referred to as 'the scoping study'. The contingency fee research was heavily relied on by the Ministry of Justice on their consultation paper leading to the Draft Damages-Based Agreements Regulations 2010 ('the DBA regulations').

Although the DBA regulations can be criticised on a number of levels, I will confine my views to the two most important points: caps and termination clauses.

Justification for a 35% cap

The main change introduced by the DBA regulations is to introduce a cap on the percentage fee chargeable by representatives taking employment claims on contingency fees. The justification is that this is necessary to prevent overcharging of claimants. I would make two points in this regard. The research base did not support the view that contingency fees generally led to overcharging of clients, indeed the evidence suggested that contingency fees were generally a better deal for clients than paying on an hourly basis. It is important to acknowledge that the research base is limited, but it is the best information we have. On this basis, I would question the need for a cap of the kind implemented.

There is a second point about the level of the cap. The regulations are now justified on the basis that the proposed 35% cap is consistent with normal practice in the industry. This is something of a simplification. The contingency fee research found that, the average (mean) contingency fee was 31% with 33% but about half the time VAT would be added onto that. This means that the mean fee was probably around 33-38%. However, it was reasonably common for higher fees to be charged on more difficult but meritorious cases: 41% had an upper limit on the percentage of fees they charged of between of 40 and 50%, which the reserved for more difficult cases or cases which they hoped to win but which would be likely to settle late or go all the way to tribunal (and so be more expensive to run).

It follows that a likely impact of the cap on contingency fees at 35% inclusive of VAT is to reduce the number of more difficult but meritorious cases and therefore, in my opinion, to reduce access to justice for cases that merit support.

Termination

My second point on the DBA regulations is made in the context that that they purport to introduce protection for consumers against unfair contract terms. Although the consultation paper sought to rely extensively on the contingency fee research in this regard, amendments to the regulations in the latest version have been inserted to protect lawyers and not clients.

To be more specific I have a particular concern with the way the draft Regulations deal with termination: they prohibit termination by the client in specific circumstances

designed to address the mischief of clients seeking to terminate contingency fee agreements when the lawyer has all but settled their case. The benefit to the client is the bulk of the work is done and they may be able to reduce the bill that they pay as a result.

My problem is twofold: firstly, the mischief is likely to be rare and secondly the solution here is disproportionate – prohibiting the client from terminating the agreement (under Clause 6) after liability has been admitted; settlement has been agreed; or within seven days before the start of the tribunal hearing. There are a variety of reasons why a client might wish to terminate agreement before a tribunal or after admission of liability (which may occur well before a case is in fact settled) which would be perfectly legitimate and not based on the mischief which the regulation purports to tackle. The regulations do not cope with that fact. They are simply too broadly and inflexibly drawn.

In contrast the effect of Clause 6(4) is that lawyers may terminate agreements where the contract provides for it and the client has behaved or is behaving unreasonably. This is a relatively wide discretion and one which the clients will be in difficulties in challenging.

I would submit therefore that Clause 6, if anything, weakens consumer protection rather than strengthening it.

March 2010

Submission from the Bar Council

Introduction

The Bar Council's Remuneration Committee became interested in Damages-Based Agreements in the previous Session during the course of the parliamentary passage of the Coroners and Justice Bill when, at a late stage in the proceedings in the House of Lords, the Government sought to introduce amendments on this matter.

The Bar Council contributed a response to the Ministry of Justice's consultation earlier this year and expressed a number of concerns with what was being proposed. The purpose of this paper is to express the Bar Council's concerns about the termination of contract provisions set out in paragraph 6 of the draft regulations.

Terms and conditions of termination

Paragraph 6(2) prohibits the legal representative from charging the client more than his legal fees calculated on an hourly rate multiplied by time spent basis if the agreement is terminated. In other words, termination excludes any entitlement to the Regulation 5 payment – namely the 35% contingency fee.

It would preferable to make it clear that Regulation 6(2) only applies to termination before sums are recovered in the proceedings. There is no good reason to deprive a legal representative of an agreed 35% regulation 5 payment where sums have been recovered in accordance with the agreement but prior to termination.

Paragraph 6(3)(a) prohibits a client from terminating an agreement after settlement has been agreed. Is such a clause fair to the consumer? What if the legal representative after settlement refuses to account to the client for sums due to him following settlement? The consumer may then wish to terminate the retainer but there would be a statutory bar preventing him from doing so. This regulation would prevent the consumer from terminating after settlement whatever the circumstances, including a breach of retainer on the part of the solicitors. There is no similar statutory requirement (and never has been) in respect of any other fee arrangements between legal representatives and clients. The CFA legislation did not contain such a clause. What is the justification for such a clause in DBA cases?

Paragraph 6(3)(b) prohibits the client terminating the DBA within 7 days before the start of the tribunal hearing. But again, what is the justification for this? It would potentially leave a client having to continue to retain a solicitor who was failing to act in the client's best interests. Is that really intended? Again there is no similar requirement imposed by any other legislation controlling the terms of a legal representative's retainer.

Paragraph 6(4) limits the circumstances in which a legal representative can terminate a DBA to cases where the client has behaved unreasonably. But what is the justification for such a narrow approach to termination. A solicitor/barrister may wish to terminate a DBA where information comes to his knowledge which substantially alters the prospects of success (for example). This may not be due to any unreasonable conduct on the part of the client. It may be entirely due to the fault of a third party – perhaps a witness or the opponent. In such a situation regulation 6(4) would prevent the solicitor/barrister from terminating the agreement. Is that intended? If so why?

In summary, the Bar Council shares the concerns of the Lords Merits Committee on regulation 6 and the basis on which a DBA may be terminated. The termination provisions are unusual and may lead to unfair consequences for both the legal representative and the client.

March 2010

APPENDIX 2: CONDITIONAL FEE AGREEMENTS (AMENDMENT) ORDER 2010: EVIDENCE

Letter from Nicholas Green QC, Chairman of the Bar Council

I am writing to you in your capacity as Chairman of the Merits of Statutory Instruments Committee, since I gather that the Committee is due to consider the Order reducing the maximum conditional fee agreement ("CFA") success fee in defamation cases from 100% to 10% at its meeting on Tuesday 16th March 2010.

This measure is being rushed through quite separately from any reforms to the rules on costs recommended by Lord Justice Jackson. It was the subject of a Consultation Paper from the Ministry of Justice published on Tuesday 19th January 2010, which reduced the period for responding from the minimum period of three months stipulated in the Government Code of Practice to a mere four weeks. Requests from the Bar Council and practising barristers and solicitors for the period to be extended were rejected, and the Consultation closed on Tuesday 16th February 2010. Just over a fortnight later, the Government published its Response on Wednesday 3rd March 2010.

Although I am not an expert in this area of the law, I have received a number of representations from practitioners at the Bar who specialise in media and defamation law on both sides. Their concerns do seem to raise matters which should be of interest to the Merits Committee on the grounds that the Ministry's proposed Order is politically and legally important and gives rise to issues of public policy likely to be of interest to the House. The key concerns which have been put to me, and which on the face of it raise matters worthy of parliamentary debate, are summarised below.

(1) The reason given by the Secretary of State for deciding to deviate from the Code of Practice was that "in order to be in a position to implement the proposal as soon as possible (subject to consultation), it will be necessary to shorten the consultation period to four weeks." This wording made it sound as though there was not so much a predisposition to implement the proposal as a predetermination. What is certain is that the rush made it impossible for practitioners to respond with reliable data as to the success and failure rates of actions brought by claimants on CFAs. As one head of a leading set of media lawyers pointed out, it was impossible to assemble such figures in the time available – not least, because client consent needed to be obtained.

(2) *"It is vital to the maintenance of press standards that access to justice for those who have been defamed is preserved":* this is a quotation from the Report of the Commons Select Committee on Culture, Media and Sport, published on 24th February 2010 (HC 362-I) at paragraph 307. The Committee disagreed with the Ministry's proposal that the maximum level of success be capped at 10%, regardless of whether it is recovered from the losing party or from the client. They saw no reason why any balance should not be agreed between solicitor and client. This is not an option which the Ministry appears to have ever considered.

(3) The weight of the evidence from practitioners in response to the Consultation Paper was that they would be unwilling to conduct defamation cases on CFAs if the success fee were no more than 10%. It is not surprising therefore that the media have greeted the Ministry's response with acclaim, but it has the most serious ramifications for access to justice. The injustice of recoverability from the losing party of 100% success fees, plus after the event insurance premia, is now to be replaced with the injustice of lack of access to justice for claimants and the minority of defendants who have taken advantage of CFAs. This is the consequence of the unsatisfactory nature of the consultation, which contained only one option as an alternative to the status quo – the reduction of success fees to 10%.

(4) The Consultation Paper accepted the principle that a system of CFAs should be cost-neutral, in other words, the maximum percentage success fee should be set at a level at which the success fees recovered in successful cases cover the base costs lost in unsuccessful cases. On that basis, a 100% success fee would be justified in cases where the prospects of success were 50:50 – a win in one case would compensate for the statistical probability of a loss in another. On the basis of cost neutrality, a maximum success fee of 10% could only be justifiable if 95% of all defamation claims were successful. Such evidence as was produced in the limited time available for response indicates that the percentage success rate is much lower.

(5) The Ministry attached great importance to a schedule of 154 cases supplied to Lord Justice Jackson by the Media Lawyers Association (an association of in-house media lawyers and those acting for defendants). This was not, as described, a sample, nor did it include cases against non-members or cases which MLA members won. Such was the weight given to this survey that in the Consultation Paper (paragraph 19) it was suggested that the figures indicated *"not a justification for 100% success fees, but rather the abolition of success fees in defamation proceedings altogether"*. There was no attempt to gauge the number of cases lost, or the cost to practitioners of unrecovered base costs in a case lost after a trial. Obviously success fees incurred in a settlement before trial are infinitely less than fees lost after a week-long trial or longer. The attenuated period for response made it impossible for practitioners to assemble this data, as did the fact that the options for consultation were only the status quo of 100% or the Ministry's proposal of 10%.

(6) Nothing in Lord Jackson's report supports the measure proposed by the Ministry: Sir Rupert suggested an integrated package of measures, including so-called "one-way costs shifting" (under which the defendant pays the costs of a successful claimant, but an unsuccessful claimant does not pay the defendant's costs) and a 10% increase in the level of general damages (including in defamation). Nothing in the report justifies defamation cases being treated separately and differently from other causes of action. If, as appears to be the case, the judicial consultees (the Master of the Rolls, Lord Neuberger and the Senior Costs Judge) were opposed to the proposal, this would appear to be the reason.

(7) In his press release, accompanying the laying of the Order before Parliament, the Secretary of State talked of "levelling the playing field so that scientists, journalists and writers can continue to publish articles which are in the public interest". This ignores the substantial minority of very important cases where scientists and journalists have been defended on CFAs. In the much publicised recent hearing in the Court of Appeal in ***British Chiropractors Association v. Simon Singh***, the scientist defendant was represented by counsel on a CFA, as was the defendant consultant radiologist in ***GE Healthcare v. Thomsen***. In the highly important case of ***Charman v. Orion Press***, involving a Reynolds defence of responsible journalism, the journalist who had lost at trial was successfully defended on appeal by counsel on a CFA. The reduction in the level of the success fee thus threatens to damage the interests of the very people the Secretary of State believes that it will assist.

I would be happy to arrange for a specialist media law practitioner to discuss these issues with you further if that would be of interest. The proposed Order does appear to raise issues of public policy that deserve proper and adequately detailed attention by the House. Justice rushed is justice denied.

March 2010

Submission from Carter-Ruck Solicitors

We write with regard to the above draft Statutory Instrument (the SI), originally laid before Parliament on 3 March 2010, by which it is intended to reduce the maximum success fee in defamation and other media-related cases from 100% of the base costs to 10%. The proposal is intended to cover all proceedings for *"defamation, malicious falsehood or breach of confidence involving publication to the public at large"* and would therefore embrace all claims for misuse of private information where the publication is to the public at large.

We believe the SI should be drawn to the attention of the House of Lords because of its considerable political and legal importance and the serious issues of public policy raised by it.

As stated in the Explanatory Memorandum, the policy background is that "Conditional Fee Agreements (CFAs) were first made available in 1995 to improve access to justice for consumers of legal services. Changes introduced in the Access to Justice Act 1999 extended their use to most types of civil cases" (save only for certain types of family proceedings). It would appear from the primary legislation that in regard to CFAs Parliament decided as a matter of policy not to distinguish between different causes of action in civil proceedings (apart from family law, which is excluded). We therefore believe that this SI which isolates defamation from the rest of civil proceedings raises serious policy issues which should be brought to the attention of the House of Lords.

The SI has been laid before Parliament following a severely truncated 4 week consultation period, despite some respondents, including the Bar Council, complaining that the four week period was too short and impeded their ability to respond properly or fully. It appears to be the intention to rush this Statutory Instrument through Parliament before the election.

The Explanatory Memorandum to the SI states that out of a total of 57 responses received to the consultation, *"more than half (53%) - mainly those representing the media's interests - supported the proposal"*. This means 47% (i.e. 27 out of 57) did not support it; it appears from the list of respondents, that those who do **not** support it include Lord Neuberger MR, the Senior Costs Judge, the Bar Council's CFA Panel and The Law Society.

There is, we believe, widespread concern within the legal profession that the proposed reduction in success fees would seriously reduce - if not eliminate altogether - the rights of ordinary individuals without substantial means to obtain access to justice in defamation and privacy cases.

The proposed reduction in success fees appears to be based on unrepresentative data supplied by the Media Lawyers Association that claimants win the vast majority of defamation cases. In fact evidence was submitted to the Ministry of Justice that the success rate of defamation claims is far lower than 100%, and success fees of 100% are not routinely applied.

A second false premise of the SI appears to be that CFAs are only used by claimants; we have just settled a case where we were acting on behalf of a Danish professor who was sued for libel in London by three companies within the multi-billion GE Healthcare Group; there is no way this firm could have taken on a risk of that magnitude if the recoverability of the success fee had at the time been limited to 10%.

The SI, if introduced will, without doubt, lead to this firm and others declining to take the risk of acting on a CFA for clients who have cases which deserve to be heard; without CFAs the vast majority of people of ordinary means simply will not be able to afford legal representation to take on wealthy media organisations.

The logic behind calculating success fees was that, with a basket of cases, the lawyer's remuneration would be "revenue neutral" in that what was lost in terms of fees on one case, would be recovered on cases which were won. Thus, where a lawyer agreed to take on two 50/50 cases, the probability was that he would lose one and win one and therefore, with a 100% success fee, recover on the cases won the same or nearly the same as the sum lost on the unsuccessful cases.

In practice, however, this logic is flawed because no two cases are equal. The cost to the lawyer of one loss at trial, with all the work by then carried out, may exceed the benefit of 50 "wins" where early settlement can be negotiated.

The media objected to CFAs from the outset. To try to find an acceptable balance, this firm achieved an agreement with News International which provided for staged success fees, by which the success fee rose from nil to 25%, to 50% to 75% if the case were settled by agreement at different stages. Only if the case was not settled 45 days or less before trial would a 100% success fee be applicable. The logic of this is that by the stage of trial both sides presumably believe they have a reasonable chance of winning, so the prospects of success are truly 50/50 which justifies a 100% success fee.

Originally, in 2007, the Ministry of Justice agreed that this scheme was workable, but now it seems to have been rejected simply because the powerful media lobby did not like it. We attach a copy of the Protocol agreed between ourselves and News International, which is known as the "Theobalds Park Plus agreement."

We would be happy to provide the Merits Committee with any further information or data which may be required.

Protocol between News International and Carter-Ruck ("Theobalds Park Plus agreement")

PART 1 - success fees in media related cases

Base Costs

1. O% success fee

Save as provided in 2-7 below, no success fee will be recoverable in cases where within 14 days from receipt of the letter of claim in which notice is given that a funding arrangement has been entered into or within 14 days of receipt of notice that a funding arrangement has been entered into:-

a) the defendant makes an offer of amends pursuant to Section 2 of the Defamation Act 1996 i.e. effectively admits liability, which is accepted and/or leads to the action being settled with damages and costs being agreed without court proceedings or a Request for Detailed Assessment being taken out.

b) the defendant's detailed response to the letter of claim pursuant to either the Pre-Action Protocol for Defamation or the Practice Direction on Protocols (for non-libel claims) admits liability and leads to the action being settled with damages and costs being agreed without court proceedings or a Request for Detailed Assessment being taken out.

c) (proceedings are issued solely for the purpose of a statement in open court.

2. 25% success fee

A 25% success fee will be recoverable where:-

a) a case settles before service of the defence and the defendant has not responded to the letter of claim as set out in 1. (a) or (b) above.

b) the defendant makes an offer of amends pursuant to Section 2 of the Defamation Act 1996 which is accepted but agreement cannot be reached on damages and Part 8 proceedings under s. 3 (5) are issued and served.

c) agreement is not reached on damages and proceedings are issued and served.

d) costs are not agreed and a Request for Detailed Assessment is taken out.

e) the parties agree to a binding arbitration on any issue AND the defendant offers to pay for the arbitration, if the action settles under 1 (a) or (b) above as a result of the binding arbitration.

3. 50% success fee

A 50% success fee will be recoverable where:-

a) a case settles after the defendant states or otherwise indicates in a response to the letter of claim that the defendant will be raising a substantive defence to the letter of claim or there is a denial that the publication is actionable. This includes cases in which the defendant disputes that the publication is (a) defamatory and/or (b) identifies the claimant and/or (c) amounts to a misuse of private information.

b) a case settles after service of the Defence but on or before the 14th day following first service of witness statements. This period shall be extended, if within the 14 day period following service of witness statements the defendant makes a Part 36 offer which is accepted.

c) a case settles after the trial of a preliminary issue (save where the time scale envisaged in stage 4 or 5 below has already been reached with regard to the hearing of the preliminary issue, in which case that percentage success fee shall apply).

4. 75% success fee

A 75% success fee will be recoverable where:-

a case settles after the 14th day following first service of witness statements (or any extension thereto as set out above) but earlier than the 45th day before the date listed for the start of trial,

5. 100% success fee

A 100% success fee will be recoverable where;-

a case reaches trial or settles within 45 days before the date listed for the start of the trial

6. Extensions of time

Any period provided for in this Protocol may be extended by agreement between the parties. If a Part 36 offer is made and subsequently accepted the relevant success fee will be the success fee at the time the offer was made.

7. Costs of Detailed Assessment

A success fee of 25% will be recoverable on the costs incurred in preparation of and of any detailed assessment hearing if the case settles under paragraphs 1, 2 or 3 above and in other cases will be 50% of the success fee applicable to the case at the point of settlement.

(Nothing in this agreement shall prevent a defendant from requiring a claimant to have its base costs or disbursements assessed by the Court in accordance with normal assessment principles, or from challenging the reasonableness of the claimant issuing proceedings.)

March 2010

Submission from the Law Society

Summary

The consultation paper proposals on which these Regulations are based suggests that very high legal costs "appear" to have a harmful effect on the publication decisions of the media and others. The proposals in the consultation paper represent a fundamental change. To introduce such a change in response to a perceived harm rather than a harm that is demonstrable in the absence of any evidence is, in our view, entirely unreasonable and disproportionate.

Our understanding of the reasoning behind the introduction of the 100% success fee was that as many cases would be won as would be lost. Adopting this approach a reduction in the maximum success fee which a lawyer can currently charge from 100% to 10% of the base costs suggests that claimant solicitors acting on CFAs in defamation actions currently lose only one in eleven cases. There appears to be no evidence whatsoever to support this assertion.

The proposals which are being considered in the current consultation do not reflect the recommendations made by Lord Justice Jackson. The current proposals are completely different to those proposed by Sir Rupert Jackson and appear to have been introduced before any proper consideration of his report has taken place. The Regulations should be withdrawn while the Jackson review is being considered by Government and other stakeholders.

March 2010

Submission from Professor Moorhead of Cardiff University

The Ministry of Justice commissioned myself and two economists (Professors Fenn and Rickman) to investigate the feasibility of research work in relation to, inter alia, conditional fees in defamation cases. The basis of that was a perceived lack of evidence in the field to judge whether the approach to costs generally on conditional fees was leading to inappropriate expense. It should be noted that the Government has instead decided to proceed on the basis of a consultation without the benefit of the research base it originally felt was necessary when commissioning the scoping work. I am aware of no objective evidence base from which the Government could draw its calculations for the 10% fee beyond that provided by those lobbying for one side or other in the debate.

Against that background the outcome, a suggested 10% cap on success fees in defamation proceedings, is somewhat surprising. Without persuasive evidence to support it, the basic economics of conditional fee agreements would suggest that at a level of 10% uplift would prevent all but the most meritorious cases from proceeding on a conditional fee. For rich litigants this presents no problem, for poorer litigants this presents a major impediment to access to justice. That is not to diminish the significant problems that arise in relation to costs in defamation proceedings and the broader public interest issues at stake, but the 10% limit is a questionable reaction in terms of its proportionality. It is also a reaction taking place at a time when Lord Justice Jackson has delivered a report which looks at these issues much more fully and in the broader context of civil costs as a whole.

March 2010

Submission from Which?

On the CFA Order, while we do not have specific evidence on the direct impact on consumers, we can give you our views on the beneficial impact on our organisation - the leading consumer body in the UK - and therefore indirectly on consumers. CFAs are designed to enable access to justice for cases with merit and the uplift should vary according to the merits of the case and its likelihood of success.

As a publishing organisation, we are subject to defamation threats on a regular basis. It is common practice for claimant libel lawyers acting on a CFA basis to have a 100% uplift irrespective of the claimant's chances of success. While we would always seek to defend any unjustified claim, it is possible that some publishers will hesitate to do so because of the potential legal costs, not the damages that may be awarded. By restricting the uplift to 10%, publishers will be encouraged to more robustly defend their position. This should have the indirect benefit of encouraging fair free speech and will enable an investigative and research based organisation such as Which? to continue its work on behalf of consumers. We have no evidence that ordinary consumers will be affected by this CFA Order and we do not know how many 'ordinary' consumers (as opposed to high profile individuals who can afford legal fees without the need for a CFA) are likely to bring defamation cases. However in cases where an 'ordinary' consumer (as opposed to someone in the public eye) does bring a defamation case, we would hope that a maximum 10% uplift would not reduce their access to justice. In our view, what matters is the merits of the case, not the level of uplift in legal fees that may be payable.

March 2010

APPENDIX 3: CHILDCARE (FEES) (AMENDMENT) REGULATIONS 2010 (SI 2010/307)

Information from the Department for Business, Innovation and Skills

Q1. *No Impact Assessment has been prepared for this instrument: please could you explain why you consider this to be within the Government's policy on Impact Assessments?*

A1. The regulations provide support for a small number of students taking postgraduate courses at the European University Institute (EUI) (20 places) and revokes support for a small number of student places at the College of Europe (22 places) and Bologna Center (2 places).

This instrument would not impose or reduce costs on businesses or the third sector and any impact on the public sector would be minimal and certainly fall below the £5m threshold. The funding for the EUI is staying very much as it was and we are shortly to introduce Regulations, subject to parliamentary approval, funding 11 places at the College of Europe on similar terms as before for the academic year 2010/11. This will be for one year whilst other arrangements are being considered for funding to meet the Government's policy aim of increasing UK representation in the EU institutions.

Q2. *What was the policy objective for the funding of the postgraduate posts at the three European colleges?*

A2. The original policy objective was to strengthen the representation of UK nationals in the EU Institutions. In 1990 the Government conducted a review of how to boost UK representation and concluded that increasing the number of grants to the College of Europe would boost the number of successful applicants for the concours. The programme offered by the Bologna Center is more targeted at students interested in pursuing careers in international relations. We are under a Convention obligation to fund the European University Institution.

Q3. *What is the policy objective for the reduction of the number of posts at the Bologna Center and the College of Europe?*

A3. The Department does not generally directly provide funding for postgraduate students or fund students studying outside the UK (other than study at an affiliated institution overseas as part of undergraduate study at a UK institution), and the existing funding was contrary to the policy objective of targeting support at those accessing HE for the first time.

The role of the College is being considered as part of the Government's programme of activities to improve representation in the EU institutions and, (subject to parliamentary approval), 11 places are being provided at the College for postgraduate study in 2010/11 as part of this process. Officials have not identified any policy justifications for continuing to fund students attending the Bologna Center.

Q4. *Why did you not consult on this SI? Please could you explain why you consider this approach to be within the Government's policy on consultation?*

A4. The decision to withdraw funding for students attending the College of Europe and the Bologna Institute was made known to the interested parties in both institutions. Following representations from the Bologna Institute, the College of Europe, other interested parties and cross Government discussions, the decision was taken to reinstate funding for the College for one year. For the Bologna Institute, officials were not able to identify any policy justifications for revisiting the decision to remove funding.

Lobbying by the College of Europe supported by Lord Kinnock and Lord Wallace

The College, Lord Kinnock and Lord Wallace have made the following points:

The College provides unrivalled post graduate training and education opportunities for students to develop an understanding of the European Union and go to take up senior positions in EU Institutions. Graduates also go on to take up important posts in the world of business, diplomacy and government.

The College takes the view that the Department's view may be open to other interpretations.

The withdrawal of scholarships may mean that only people from prosperous families would get the opportunity to attend the College.

Bologna Institute case for continued funding.

The fellowships reward merit and secure social diversity in the international student body;

There is no evidence of a restriction on the freedom of movement given the way the fellowship application and award process have so far been carried out;

The decision to suspend the MA fellowships seems to be driven by financial concerns;

Numbers of students supported and the European University Institute

The maximum number of students funded by the Department at the European Institutions in the 09/10 academic year was as follows:

Bologna Center: 2

College of Europe: 22

EUI: 20

Currently the maximum number to be funded in the 10/11 academic year (subject to parliamentary approval) will be:

Bologna Center: 0

College of Europe: 11

EUI: 20

The College of Europe budget is a ring fenced budget. The non-means tested fee support for these students is paid in Euros. Due to an increase in fees and the poor exchange rate the budget is not sufficient to fund 22 students and we have, therefore, had to reduce the maximum number of students funded.

This is not currently an issue with the EUI as we are not required to pay fee support for these students and the EUI rarely fills its quota of students. However, the EUI has previously had the maximum number of students reduced following an increase in living cost support.

Q5. *Why is funding being withdrawn from the other European Institutions?*

A5. The Department does not generally directly provide funding for postgraduate students, nor does the Department fund students studying outside the UK (other than study at an affiliated institution overseas as part of undergraduate study at a UK institution), therefore the existing funding was contrary to the policy of targeting funding at those accessing HE for the first time.

Further, there is a risk (albeit low) that a challenge could be made under EC law that providing funding for certain institutions and not others could breach an individual's freedom of movement.

Funding remains in place for the European University Institution due to a Convention obligation to fund that institution.

However, it is the view that the College of Europe scholarships might help the Governments strategy to increase UK representation in the EU institutions and therefore a limited number of scholarships will be reinstated for this year only whilst new ideas are developed on how to target funding more effectively for future years. This is part of the Success in the EU strategy and the role of the College of Europe will be considered as part of that. The College of Europe has been notified of this decision and regulations are currently being drafted to provide funding for a small number of students for 2010/11.

Q6. *Has any dissatisfaction been expressed about these changes?*

A6. There has been lobbying from the College of Europe, supported by Lord Wallace and Lord Kinnock, but it is expected that the interim reinstatement of funding and involvement in future discussions on strategy will satisfy the issues raised by them.

The Bologna Institute has also contacted the Department over the decision to withdraw funding for students wishing to attend that institution. It has been decided that such funding does not meet policy objectives and the funding is to remain withdrawn.

The EUI Regulations

The decision was taken to proceed with the laying of the European University Institute 2010 regulations, which revoke all existing regulations, notwithstanding the decision to reconsider the role of the College of Europe. Providing a discrete statutory framework for the funding of the European University Institute enables those regulations to be updated quickly and simply in future years. No significant changes are anticipated for those regulations in the future.

The eligibility conditions for students seeking support for the College of Europe vary significantly from those applying to the European University Institute. It was agreed that, due to the anticipated changes to the funding arrangements relating to the College of Europe, a standalone set of regulations that could be amended/revoked simply and quickly provided the simplest and most efficient option for handling this specific funding arrangement.

Q7. *What about students already receiving support at those institutions, will they continue to get funding?*

A7. No current students are affected as scholarships at the College of Europe and the Bologna Institute are for one year only and all current students will complete their studies in 2009/10.

Background to funding for the College of Europe and the Bologna Institute

College of Europe

In 1990 a letter from the Department for Education & Science (DES) to HM Treasury stated that the Prime Minister had asked for an interdepartmental review to be carried out into the representation of the UK on the staff of European Community institutions. The review was to consider various things which could be done to improve that representation as at that time the number of UK candidates appointed to Commission posts in previous years had been half of what it should have been and those who did secure posts seemed to move on quickly.

The FCO and Cabinet Office (who actively promoted UK student participation at CoE) had advised that one of the most effective ways of increasing the number of applicants for the concours (the competitive examinations for entry to the EC institutions) would be to increase the number of students who were able to study at the College of Europe, as a

high proportion of CoE students at that time went on to take the concours and had a high success rate.

In 1990, 6 bursaries were available to UK students (DES funded for the whole of the UK at that point), but following representations from FCO and Cabinet Office, Ministers had agreed to bring up the number of students to be supported to the same level as other Community countries such as France. This increased the number of bursaries to around 25.

Bologna Institute

Prior to 1979, the Bologna Institute did not receive any DfES funding but following representation from the Institution and a couple of MPs who were graduates of the Institution, DfES were asked to consider funding one or two places. At that time funding was made under the State Award Regulations.

In January 1980, the Department wrote to the Institution to inform them that they were prepared to pay the tuition fees for a small number of students from England and Wales and that for this purpose, they proposed to make available 2 state studentships per year.

The studentships commenced in 1980/81 with the following conditions:

i. The studentships would only be tenable at Bologna (Bologna Center is part of an American institution, the John Hopkins University);

ii. Candidates would have to be ordinarily resident in England or Wales;

iii. Unless there were exceptional circumstances, the candidate would have to be a graduate of a UK university.

March 2010

APPENDIX 4: CORRESPONDECE RELATING TO THE COMMITTEE'S POST-IMPLEMENTATION REVIEW INQUIRY

Letter from Lord Davies of Abersoch, Minister for Trade, Investment and Small Businesses, to Lord Rosser

I am writing to follow up on the points raised in the debate on 24 February and my subsequent discussion with you and Lord Filkin.

As I promised during the debate, I have written to the Minister for Schools to pass on Baroness Butler-Sloss's request that the Merits Committee be made aware of the response to their recommendation that "DCSF should ensure that all significant Statutory Instruments are subjected to post-implementation review, and that the review findings are made known to Parliament".

I also undertook to share the revised Impact Assessment Template with the Merits Committee. I attach the Impact Assessment Template, Post-Implementation Review Template and Impact Assessment Guidance. These were cleared across Whitehall last month and will come into effect across Government from 1 April.

Impact Assessments (IA) must be pUblished at various stages in the policy development process: (i) on public consultation; (ii) when the final policy choice is made, with a published revision at enactment if changes are made during the Parliamentary process; and (iii) when a post-implementation review (PIR) is carried out. All published lAs must be signed off by a Minister and published on the IA library. My Department is working with the Office for Public Sector Information to make the lAs available alongside the legislation to which they refer, and to make the IA library easier to search.

The revised IA Template supports the Government's strengthened "comply or explain" PIR policy in a number of ways:

- The IA must include a plan for PIR, together with a date;
- Where there is no plan to review an 81, a reason must be given;
- Where a PIR has been delayed, there must be an explanation of the delay.

The purpose of publishing lAs including PIR commitments, and of the 'comply or explain' policy, is to make information on plans to review policy more accessible and the process of review more transparent, so that the Government can be held to account.

During the debate Lord De Mauley asked about the Regulatory Policy Committee. The RPC has been tasked with providing strong and effective external independent scrutiny throughout the government policy making process. The Committee, chaired by Michael Gibbons, is scrutinising all regulatory proposals from all Departments and Executive Agencies which are put out to consultation. By considering the information provided on lAs, where the RPC finds significant issues with the evidence and analysis supporting the policy proposals, it will comment publicly on its findings. In this way the RPC will play a key role in improving the quality of analysis and help influence behaviour and attitudes in the design of regulatory policy within Departments. I attach the RPC's terms of reference to this letter at Annex (d). *[not printed]*

Government also imposes its own disciplines. Lord De Mauley referred to the National Econornic Council sub-committee on Better Regulation, NEC(BR). Its mandate is to scrutinise planned regulation and proposals for new regulation. In practice policies imposing regulatory costs above £20m a year must be sent to NEC(BR) for approval. The Impact Assessment is a key piece of evidence informing the committee's decision and the Government has also committed to make the findings of the RPC available to NEC(BR).

The RPC will be able to take an interest in PIR in two ways: first, the RPC may choose to comment on the plans for PIR contained in the consultation stage IA; secondly, lAs proposing further regulatory policy in an already regulated area may refer to any previous evaluation of the current regulatory regime in the Evidence Base section. Again, the RPC will be able to comment on that analysis, or note where it is lacking.

The RPC is, of course, only one way in which Departments may be held to account for the manner in which they implement policy. Parliament itself has a unique role to play. As Lord Norton said during our debate, the House of Lords has the power to send back secondary legislation; and as I said in the House I believe it should exercise this power more frequently, along the lines set out by the Joint Committee on Conventions in 2006 at paragraph 229 of its report.

I also believe that Lord Norton's proposal of a Joint Committee is a good idea, which would potentially strengthen Parliament's scrutiny capacity and thereby improve the quality of legislation. I understand that, in a subsequent debate on Legislative Scrutiny, Baroness Royall agreed to include this proposal on the agenda of topics to be considered by a Leaders' Group, if one can be established, or by the Liaison Committee.

Finally, although I note your comments about the finite capacity of the Merits Committee, I would emphasise that the Government sincerely welcomes the important work of the Merits Committee and would encourage the Committee to do as much as it can to keep "grinding away", as Lord Filkin put it, to improve the quality of policy implementation.

4 March 2010

APPENDIX 5: INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 16 March 2010 the following Members declared interests on the following instruments of interest:

Draft Damages-Based Agreements Regulations 2010

Draft Conditional Fee Agreements (Amendment) Order 2010

Baroness Deech: as chair of the Bar Standards Board.

South Downs National Park Authority (Establishment) Order 2010 (SI 2010/497)

Lord James of Blackheath: as a member of the South Downs Heritage Committee