Department for Constitutional Affairs
Justice, rights and democracy

New Regulation for Conditional Fee Agreements (CFAs)

Response to Consultation
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Department for Constitutional Affairs

Justice, rights and democracy

New Regulation for Conditional Fee Agreements (CFAs)

A summary of responses to the consultation paper *Making Simple CFAs a Reality*, the DCA's conclusions and the new regulations

Response to consultation carried out by the Department for Constitutional Affairs. This information is also available on the DCA website at www.dca.gov.uk

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Introduction

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Executive Summary

This section summarises the DCA's conclusions.

1. The existing Conditional Fee Agreement (CFA) and Collective Conditional Fee Agreement (CCFA) regulations are not necessary or effective and will be revoked from 1 November 2005. The primary legislation (section 27 of the Access to Justice Act 1999) will provide the minimum government legislative framework for the use of CFAs by legal representatives. Primary responsibility for client care, contractual and guidance matters will be focused on solicitors and the Law Society's Professional Rules of Conduct, supporting costs guidance and proposed new model CFAs. The Membership Organisation Regulations 2000 will be simplified as far as primary legislation will allow.

2. DCA has been pleased to work closely with the Law Society and other relevant stakeholders to help develop the appropriate model CFAs to support the new regime, to ensure the professional rules can effectively regulate and/or guide solicitors' use of CFAs and their obligations to their clients. The Law Society intends to introduce the amended rules and new model agreements at the same time as the CFA regulations are repealed.

3. Minor consequential amendments to the Civil Procedure Rules to take account of the reforms to the CFA regulations will be brought forward later this year for the Civil Procedure Rule Committee's (CPRC) consideration.

4. DCA supports the Civil Justice Council's (CJC) initiative to facilitate a mediated solution to the dispute between the media organisations and claimant practitioners in publication proceedings (defamation, malicious falsehood and privacy) in relation to concerns over the impact of CFAs. The House of Lords recently considered a range of issues related to the use and impact of CFAs in privacy and related proceedings (*Campbell v MGN Limited*). We will consider the House of Lords' judgment carefully when handed down, and discuss appropriate next steps with the Council.

Background

1. This paper provides a summary of responses to the consultation paper *Making Simple CFAs a Reality* published on 29 June 2004 and sets out the Department for Constitutional Affairs' (DCA) conclusions on the simplification of Conditional Fee Agreements (CFAs). The paper includes the new CFA regulations to revoke the current secondary legislation governing CFAs and simplified membership organisation regulations that will be laid before Parliament a few days after the publication of this paper. A regulatory impact assessment is also provided.

2. Copies of the responses made to the 2004 consultation are available on request. This paper is of relevance to those who use these methods of funding to initiate or defend litigation in the civil courts in England and Wales. Copies of this response are being sent to a wide range of organisations, representative bodies and individuals in the legal, insurance, financial and consumer sectors.

The 2004 consultation

This section explains the 2004 consultation.

The 2004 consultation paper

1. The consultation paper *Making Simple CFAs a Reality* was published on 29 June 2004 and the consultation period was extended to end on 29 September 2004. The consultation paper can be found at www.dca.gov.uk

2. The June 2004 paper summarised responses to the wide ranging Simplifying CFAs review carried out in 2003 and made some specific proposals. The paper also set DCA's strategy towards the development of CFAs (simplification leading to increased stability, transparency and better consumer protection) and to related legal costs matters (ensuring reasonableness and proportionality in costs generally and better behaviour between the parties to help minimise technical challenges on costs).

3. The June 2004 paper comprised the following:

- **Specific proposals to reform the secondary legislation** governing the operation of CFAs, published a set of new draft regulations for consultation and a partial regulatory impact assessment.
- **The impact of CFAs and costs in defamation proceedings** and invited respondents to comment on the problems identified and potential solutions.
- **DCA's conclusions and proposed actions on a number of other issues** raised during the 2003 review, including: the regulation of claims intermediaries; the indemnity principle; recoverable success fees and after the event (ATE) insurance premiums; the potential use of CFAs in cases run on a pro bono basis to assist the recovery of costs for pro bono organisations.

CFA round table

4. In July 2004 the then Minister for Civil Justice, David Lammy, hosted a round table meeting with selected stakeholders and practitioners to discuss CFAs and their future development. The round table provided the first opportunity to gauge reaction to the proposals set out in the CFA consultation paper. Overall the response from participants at the round table was positive and constructive, although opinions varied on some detailed matters. This has been reflected in the range of formal responses to the consultation paper. The consultation has been welcomed as making an important contribution to analysis in this area and will help ensure that the good progress already made on sustainable reforms continues.

5. In relation to the consultation there was broad consensus on the following points:

- Support for CFA simplification and for the thrust of the proposals set out in the CFA paper and agreement that CFAs could and should be made simpler. A few doubts as to whether CFAs could actually be made simple.

- Agreement that the proposed new simplified regulations would be a significant step forward in deterring technical challenges and bring more certainty and stability to the CFA regime. Some concern that challenges would still be possible via professional rules (the primary mechanism for regulating solicitors' use of CFAs) and proposals were put forward at the round table to minimise this possibility.

- Some concern that CFAs were being abused in defamation actions where a few firms were charging excessive success fees, particularly in 'celebrity' actions where the claimant could well afford to pay for their legal services in the traditional way. But also there was acceptance that the increased use of staged success fees and ATE insurance premiums would be a positive development (in defamation and generally).

- Recognition that the mediation methods used to secure progress in personal injury might work in trying to resolve the contentious costs issues in defamation.

- Acknowledged that a 'smart' approach to determining solutions to costs problems would be the most effective way forward, i.e. solutions tailored to a problem or collection of problems in different areas of the law for different types of cases.

Short summary of responses and conclusions

This section summarises briefly the responses to the 2004 consultation exercise, analyses the issues raised, and sets out DCA's conclusions and reforms on the issues consulted on. A full summary of written responses is attached at **Annex A**.

The response

1. Forty written responses, some very detailed, were received including from the legal professional bodies, trade unions, media organisations, the judiciary, individual legal practitioners, liability and legal expense insurers, small businesses and private individuals. We have also had a number of meetings with selected stakeholders (one-to-one and larger meetings) to discuss elements of the responses received and possible next steps. A full analysis of the written responses received is provided at **Annex A** and a list of the respondents is at **Annex D**.

Simplifying the CFA regulations

Response

2. Respondents continue to welcome the simplification process. All agreed that the current CFA secondary legislation is unnecessarily complex and should be simplified and that the current detailed nature of the requirements had led to enormous problems in the application of CFAs and had made them virtually impossible to explain to clients. Most agreed that the client care and contractual requirements effectively duplicate the Law Society's rules, and that the proper place for regulating solicitors' use of CFAs and protecting consumers is through the regulation of legal providers and not CFA legislation.

3. Many respondents put forward detailed comments on the wording of the draft regulations, suggesting amendments, further simplifications and deletions. For example, the costs judges felt the proposed regulations could be simplified further by relaxing the requirements for signatures, removing the requirement to prepare risk assessments and the requirement to identify any fee deferment. The Law Society, Association of Personal Injury Lawyers

(APIL) and some practitioners also suggested a range of other simplifications/deletions. Thompsons were concerned that the suggested combined simplified regulations would have the unintended effect of applying more complicated requirements to Collective Conditional Fee Agreements (CCFAs). Some respondents thought the proposed simplified regulations were clear and concise and did not appear to need further simplification.

4. A few respondents felt that regulations could serve a useful consumer protection purpose by controlling the amount of success fee that could be recovered by the solicitor from the client where the court had disallowed a proportion of the success fee claimed from the other side, or where the parties had agreed a reduced recoverable success fee as part of the costs settlement. The current regulations effectively prevent solicitors from charging clients any unrecovered success fee without the approval of the courts – the draft simplified regulations would end this requirement.

5. A few respondents suggested this would remove a useful protection for clients that could be a barrier to possible 'overcharging' by solicitors. However, others (including the Forum of Insurance Lawyers (FOIL)) argued that the charging agreement between the solicitor and client was a matter for just the solicitor and client and for competitive market forces (i.e. solicitors competing on the charging arrangements offered to potential clients and consumers shopping around for the best deal for them). This applies not just to individual consumers in personal injury cases but to any area of the law where CFAs are permitted, and to groups of people and large commercial organisations. The success fee between the solicitor and client is governed by the Solicitors Act 1974 and the client can challenge the charges made by asking the courts to conduct a solicitor-client assessment.

Conclusion

6. We will repeal the CFA and CCFA regulations for all agreements entered into on or after 1 November 2005 – the necessary regulations will be laid shortly. We will rely on the primary legislation to provide the minimum government legislative framework for the use of CFAs by legal representatives and professional regulation to provide the practical governance of the use of CFAs. This would very clearly focus primary responsibility for all client care, contractual and guidance matters on solicitors and the Law Society's professional rules of conduct, supporting costs guidance and proposed new model CFA.

7. The primary legislation requires us to maintain the Membership Organisation Regulations, as certain provisions in the primary legislation are required for the recovery of notional self-insurance premiums. However, the provisions can be simplified and respondents' suggestions to improve the wording of the draft Membership Organisation Regulations are included with this response paper.

8. The proposal to abolish the CFA and CCFA regulations would take simplification of the legislative framework a stage further than proposed in the 2004 consultation (no regulations rather than simplified regulations) but it is just a practical, cleaner and logical extension of the simplification objective. The consultation has confirmed widespread support for significant simplification and for a focus on provider-based regulation.

9. Many suggestions for further simplifications and deletions were put forward during the consultation to the extent that, in practice, any simplified regulations would perform no regulatory role and would be superfluous. The primary provisions brought in by section 27 of the Access to Justice Act 1999 provide the essential regulatory requirements that CFAs must be in writing and that they must state the percentage success fee applied, and the powers for regulating which proceedings CFAs cannot be used in (i.e. family and criminal). The provider-focused regulation of CFAs through the Law Society's professional rules looks after solicitor-client matters and the Civil Procedure Rules regulate between the parties costs issues.

10. We have explored the abolition proposal informally with the Law Society, Thompsons, APIL, FOIL, the Civil Justice Council (CJC) and some of the individual practitioners that took part in the CFA round table. The response has been positive. The only concerns have been about ensuring that the changes, if implemented, are communicated clearly to practitioners, insurers, other large defendant organisations and judges. It will be important to help ensure that all understand the purpose of the reforms, how CFAs will be regulated in future and that abolition of the current regulations does not mean the abolition of CFAs or CCFAs.

11. We have also continued to work with the Law Society, APIL and FOIL to develop the model agreements needed to support the revised regulatory regime on CFAs and the supporting guidance. Considerable progress has been made to produce a set of much simplified model CFAs that the Law Society would issue at the same time as the new regulatory regime was introduced.

12. This proposal would be a major step forward to stabilising the CFA regime and make it much simpler to use. This should benefit consumers, solicitors and defendants as agreement should be more transparent and the length of time solicitors need to spend explaining the CFA requirements reduced as very simply there is much less to explain. Prior to the 2004 consultation paper we consulted the Small Business Service (SBS) about the likely regulatory impact of the proposed changes and the SBS believed replacing the existing CFA regulations with a simpler set of requirements should benefit small businesses as users of legal services and sometimes defendants. We are now going further than that.

13. The Better Regulation Task Force (BRTF) supported CFA simplification in its report *Better Routes to Redress*. The removal of the regulations should enhance the benefits identified and will be a major step towards removing unnecessary regulations. The BRTF recommends that regulations should be systematically reviewed to test whether they are still necessary and effective – if not they should be modified or eliminated. The current CFA and CCFA regulations meet this test. The removal of the regulations would also be consistent with the BRTF's (and now the Better Regulation Executive's) better regulation approach aimed at considering how government can take deregulation much more seriously and boost the process of removing any unnecessary or outmoded regulations. A full regulatory impact assessment is attached to this paper at **Annex F**.

14. The development of the new Law Society professional conduct requirements and new model agreements will be a major step forward in making solicitors' primary obligations crystal clear. In particular, they must explain to the client the terms of the agreement and in what circumstances, if any, the client will be required to pay anything. The simplified CFA regime will make it much easier to do this. It will also make it much easier for the individual client to understand what it is they are being asked to agree to and to shop around if they want to find a better deal, for example where the solicitor is prepared to agree not to charge the client. A provision that would impose a contractual limit would also not be suitable for larger non-consumer/personal injury cases, particularly commercial litigation where market forces are particularly relevant and solicitors and clients favour maximum flexibility in terms of the agreements they can enter into.

15. Under the proposed new regime the focus will be on: the professionalism of solicitors and the responsibility of clients to agree whatever they want to within a very clear and simple statutory framework; and on letting market forces bring an element of competition to the various terms solicitors are prepared to offer. The CFA regulations have never really been the appropriate place to try to provide consumer protection when dealing with solicitors. The fear of consumers being overcharged and the feeling that the client needed to be protected through the regulations led to the comprehensive (and in practice unworkable) regulations we now have.

16. The current regulations have not been a force in protecting consumers from unregulated providers and have done little to provide protection from the minority of solicitors not living up to their professional standards. The Law Society has a range of effective mechanisms and sanctions to apply to members who do not comply with the professional rules of conduct and are more focused than ever on enforcement. Non-compliance is also a matter that judges are able to take into account in any costs assessment between the solicitor and client.

The impact of CFAs in defamation (and publication) proceedings

Response

17. The use of CFAs in defamation litigation was a controversial issue that first emerged during the 2003 CFA review. Several national and regional media organisations took the opportunity provided by the review to raise a number of concerns about the impact of the use of CFAs in defamation cases. The media organisations claimed that CFAs inhibited the right to freedom of expression and encouraged unmeritorious claims. Defamation practitioners said in return that lawyers believed the use of CFAs in libel cases had greatly widened access to justice and placed claimants on an equal footing with their opponents (mainly media organisations). The responses to the June 2004 consultation split in a similar way. The main differences included that the media organisations were better informed about the operation of CFAs and after the event (ATE) insurance. We also had the benefit of the Court of Appeal's judgment in *Musa King v Telegraph Ltd*.

18. In the 2004 consultation the media organisations confirmed their view that CFAs needed to be controlled in publication proceedings due to the 'chilling effect' on the media's freedom of expression. The claimant practitioners have stressed the role of CFAs in promoting access to justice for all, not just those who happen to be rich and famous. Many other respondents appeared to be slightly bemused that the 2004 consultation paper covered this issue in so much detail, particularly as it concerns an area where there are so few cases and where often both sides litigate in an aggressive and extravagant manner and consequently run up enormous costs.

19. The media organisations suggested that the issues relevant to defamation (the case type focused on in the 2004 consultation) applied to publication proceedings (claims brought in defamation, malicious falsehood, breach of confidence and misuse of personal information). They also put forward a number of suggestions for controlling the costs and recoverable success fees in publication proceedings, addressing the issue of ATE insurance and the costs of costs assessment proceedings. Their proposals are based on the premise that media organisations are in a special position. They claimed the media is under serious threat from the 'ransom factor' (identified in the Musa King judgment), particularly where cases brought are funded by a CFA but without any ATE insurance.

20. The media organisations argued that the effect of a success fee in publication proceedings – when added to the high costs typically charged by claimant solicitors – constituted a heavy inducement to settle a case on commercial grounds irrespective of the merits. This in turn has a chilling effect on the freedom of the press and other such groups. The media organisations suggested the potential abuses were starker in publication proceedings because of a number of factors including: the onus of proof on libel defendants; the relatively small number of such cases going to trial compared with personal injury actions; that there is no true ATE insurance market; the disproportionately high fees already charged by claimants' solicitors; and the failure of costs judges to use the regulatory regime effectively to control CFA costs in publication proceedings. The media organisations believed the position had been reached where the costs and CFA provisions needed to be revised in order to protect their legitimate right to freedom of expression.

21. The claimant practitioners argued that CFAs provided actual and effective access to justice in this area of law where many would otherwise not be able to afford to seek redress. CFAs (and costs) also played an important role in discouraging irresponsible journalism. The claimant practitioners argued that the sharp decline in the number of defamation claims issued in the past five years, after the introduction of CFAs in defamation, pointed to solicitors being more cautious when advising clients with regards to suing. They argued that the use of CFAs should not be banned or restricted but suggested that success fees should be staged – 100 per cent for cases that go to trial but substantially less for cases that settle early. Some also suggested that one possible method of restricting unmeritorious cases would be to refer them at an early stage for adjudication (similar to construction and engineering cases).

22. Other respondents, including the Law Society and Bar Council, suggested that defamation cases were no different in principle from any other type of case and that the Civil Procedure Rules already provided all the necessary powers for the court to disallow costs that are unreasonable and disproportionate.

Conclusions

23. DCA stated its policy position on the general matters at hand in relation to CFAs in the 2004 consultation paper, which the Lord Chancellor reiterated in a speech to the Fleet Street Lawyers' Association on 29 April 2005: that is, DCA did not plan legislation to restrict the use of success fees in this area (of publication proceedings) and that we supported the initiative launched by the CJC to mediate a general agreement on success fees in this area of law. We also suggested that the courts had sufficient powers to address unreasonable and disproportionate costs.

24. The Musa King judgment and the 2004 consultation paper prompted both sides to engage with each other to see if it would be possible to reach some agreement on the way forward, rather than leaving it unresolved or for others to impose a solution. Following the CFA round table in July 2004, leading claimant practitioners and media organisation representatives approached the CJC to help work through the issues and how the mechanics of a mediation process might work. A pre-mediation forum was held in December 2004 to consider these issues. There was general agreement that the costs mediation process should be attempted without prejudice to try to secure agreement on success fees, ATE insurance premiums and whether success fees in particular could be fixed as in some personal injury areas. Both defendant and claimant parties were considering the next steps when the House of Lords' appeal referred to in the next paragraph came to light and the CJC suspended its involvement pending the outcome of the House of Lords' consideration.

25. On 26 May 2005 the House of Lords considered an appeal in the case of *Campbell v MGN Limited* in which the principal issue was that the recovery of success fees in cases where the paying party's right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR) infringes that right. MGN were not seeking a declaration of incompatibility in respect of Article 10 of the ECHR but rather to argue that aspects of the secondary legislation and the Civil Procedure Rules should be either 'read down' or words 'read in' to safeguard the convention's rights.

26. The House of Lords judgment is expected in the autumn. DCA will consider carefully the House of Lords judgment and will examine what measures, if any, need to be taken to ensure the guidance given by the House of Lords is taken forward. If appropriate, DCA will continue to work with the CJC to improve the evidence base and try to find agreed solutions.

Annexes

Annex A: Summary of responses

Introduction

1. The consultation paper *Making Simple CFAs a Reality* was published on 29 June 2004. It invited comments on DCA's proposals to reform the secondary legislation governing the operation of Conditional Fee Agreements (CFAs) and Membership Organisation Regulations.

2. The consultation paper comprised three parts – proposed reforms to secondary legislation governing CFAs, the impact of CFAs in defamation, and other issues related to CFAs. Responses were invited on simplifying the regulations and on the impact of CFAs in defamation.

3. Annexed to the consultation was a version of a set of new draft regulations, to replace the existing CFA and Collective Conditional Fee Agreements (CCFAs). The paper also invited respondents to comment on the impact of CFAs and costs in defamation cases. It summarised DCA's response and proposed action on a number of issues raised during the consultation period including the regulation of claims intermediaries; the indemnity principle; the impact of recoverability; and the potential use of CFAs in pro bono cases.

4. The consultation period closed on 29 September 2004. Forty responses were received from the legal professional bodies, the judiciary, the insurance industry, media organisations, trade unions and individual practitioners. In addition, a round table event on issues raised by the consultation paper was held on 8 July 2004. Hosted by the then DCA Minister David Lammy and attended by a range of key stakeholders, it provided a forum to discuss the implications of the consultation paper and other issues on CFAs and costs including defamation.

5. A list of respondents is at **Annex D**.

6. The first part of this annex summarises the general comments and responses to the specific questions asked on the draft regulations (Q1 – Q4).

General themes

7. Respondents strongly agreed with the proposal that the CFA regulations should be simplified and client care moved to the Law Society Professional Conduct Rules. Some suggested that it was essential that provisions should be made within the Professional Conduct Rules to describe the penalties for failure to comply with the rules.

8. The Law Society supported the proposal to remove the detailed client care regulations in relation to CFAs and is currently modernising and clarifying its professional rules. They believed that these rules would provide the necessary protection for consumers and that duplication of these rules in the regulations not only provided no additional protection for the client but also exposed the regime to technical challenges. They also commented that the Society has a range of mechanisms and sanctions to apply to members who do not comply with the professional rules of conduct and that the courts are entitled to take into account any non-compliance with the Law Society's professional rules when dealing with costs assessment between the solicitor and their own client. The Law Society believed that it would be inappropriate for a third party to obtain a windfall benefit from any alleged breach of the professional rules.

9. Many respondents felt that, although technical challenges would be significantly reduced, they would not be completely eliminated by the reforms. Some expressed concerns that challenges could shift to the Professional Conduct Rules. As a counterbalance, there must be an effective system in place to prevent abuse of the new system. Other respondents suggested that the new regulations should include a specific provision, similar to that in consumer credit legislation, giving the court power to disapply any requirement of the regulations retrospectively in any case, either conditionally or unconditionally. A court considering a dispute between the parties or as between the solicitor and client should exercise such powers.

10. The Bar Council commented that underpinning the satellite litigation is the principle found in section 58. So long as section 58 remained unchanged satellite litigation would continue and parties would continue to use over-complex CFAs in order to comply with every minute detail of the statutory regulations. They believed that, although simplified regulations might help to reduce the undesired results, the best way to remove or reduce them would be to amend section 58 to remove the provision that the CFA shall be unenforceable. Instead, it should provide that if the CFA-funded winner has failed to comply with any conditions and regulations to the detriment of the losing party, then the court would have a discretion to disallow on assessment some or all of the winner's costs (including success fee and insurance premium). The Bar Council believed that amending section 58 would be far more satisfactory than the 'materiality' concept introduced by the Court of Appeal in *Hollins v Russell*, for section 58 does not allow any alternative between enforceable and unenforceable. It is all or nothing.

11. Some respondents commented that it was difficult to make any additional comments without seeing the new Law Society rules. They believed that, since claimants have no financial interest in their own legal costs, then the paying parties would need to have some form of direct access to the Law Society's mechanism for enforcing the new practice rules direct. Some expressed concerns about whether the Law Society is capable of keeping abuses under the CFA regime in check without considerable strengthening of its rules on client care and enforcement procedures. They highlighted the failure of the Law Society to regulate its members effectively on referral fees.

12. One respondent suggested that further consideration be given to how the regulations would apply to barristers who undertake direct access work on a CFA basis. This respondent commented that the Bar Council would need to draft suitable Rule 15-style material or else their clients might not be adequately protected.

Annex A: Part I

General comment on CFAs and responses to questions 1–4

Q.1 Do you think the proposed regulations could be simplified further?

13. The majority of the respondents did not specifically comment on this question. Most who did respond believed that the proposed regulations could be simplified further.

14. The Supreme Court Costs Office (SCCO) believed that the proposed regulations could be simplified in three respects:

    (a) relaxing the requirements for signatures;

    (b) removing the requirement to prepare risk assessments; and

    (c) removing the requirement to identify any fee deferment and the amount thereof.

15. The Law Society suggested that the regulations should specify which regulations applied to which type of agreement. The new draft regulation as currently drafted, they said, posed a threat that there would be further arguments and satellite litigation about actual requirements in a particular case. Regulations 3 and 4 are intended to apply to CFAs and regulations 5 and 6 to CCFAs. This should be clarified in the actual regulations.

16. The Motor Accident Solicitors' Society (MASS) suggested that Regulation 4(c) could simply state "the amount of the percentage increase that relates to the cost to the legal representative of the postponement…", thus making it clear that it is compulsory to state the amount.

17. One respondent suggested that it was essential to take steps to a) prevent opportunities for opponents to challenge the claimant's right to recover any legal costs arising and b) clarify the position by stipulating the penalties for failure to comply with the regulations. Other respondents believed that the proposed regulations were clear and concise and did not appear to need further simplification.

18. The trade unions believed that Regulation 5 (3) of the combined CFA and CCFA Regulations 2004 needed to be amended to remove the reference to "any statement prepared under Regulation 6" as this unnecessarily complicated matters. One representative of the trade union sector believed the draft regulations were flawed because they appeared to apply to CCFAs the terms intended to apply only to CFAs.

19. Other respondents believed the proposed regulations could not be simplified further given the current section 58. A few expressed concerns that there was a danger that the regulations could be oversimplified and lose some of the consumer protection benefits that they were intended to produce.

Q.2 Do you have any comments on the detail of the regulations, and have you any suggestions for amendment?

The detailed drafting suggestions made are at ***Annex B****.*

20. Respondents to this question expressed a variety of views – from minor changes of wordings to significant redrafting of the regulations. Some suggested changes to specific sections of the regulations whilst others suggested changes to all sections.

21. The SCCO suggested a number of further simplifications including relaxing the requirements for signatures, and removing both the requirement to prepare risk assessments and the requirement to identify any fee deferment element and the amount thereof. They also suggested that the draft regulations should be amended to require legal representatives to agree that the maximum amount in respect of any part of the success fee that is not recoverable from the opposing party should not exceed 25 per cent of any monetary compensation recovered. The purpose of imposing such a cap on deductions would be to restore to clients some of the protections presently enjoyed under Regulation 3 (2) of the current CFA regulations or under Regulation 5 (2) of the current CCFA regulations.

22. One legal expenses insurance provider commented that the definition of client in section 1(3) (b) could be interpreted as including costs awarded against a losing opponent.

23. The Treasury Solicitor believed that if the regulations were applied to an agreement entered into on or after a certain date, it would leave the regulations open to abuse and could cause delay in some instances. It would be simpler if the regulations applied to agreements relating to causes of action on or after a certain date, as with the fixed recoverable costs in costs-only proceedings in road traffic accidents set out in CPR 45.7. The Treasury Solicitor also suggested that there might be instances where the claimant seeks to bring action against an incorrect party. In those circumstances it would be inappropriate for the party eventually liable to pay the receiving party's costs, to pay the costs of the claimant pursuing such an action. It suggested it might be appropriate to amend Regulation 3 (1) so as to provide that the agreement should set out the name of any proposed defendants (as with Community Legal Service (CLS) public funding certificates).

24. Representatives from the trade union sector believed that there was no need for detailed information about costs as claimants would not be liable for any legal fees. They welcomed DCA's proposal to remove the detailed client care and costs information requirement from the current CFA regulations. They were concerned that, in trying to simplify the current regulations, not enough detail had been included to reduce other technical challenges that might arise in respect of the new regulations and CCFAs. They commented that regulation 5 (3) of the combined CFA and CCFA regulation 2004 be amended to remove the reference to "any statement prepared under regulation 6" as this unnecessarily complicated matters.

25. They also believed that the new regulations needed further detail to prevent future challenges to CCFAs. They suggested the new regulations be drafted more precisely so that Regulations 3, 4 and 7 (1) do not apply to CCFAs. The absence of this express provision would render CCFAs unworkable. Some representatives of the trade unions also believed that Regulation 8 needed to take into account the nature of CCFAs and so did not impact on older cases unnecessarily.

26. One firm of solicitors commented that Regulation 3 (1) was not appropriate for CCFAs. One barrister suggested that Regulation 3 (1) and Regulation 4 were not appropriate for CCFAs and should be expressly disapplied. One respondent suggested that the regulations should make it clear that a solicitor partner could act in their firm's name under a CFA with an uplift.

27. The Institute of Legal Executives (ILEX) believed there was some lack of clarity in the definition of 'legal representative' in clause 1 (3) (a). As currently framed it implied that the individual case handler entered into the CFA with the client and should be amended to make it sufficiently clear that it was the firm that entered into the CFA.

28. MASS commented that there had never been any provision in the current regulations specifically providing for staged success fees. The proposed regulations were also silent on the concept of staged success fees. They suggested Regulation 8 could be amended by deleting the words "to cover further proceedings or parts of them" or by adding "upon a change of circumstances". MASS also suggested that the term "proceeding" in Regulation 3 (1) was undesirable as it was not defined and had no accepted meaning in law, and could be replaced by the term "claim" which was unambiguous and consistent with the Civil Procedure Rule.

Q.3 In circumstances where fixed recoverable success fees will apply (fixed recoverable fees for all RTA claims brought on a CFA came into force on 1 June 2004), should the requirement for a risk assessment in Regulations 4 (1) and 6 (1) be disapplied?

29. Nearly all the respondents agreed that a risk assessment was not required in all those cases where a fixed recoverable success fee applied. However, where the legal representative sought to make any extra charge against the client in respect of any extra percentage success fee then a risk assessment would still be required. In cases that were likely to be exempt from fixed recoverable success fees a risk assessment should still be prepared.

30. FOIL and one other respondent suggested that, where there was a variation in success fees, claimants' representatives should be required to state from the outset of a claim whether they believed the case to be 'exceptional' and therefore outside the usual fixed success fee arrangements. These representatives should also take all reasonable steps including the completion of a risk assessment to try to justify their belief in securing a higher level of success fee.

31. A few respondents suggested that CPR 45.18 and 45.19 be amended so that they may only be applied where a risk assessment needs to be carried out, for example in exceptional cases. It was also suggested that CPR 11.8 (2) be amended. If there was a fixed scale of success fees it should not be possible for costs judges to utilise CPR 11.8 (2) to lower the success fee. This would be particularly unfair if there were no risk assessment to fall back on to resist an 11.8 (2) submission.

32. The Law Society suggested that 4 (b) and 6 (b) should be disapplied but 4 (a) and (c) and 6 (a) and (c) should not be disapplied for reasons of variation in success fees.

33. One firm of solicitors suggested the only requirement should be to advise the client that the success fee would be either 12.5 per cent or 25 per cent increasing to 100 per cent should the case reach trial.

34. Concerning CCFAs, one law firm suggested that a written statement confirming that the fixed recoverable success fee would be applied should be substituted in place of the present 6 (1), unless the solicitor wished to apply a success fee greater than the fixed success fee.

35. The SCCO believed that risk assessment should be disapplied in all cases. The making and supplying or retaining of a risk assessment should not be a formal requirement for a CFA or CCFA. Regulations 4 (b) and 6 (b) should be deleted. Alternatively, if they were retained, the regulations should be amended to replace the words “the level stated in the agreement” with the words “the level or levels stated in the agreement”. This would more appropriately provide for the practice recommended by case law of specifying staged fees.

36. According to the SCCO, risk assessments were of little value in the assessment of costs at the end of a case. In most cases it was wholly impossible for a legal representative to accurately assess a single amount of success fee before the end of the pre-action protocol stage. The absence of risk assessments prepared at the outset of instructions would not imperil the process of assessment. Clients usually accepted without question the risk assessment their solicitor made and they never expected to pay any part of the success fee which was not recoverable from the opposing party.

37. The Association of Law Costs Draftsmen believed that excluding those cases where fixed recoverable success fees applied would lead to an unnecessary complication in the rules and could be confusing to practitioners. The Treasury Solicitor believed that fixed costs might not be appropriate in every case. The Group Litigation Costs Services believed that it would be necessary for a risk assessment to be prepared in respect of all cases bearing in mind the difficulties that have arisen in the past in respect of the so-called 'technical challenges'.

Q.4 It is likely that Rule 44.16 will need to be amended if these regulations are introduced. What other consequential amendments, if any, would need to be made to the Civil Procedure Rules or Practice Directions?

38. The majority of respondents agreed that Rule 44.16 would need to be amended but views expressed were varied. The SCCO suggested that the consumer protections presently activated by this rule should be replaced by a regulation imposing contractual limits on the amount of any success fee payable by the client that was not payable by the opposing party.

39. MASS believed that the principle of Rule 44.16 emanated from Regulation 3 (2) (b) of the CFA regulations 2000, which were to be revoked and that there was no corresponding requirement in the draft new regulations.

40. The Law Society believed that it should be specifically set out in the Civil Procedure Rules that any breach of the solicitors' professional rules could be taken into account in a solicitor-client assessment. In those circumstances, the solicitor's bill could be reduced by an appropriate amount given the nature of the breach. They also commented, however, that it should be specifically stated that a breach of the professional conduct rules could not be taken into account in a between the parties summary or detailed assessment.

41. The Association of Personal Injury Lawyers (APIL) believed that Rule 44.16 should be substantially amended to reflect the fact that solicitors were prevented from charging anything to their clients. It should, however, be made clear to all clients that their right to solicitor-client assessment applied not only to any base costs incurred but also to any additional success fee. They also suggested further amendments to the Civil Procedure Rules be made stating that only clients were allowed to challenge the validity of a CFA and clarifying that the indemnity principle was abrogated for all CFAs.

42. One firm of solicitors believed that Rule 44.16 would still need to remain substantially in force because there might be circumstances in which a solicitor and own client charge needed to be made, in respect of any shortfall in recovery of the success fee. This firm also suggested that amendments be made to Rule 47.6, PD 32.4 (c) and PD 32.5 (3) to reflect the changes in those circumstances where a risk assessment was disapplied.

43. It was felt that any amendment to Rule 44.16 would be required only as a result of removing Regulation 3 (2) (b) which would take away a substantial measure of protection for a claimant. Regulation 3 (2) (b) provided a level of consumer protection that could not be provided by the Law Society's regulation. Some respondents believed Rule 44.16 and Regulation 3 (2) (b) were an important barrier to overcharging of clients, were easy for clients to understand and easy to implement, and should therefore remain.

44. The Treasury Solicitor suggested that the rules should be amended so that receiving parties must serve the CFA during the assessment process (similar to the requirements set out in CPD 32.5 about success fees) and that there should be sanctions for non-service (similar to CPR 44.3B (1) (d)). They also suggested that the CPR and/or PD should be amended accordingly so that proposed defendants were made fully aware of their potential costs liabilities prior to the issue of proceedings.

45. FOIL commented that they did not anticipate that rule changes should follow the regulations. A solicitor wishing to impose a higher level of success fee was a matter between the solicitor and the client and therefore the arrangement should be governed not by court rules but by the 1974 Act from the point at which an invoice was raised.

46. Some respondents commented that Rule 44.16 would require amendments as it made reference to the 2000 regulations, but other amendments to the CPR and PD would depend on the final version of the draft 2004 regulations and amendments to the Solicitors' Professional Rules. It was also suggested that parts of the CPR and PD should be kept even where the provisions they referred to had been moved from the regulations to the Solicitors' Professional Rules.

47. Representatives from the trade union sector commented that numerous amendments would be required in respect of CCFAs and section 30 arrangements. They believed that the CPR was inconsistent with the legislation, the regulations and practical arrangements and that therefore a 'tidying up' exercise would be appropriate to ensure certainty and consistency and to avoid unmeritorious technical challenges and satellite litigation.

48. Only a minority commented that no further amendment/provision was required and some that Rule 44.16 should remain.

Annex A: Part II

General comment on defamation and responses to questions 5–6

49. Some respondents believed that defamation action was not the sole preserve of celebrities and mass media organisations but also available for small publications, small businesses, partnerships, charities, sports organisations and individuals.

50. Many argued that CFAs did not encourage the taking on of weak cases. They believed that the risk of taking on an unmeritorious claim was too great both to claimants in terms of their reputation and to the firms in terms of their costs as they received nothing for a case lost. Some emphasised that the risk of solicitors receiving nothing if the case was lost was too great. Many commented that CFA cases were bound by the defamation pre-action protocol in the same way that privately funded cases were and that mediation was becoming more popular.

51. Those firms that have used mediation found that mediation has successfully resolved a number of defamation cases to the satisfaction of both claimants and defendants. Some commented that they have seen no evidence of the so-called ‘chilling effect’ as a result of CFAs and that in fact the number of defamation cases has actually decreased in recent years. The majority believed that CFAs have been instrumental in bringing about a ‘level playing field’. Many agreed that active case management would be a sensible means of controlling costs in defamation cases.

52. Representatives from the media organisations entered a joint submission. It included comments from Associated Newspapers Ltd, the BBC, BSkyB, Channel Four Television Corporation, Express Newspapers plc, Five, Guardian Newspaper Ltd, Independent News & Media Ltd, ITN, News Group Newspapers Ltd, The Newspaper Society, Times Newspapers Ltd and Trinity Mirror plc.

53. The media groups commented that, while damages in defamation cases could be large the costs almost invariably dwarfed them and that the current CFA regime magnified these problems and introduced more. They commented that the media have experience of claimant solicitors routinely demanding 100 per cent uplifts for the entire claim (with no staging of success fees) and even after an offer of amends. In certain cases, the courts have begun to reduce the success fees recovered but since these cases were not reported, claimant firms continued to claim very high success fees and it was not easy for media defendants to challenge the success fee claimed by reference to precedent.

54. The media groups were concerned about the added burden to costs since, if successful, claimants could recover their premium from the defendants. They were also concerned that wealthy claimants were persuaded to enter a CFA arrangement even though they could afford to pay their solicitors' normal hourly fee. They believed this served no public interest in terms of access to justice but merely served to increase the costs exposure of the media defendant.

55. The media groups also commented that, with no prospect of ever having to pay for solicitors' bills or insurance premiums, claimants had no interest in controlling costs. Moreover, impecunious claimants were less responsive to sensible settlement proposals or Part 36 offers since they would effectively pay nothing even if they failed to beat the offer at trial. Thus the media believed they were being held to ransom.

56. The media groups had the impression that certain solicitors would conduct weak cases on an ordinary fee paying basis and strong cases on a CFA basis because, more often than not, cases taken on a CFA basis would allow solicitors to 'double their money'. The media believed allowing this practice to continue was of no public benefit. They submitted that the series of procedural measures aimed at controlling costs proposed by the court in the Musa King case should be put on a formal footing and expanded to provide a self-contained code for the conduct of all CFA-funded litigation in cases where freedom of expression was at stake.

57. The media groups commented that ATE premiums could be very high and it was inappropriate for some insurance providers insisting upon a policy being taken out at the very outset of a claim. They argued that in some cases it would be obvious from the outset that the claim was bound to succeed and therefore there was little or no risk to insure. Some cases would be so strong that insurance would be unnecessary. There might be borderline cases in which case a defendant would rather not be exposed to the risk of additional liabilities in insurance premium, especially early in the proceedings, if there was a realistic prospect of settlement.

58. The media organisations put forward a number of rule changes. They proposed methods of controlling the cost and recoverable success fee in publication proceedings including the courts limiting additional liability to 12.5 per cent where no offer of amends was made. In cases in which proceedings were initiated or pursued under a CFA, recoverable costs should be limited to a specified amount inclusive of any liability. In making any costs capping the courts should consider the maximum likely financial compensation the claimant might recover if successful and have regard to the principles set out in CPR 44.3. The courts must also consider all circumstances in deciding whether a percentage increase was reasonable.

59. They also addressed the issue of ATE insurance and proposed that a solicitor should not take out ATE insurance for their client unless the solicitor gave the defendant reasonable notice of their intention to do so and the defendant had a reasonable opportunity to agree/disagree to such cover being taken. The court should take into account the stages of the proceedings for which the insurance cover had been taken in deciding whether the costs of the insurance were reasonable.

60. One firm of solicitors commented that without CFAs being made available in defamation a large number of claimants with meritorious claims could not begin to afford to clear their names. They believed that CFAs provided actual and effective access to justice in this area of law. This firm also submitted that costs in defamation actions played an important role in discouraging irresponsible journalism. The firm commented that when the media won a defamation action, there was no corresponding ‘chilling effect’ on the level of their costs. According to this firm, due to the unpredictability of defamation actions and the time and expense involved, it would be “commercial madness” for a lawyer to take on a hopeless case on a speculative basis.

61. The firm commented that the sharp decline in the number of defamation claims issued in the past five years, after the introduction of CFAs in defamation, pointed to solicitors being more cautious when advising clients with regards to suing for defamation and not taking on speculative claims. Further, the court had the power under sections 8–10 of the Defamation Act 1996 and Part 24 of the Civil Procedure Rules to dispose of trivial or unmeritorious claims.

62. The firm proposed that the level of success fee in defamation should be staged – 100 per cent for cases that went to trial but a substantially smaller success fee should the case settle early. They also did not believe that CFAs encouraged litigation rather than alternative dispute resolution (ADR). ADR had become increasingly common in the field of defamation in recent years, whether or not the case was funded by a CFA.

63. The Bar Council believed that defamation cases were no different in principle from any other type of case and the advent of CFAs had led to an increase in the instances of claimants bringing defamation actions against the media. Previously, claimants could not do so because legal aid was not available. There were no means by which an impecunious claimant could be denied access to the courts, whether to bring defamation claims or any other litigation.

64. The Bar Council believed that by applying and developing existing principles of law and practice, however, which required costs recoverable from the losing party to be a) proportionate in amount to the claim and b) subject to assessment on one of the permitted bases, there was a means to control impecunious claimants' recoverable costs (whether in defamation or any other action). Although this might not assist the winning media defendant to recover its costs from impecunious claimants who had no ATE insurance, as a general rule media organisations could insure against the costs of defending defamation claims.

65. MASS believed that since the law relating to CFAs did not discriminate between types of case, great care should be taken to ensure that any changes thought necessary as regards defamation CFAs should not prejudice or otherwise adversely affect the operation of the majority of CFAs which related to everyday claims. APIL appreciated the difficulties caused by using CFAs in defamation cases. They advised that all parties involved in the ongoing debate surrounding CFAs and defamation should consider mediation as a worthwhile alternative.

66. One firm of solicitors commented that media defendants generally ignored the fact that CFAs were available to both claimants and defendants. The firm said that they had successfully represented defendants (both impecunious and wealthy) on a CFA basis. They commented that, even if the issue of costs was a cause of concern, there was no evidence of the so-called 'ransom effect' and that there had, in fact, been a downturn in defamation in recent years. They suggested that in instances where the media organisations were being forced to settle because of the use of CFAs, which in their view were rare, these could be addressed through modifications rather than banning CFAs.

67. It was argued that the law on defamation was designed to safeguard reputations and in many cases it was the injunction, not damages, that was the primary remedy. Therefore, any protocol or scheme should not ignore the importance of protecting an individual's reputation. It was suggested that one possible method of restricting unmeritorious cases would be to refer them at an early stage for adjudication (similar to the arrangements for construction and engineering cases). This referral should be made mandatory, but acceptance of the outcome would be voluntary. There could be costs consequences, however, for a party that proceeded to litigation following a finding by an adjudicator. A change in the Defamation Act would be required to make this mandatory. It was also suggested that there was a real need for the prospective fixing of costs budgets.

Q.5 How should the guidance given by the Court of Appeal be developed to ensure that costs in defamation actions are reasonable and proportionate?

68. The majority of respondents to this question believed that the existing court powers were sufficient to deal with any abuses concerning costs budgeting, costs orders, proportionality and assessment of success fees. Many believed that the courts should be more rigorous in ensuring that these powers were exercised. There were mixed views as to whether or not ATE insurance should be compulsory. Many also saw no reason why defamation cases should be treated any differently.

69. The media groups commented that the Court of Appeal in the Musa King judgment proposed a series of procedural measures aimed at controlling costs in these actions. They felt these measures needed to be put on a formal footing and expanded into a self-contained code for the conduct of all CFA-funded litigation in cases where freedom of expression was at stake. They submitted suggested rule changes to this effect (see **Annex C**). One firm of solicitors suggested that this and other issues should be discussed at the mediation between claimant defamation practitioners and the media groups under the auspices of the Civil Justice Council.

70. The Law Society believed that the Civil Procedure Rules already provided the necessary powers for the court to disallow unreasonable or disproportionate costs and that neither CFAs nor defamation matters should be subject to special treatment. They believed that the courts should exercise their powers to ensure appropriate levels of costs in all types of actions using all types of funding.

71. The Group Litigation Costs Service queried why costs in defamation actions should be treated differently from those in other cases where CFAs were used. They believed that it was not only in defamation proceedings that organisations were faced with paying increased costs with little prospect of recovery if they won, e.g. the National Health Service Litigation Authority in clinical negligence cases. They believed that CPR 44.4 (2) and (3) ensured that costs were reasonable and proportionate; that the Civil Procedure Rules were meant to ensure access to justice with reasonable costs; and they saw no reason why there should be a different rule for defamation cases.

72. The SCCO believed that, in all high costs cases, the proportionality control on costs should be applied prospectively (i.e. by setting budgets) rather than retrospectively. They suggested the Civil Procedure Rules Committee should implement new rules on budgets for all high costs cases, not just defamation cases. The Association of Law Costs Draftsmen believed that provision for costs assessments to include non-compliance already existed in the Civil Procedure Rules and provided the rules were rigidly imposed, no further sanction was needed.

73. One firm of solicitors suggested that the guidance of the Court of Appeal should result in specific rules, which should include all matters where a CFA was used without ATE insurance. They also suggested that the existing rules and practice directions should be sufficient to deal with costs capping. It would be helpful, however, if the rules were amended to require estimates to include the success fee where there is a CFA but no ATE. They also believed that estimates of costs were not an option in the Rules and should be enforced by the courts.

74. One other firm of solicitors suggested that training in this area of law might be required for costs judges. They also commented that there was no excuse for not having a policy as it was possible to buy policies where a premium was payable in the event of success.

75. MASS pointed out, however, that the principle of 'the many insuring the few' was clearly not readily applicable to defamation, where claims did not proceed in any number. They also commented that they would not wish to see restrictive provisions aimed at curbing what are seen as excesses in the field of defamation working against the interests of clients and their solicitors in the bulk of ordinary CFA cases.

76. A few respondents felt that it would be inappropriate for a costs cap to be automatically applied in each case. Rather, each case should be considered on its own merits, including the existence of ATE insurance. It was suggested that one method of controlling costs would be to permit costs capping at the allocation stage, provided there was a facility to review the costs cap. It might be possible to restrict weak cases by referring them at an early stage for adjudication. It was also suggested that referral to adjudication should be mandatory but acceptance of the outcome would be voluntary. There should be costs consequences, however, if a party proceeded to litigation following the findings by the adjudicator.

77. One firm of solicitors suggested considering withdrawing CFAs from defamation cases because there was little evidence to suggest that CFAs had significantly enhanced claimants' ability to bring actions where otherwise they would not have done so. This firm suggested that if CFAs were to continue, they should be policed rigorously by the courts from the outset of a case. Costs capping, they recommended, should be done at each stage of the action; staged success fees should be utilised to reflect the complexity of the case; and the courts should take a far more rigorous approach towards scrutinising the conduct of the claim by the claimant's solicitors. Compulsory insurance should also be introduced and where a claimant was unable to obtain ATE insurance, or only at a prohibitive cost, the courts should consider whether or not a case should be allowed to proceed.

Q6. What scope is there for new 'protocols' or agreement between the main claimant and defendant parties to provide a sustainable regime that ensures access to justice with reasonable costs for those genuinely defamed while frivolous or excessive claims are excluded?

78. Very few responded to this question. Some, including law firms and the Law Society, believed that open dialogue between stakeholders in the legal marketplace would be most desirable. The Law Society also suggested that the agreements reached by claimant and defendant groups in relation to personal injury claims (fixed costs and fixed success fees) provided a model for the defamation groups to follow. The Law Society commented that they would be happy to work with claimant and defendant groups to assist in reaching agreements on any costs issues. They also supported the increased use of alternative dispute resolution (ADR) techniques and believed that further expansion of ADR in respect of defamation matters would alleviate the media sector's concerns.

79. Most that responded agreed that the existing protocols were sufficient so long as they were followed, and that efforts should be concentrated on using the existing rules and structures more effectively to ensure a sustainable regime. A few stressed the importance of courts being persuaded to exercise their powers with regards to costs, case management etc. Experience showed that in many cases the courts did not use them.

80. It was observed that traditionally there had been a ‘blank cheque’ approach to defamation costs and this should be discouraged by early capping of costs. Unlike other protocols, there was a specific section referring to the proportionality of costs, but this was routinely ignored particularly with regard to ‘the stage the complaint has reached’. Some suggested that it would be more appropriate to introduce ATE insurance for CFAs in defamation cases rather than introducing new protocols.

Annex A: Part III

Responses to other issues

Indemnity principle

81. All respondents on this issue agreed that the indemnity principle should be replaced with something else. It was felt that there should be a robust mechanism introduced to ensure accountability for work carried out and the subsequent increase in costs.

82. MASS expressed disappointment that there was still no solution to the indemnity principle problem on the horizon, believing this was mainly due to there being no consensus on what should replace it.

83. The Law Society believed that the indemnity principle did not provide for the reasonableness of costs. They believed that for the vast majority of litigation, the reasonableness of costs was measured by guideline hourly rates suggested by the Supreme Court Costs Office. They commented that various proposals to effect the abolition of the indemnity principle had been put forward (by the Master of the Rolls, Costs Judge O'Hare and themselves). They thought that a relatively simple method of abolition could be agreed from the various proposals put forward without having to resort to primary legislation. If primary legislation was deemed necessary, the Law Society believed that the abrogation of the principle should be given priority because it remained a significant impediment to the development and use of innovative fee arrangements.

84. APIL believed that the continuing influence of the indemnity principle was the most significant factor preventing the development of a simple CFA. If the indemnity principle were to be either abrogated or abridged, CFAs would be easier for solicitors to use, harder for defendants to challenge unreasonably and easier for clients to understand. They believed that the indemnity principle could be abridged through secondary legislation, for example through the Civil Procedure Rules.

85. Unison commented that the indemnity principle continued to unnecessarily complicate their delivery of legal services, believed that a much more robust approach should be taken, and would press for abolition of the indemnity principle.

Recoverability

86. The Law Society believed that recoverability of success fees and ATE insurance premiums was necessary for the receiving party in any type of costs claim. These recoverable elements were specifically designed as compensation for the risk undertaken by solicitors and insurers in supporting access to justice for the claimant. To require individual claimants to meet those costs would create a substantial barrier to their right to obtain redress.

87. On the other hand some respondents commented that the concept of recoverability was at the root of the difficulties faced by defendants in all classes of litigation. They believed that the system should not operate so as to force defendants with meritorious defences into early settlement as a result of the possible costs consequences of losing.

88. FOIL welcomed the fixed recoverable schemes, and suggested that the scheme be extended to cover fast track. They also welcomed the fixed recoverable success fee scheme and believed that it was a step in the right direction and would avoid satellite litigation about the level of success fees in road traffic accident cases. They commented that extending the scheme to employers' liability cases would cause costs litigation to drop. They also advocated extending the principle to employers' disease and public liability cases.

Claims management companies

89. Many respondents commented and agreed that claims intermediaries should be regulated for the protection of the public. They recognised, however, that for self-regulation to be effective, the players in this particular sector would have to be under an obligation to take part in the regulatory process.

90. The Law Society pointed out that any regulation scheme for claims intermediaries was likely to be voluntary. The result would be that those most likely to engage in unacceptable practices would be least likely to enter the regulatory system.

91. The Bar Council commented that concerns about claims intermediaries were reminiscent of the concerns that arose in the early days of hire purchase agreements. These problems were resolved by deeming the dealers to be agents of the finance company and by regulating the finance company. Breach of these regulations by the finance company (acting by its officers, employees or agents) made it liable to severe penalties. They believed similar principles could be applied to claims intermediaries because it would be the principal who suffered the penalty and who would therefore have the incentive to police the intermediary at no cost to the public purse.

Clients' interest in costs

92. A few respondents expressed concerns about claimants having no financial interest in litigation. They believed the present situation removed the claimant from any interest in the volume and cost of work being undertaken on their case. This left the paying party to police the claimant's costs, which led directly to the 'costs war' as currently seen.

93. The media believed that claimants having no interest in controlling costs had resulted in unnecessary work by their solicitors, which served to increase costs.

94. FOIL's view was that any costs arrangements must retain an element of solicitor/own client payments and that the claimant must accept that not all costs would be recovered from the paying party. The financial interest would ensure that the solicitor complied with Rule 15.

95. One insurance provider commented that the introduction of CFAs had led effectively to insurers policing the level of third party solicitors' costs. They said that claimants should police their own solicitors, but recognised that the current situation did not allow this. They believed that this had led to a large proportion of fees and disbursements being unreasonable and disproportionate, resulting in inevitable increases in costs litigation. They also believed that increased costs litigation had created more mistrust between insurers and claimant lawyers. This insurer suggested that it was possible to have a CFA scheme where the claimant had a financial interest, as operated in Scotland.

Costs budgeting

96. Some respondents expressed the view that costs budgeting should be considered in order to bring certainty and transparency in costs issues. Others commented that existing court powers were sufficient to deal with any abuses, particularly costs budgeting at allocation. They believed, however, that the rules were rarely applied.

97. One respondent believed that the rules should be tightened to make sure that costs estimates were accurate and, if they were not provided or were inaccurate, then the claimant lawyer should suffer any financial consequences.

98. In addition, one firm of solicitors suggested that the Costs Practice Direction should be amended to include additional paragraphs at 4.2, i.e. dividing a bill of costs into parts. If an estimate of costs was provided in the Allocation Questionnaire, the bill should be divided into separate parts on this date. Where an estimate of costs was provided in the Listing Questionnaire, the bill should be divided into separate parts on this date.

99. One other firm suggested that if CFAs were retained in defamation costs budgeting should be used at each stage of the action. It was argued that it would be inappropriate for a costs cap to be automatically applied, and that each case should be considered on merit.

Legal Expenses Insurance – ATE

100. A number of respondents expressed concerns about ATE being made compulsory. One firm of solicitors believed that any suggestion that ATE should be compulsory was misguided because it amounted to a requirement for security for costs in all cases, and this would be likely to prevent access to justice. They commented that there had never been any requirement to provide security for costs where a claimant was funded by the Legal Services Commission. Instances where the claimant has no assets and is not concerned about the threat of bankruptcy are likely to be very limited in this already specialist area.

101. Furthermore, the ATE market is subject to many external pressures and remains immature for non-personal injury cases: for example, there has been a general hardening of the market since 2001 and a lack of competition,

which has led to substantial difficulties in obtaining ATE, even in strong cases.

102. One ATE insurance provider commented that whilst ATE insurance was widely available for personal injury claims, the same was not true for other areas. There is insufficient competition in the ATE market in many areas of law, including clinical negligence and defamation, which is not a healthy sign. The insurance provider believed that the underwriting capacity continued to be a real issue in the ATE market and needed to be resolved; the only way to do this, they said, was by prudent underwriting and rating the risks insured. They suggested that underwriters needed to review the performance of the different types of claims they had insured over the years. They recognised, however, that great care would have to be taken before any further changes were made to limit any adverse effect on the sustainability of the ATE market.

103. One respondent believed it was essential that ATE insurers should be responsible for paying defendants' costs where the claimant is unsuccessful, despite there being some potential points which the ATE insurer might be able to take. They believed that because claimants no longer had any financial interest, there would be further defendant insurer-led satellite costs litigation leading to spiralling costs and ultimately to higher premiums for all.

104. The Law Society believed that consideration should be given to taking action to help stop instances when a successful defendant has not been able to cover their costs from the ATE insurers. They suggested the following possible solutions:

- Enable the receiving party to make a complaint to the Financial Ombudsman Service in relation to any refusal by the insurers to make payment.
- Set minimum terms for ATE insurance.
- Conduct research to identify why ATE insurers void policies.

Reversing the guidance on before the event (BTE) insurance provided by the Court of Appeal in *Sarwar v Alam*

105. Unison strongly believed that the law set out in *Sarwar v Alam* should be reversed, and were disappointed to note that DCA was not going to take action. They commented that they were still faced with costs being challenged, including detailed, technical challenges being made to legitimate and reasonable costs in successful personal injury cases. They argued that DCA's comment that the problems were caused by the unions not marketing their legal services correctly was completely misguided, and they urged DCA to take steps to remove BTE precedence in trade union cases. The Law Society supported the union's view that it should be acceptable for a trade union member to use trade union funding even if they already have BTE insurance.

106. FOIL believed that 'Sarwar' remains good law. They also advocated a system that presumed that consumers would use existing methods of funding, such as BTE insurance. They also believed, however, that legal expenses insurers often made it difficult for the claimant's solicitor to use the insurance. They believed the issue was how to open up the market to require legal expenses insurers to allow non-panel lawyers to act for the policyholder. They said that the use of legal expenses insurance should be encouraged to avoid additional liabilities and having those costs passed on to liability insurers.

Use of CFAs in pro bono

107. The Law Society welcomed the idea that a CFA may be used in support of pro bono work, but recommended that careful consideration would be needed to agree how to handle and use the income.

Other issues

108. **Commercial cases.** One respondent recommended that the use of CFAs should be promoted in business claims, since experience showed that if a party faced the prospect of having to pay a high level of costs they would be less inclined to pursue a weak case and be readier to settle. If CFAs were used widely in commercial claims, solicitors could offer low rates, since they could supplement their hourly fees and finance cases lost from their CFA success fees. The respondent suggested that a starting point would be the definition of "business liability" in section 1 of the Unfair Contract Terms Act 1977. They also believed the 100 per cent cap on success fees should be removed and that CFAs should cease to be regulated either by primary or secondary legislation.

109. **CFAs in low-value claims.** The Bar Council commented that anecdotal evidence suggested many local authorities had received a plethora of small claims professionally prepared by firms operating on a 'production line basis' or from people who had allegedly injured themselves at work. Many of these claims are settled because it is not cost-effective to investigate or defend them. The practical consequence of this is that premiums for employer's public liability insurance cover have risen very substantially over the past five years.

110. **Membership organisation self-insurance.** Unison expressed their disappointment at the comments on this issue made in the consultation paper. They said that they continued to meet unrecoverable costs that arose in their CCFA cases and also to meet the full costs of more difficult or complex cases. They believed that this did not provide trade unions with a level playing field and could not be justified, and that there was a good case for amending legislation in this respect. They hoped that DCA would rethink matters and take steps to extend section 30 of the Access to Justice Act 1999 appropriately.

111. APIL believed that section 30 should be amended so as to allow trade unions to recover from the paying party an allowance to the risk of paying disbursements. They were also disappointed that DCA did not believe that there was a case to amend the legislation in respect of section 30 and the ability of 'self-insured' trade unions to recover an allowance relating to the risk of paying disbursements. APIL believed that the principle of 'polluter pays' should be paramount in determining fairness and that restricting the ability of the injured person to recoup justifiably incurred costs may hinder people's access to justice.

112. **Contingency legal aid fund.** FOIL thought that the initial financial outlay to set up such a scheme would be huge but that, if insurers were enabled to avoid additional liabilities because the claimant's solicitor would get paid, millions of pounds could be saved on success fees. The fund would also insure the claimant against the defendant's costs, so a similar saving would be made on ATE costs. Thus, they said, in principle the savings would make it an attractive option, but they were concerned about the logistics of starting and managing the scheme.

Annex B: Individual responses to question 2 of consultation paper CP22/04 29 June 2004

Individual responses to Q2 (changes to draft regulations) of consultation paper CP22/04 29 June 2004

1. Master O'Hare – Supreme Court Costs Office (SCCO)

Draft regs 4 (c) & 6 (c) should be deleted. (As drafted they require a legal representative to state the amount of any increase which he attributes to the costs to him of the postponement of the payment of his fees and expenses. Presumably it is thought appropriate because rules of court prevent the recovery of any part of a success fee which relates to the cost of foregoing payments on account. In my opinion this should not be a formality requirement for a CFA/CCFA. Rules of court could still prevent the recovery of any part of the success fee attributable to this element).

Draft regs should be amended so as to require legal representatives to agree the following: "the maximum amount in respect of any part of the success fee that is not recoverable from the opposing party shall not exceed 25% of any monetary compensation awarded". Purpose would be to restore to clients some of the protections currently existing in CFA regs 3 (2) & CCFA regs 5 (2). As far as I am aware there is no likelihood of the Law Society Professional Conduct Rules protecting the clients from risk of shortfall.

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2. Underwoods

Draft CFA & CCFA Regs 2004

Regs 3 (1) & 4 not appropriate for CCFAs.

Regs 3 (2) & 5 (3) delete words "or part of them". Superfluous and only confuse.

Reg 4 & Reg 6 add at beginning "This regulation shall not apply in any case where the success fee is fixed" (See schedule 1 to the Regulations)

Reg 4 (c) & 6 (c) delete. Abolish the cash flow percentage.

Add new Reg 4 (c) & 6 (c) "No element of the success fee shall relate to the cost to the legal representative of the postponement of the payment of his fees or expenses."

Reg 5 (3) delete words "and any statement prepared under Regulation 6" (there is no need to double the regulatory requirement thus double the opportunities for challenge). If there is a significant variation as to when fees will be payable then a fresh CCFA should be entered into. The scope for satellite litigation on the basis that a written statement is effectively ultra vires the original CCFA is endless.

Reg 6 add the words "on conditional fee terms" after the words "accepting instructions" to allow a solicitor to work on a different basis whilst considering risk (eg hourly rate or fixed rate).

Reg 7 delete entirely it is a recipe for disaster. Reg 1 defines "client" very widely. No other form of private funding requires a client to sign anything. Thus a client liable for fees of £300 per hour win or lose has to sign nothing, but where a legal representative is taking the risk, a far more advantageous situation for the client, the client has to sign. This perpetuates the concept that there needs to be greater protection for a client in a CFA case than in a case funded by other means. The current regime reinforced by Reg 7 turns common sense on its head. The law should be changed so that any funding arrangement except a CFA must be signed by client.

Reg 8 delete it serves no purpose. If the amended agreement is not regulation compliant it is invalid in any event.

Add Schedule 1 listing those areas where success fees are fixed.

Draft Access to Justice (MO) regs

Reg 2 substitute word "arrangements" for "agreements" in each case to be consistent with rest of the regs, and accurately reflect the true position.

Reg 4 what is the point of this? Solicitors' Practice Rules still apply in their entirety in relation to any potential charge to lay client, who is thus fully protected.

Reg 5 delete. Provide for a specific uplift on the success fee to reflect the fact that the legal rep/funder is taking the risk of disbursements and/or adverse cost orders and allow the legal rep/funder to agree between themselves how such extra success fee shall be split.

3. The Treasury Solicitor

The CFA & CCFA Regs 2004

Reg 2 if the regs are applied to agreements entered into on or after a certain date it leaves the regs open to abuse and could cause delays. Simpler if regs applied to agreements relating to cause of action on or after a certain date, as with the fixed recoverable costs in cost-only proceedings CPR 45.7.

Reg 3 (1) amend to provide that the agreement should set out the name of any proposed Defendants. There may be instances where the claimant and/or his solicitor seek to bring an action against a party who is not the correct party. It would be inappropriate for the party liable to pay the receiving party's costs to pay the costs of the claimant pursuing an action against an incorrect party.

Reg 5 (3) at the end add the words "by the funder or the client", this would clarify matters.

Reg 7 (1) & (2) for clarity add the words "and dated" at the end of each paragraph.

Also provide, for the sake of completeness, for agreements between legal representatives and additional representatives to be signed by them both.

Access to Justice (MO) regs 2004

Reg 3 assist if the list of prescribed bodies were set out in the explanatory note or the note set out where the list can be found.

4. Forum of Insurance Lawyers (FOIL)

Definition of "legal representative". Does it extend to solicitor agents, costs draftsmen?

Reg 3 (1) simplify further to allow for commercial clients to have one CFA cover all future cases.

Reg 3 (2) should say " the client has to pay".

Distinction between CCFAs and CFAs seems unnecessary. Professional Conduct Rules prevent either being used in certain classes of proceedings.

Reg 4 (c) should go in Professional Conduct Rules.

Reg 5 (3) no need to require circumstances to be recorded in the reg 6 statement as well. It is a client care issue and should appear in client care letter.

Reg 9 should also refer to 2003 regs.

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5. Institute of Legal Executives

Reg 1 (3) (a) definition of “legal representative”. As drafted it implies that the individual case handler enters into the CFA with the client. Definition should make it clear that it is the firm that enters into the CFA.

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6. Law Society

CFA & CCFA Regs 2004

Reg 5 (3) suggest the word “and” be replaced by “or”. Unnecessary for both CFA and CCFA and the statement prepared under Reg 6 to specify the circumstances in which the legal representative’s fees and expenses are payable.

Reg 6 delete words “when accepting instructions”. Requirement that written statement is prepared when accepting instructions is too restrictive. There may be circumstances in which the work is not initially done under a CFA and therefore such a statement would not be produced. If the matter is subsequently brought under a CCFA it will be impossible for the solicitors to comply with Reg 6.

Reg 7 (1) should make clear that this does not apply to CCFAs. Given range of people that can be a client under these regs the requirement should be that the person who will receive the advocacy or litigation services for which the agreement relates must sign the agreement. Similar requirement should apply to the Reg 6 statement under a CCFA.

Access to Justice (MO) 2004

Reg 2 delete “agreements” and insert “arrangements” as per Reg 4.

Reg 4 (3) unnecessary, delete reg. Information required by this reg is required to be given under the Law Society Professional Conduct Rules.

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7. Motor Accident Solicitors’ Society (MASS)

Reg 3 & Reg 4 inconsistency in numbering – Reg 3 in a (1, 2) format, Reg 4 in a (a, b) format.

Definitions, “percentage increase” is defined, “success fee” is not and two terms seem to be interchanged.

Reg 4 (a) needs “and” adding at the end for clarity.

Reg 7 (3) “additional legal representative” is not defined.

Reg 8 amend by deleting words “to cover further proceedings or parts of them” or by adding “upon a change of circumstances”. The draft regs are silent on the subject of staged success fees (SF) and this amendment may help. Much has been made by the Courts of staged SFs and solicitors often see cases where a higher SF is reduced from some point in the claim. However there has never been any provision in regs specifically providing for staged SF.

Reg 3 (1) states a CFA must specify “the particular proceedings… or part”. The term proceedings is undesirable as it is not defined and has no accepted meaning in law. Insurers have prevented, and do prevent, freedom of choice before the start of a claim on the grounds that there are no proceedings until a court claim has been issued. For simplicity and consistency with CPR echo the simple term “Claim”, this is unambiguous.

8. DAS

Reg 1 (3) (b) definition of client too wide, could be interpreted as including costs awarded against a losing opponent.

Reg 1 (3) add definition of agreement. Define as “including CFA and CCFA except where specified separately”. This would avoid the need for the same information on CFAs and CCFAs to be duplicated in the regs.

Reg 1 (3) unclear why definition of funder is required here, it appears to be dealt with by 1 (3) (b). Term is also referred to in 5 (2).

Reg 1 (3) definition of “percentage increase” not clear, redraft to include reference to CCFAs also.

Reg 7 (3) suggest delete this entirely as it does not appear relevant.

General drafting has resulted in repetition, e.g. information on success fees in 4 (a), (b) and (c) is duplicated by 6 (a), (b) and (c) as the information is repeated separately for CFAs and CCFAs. Suggest that heading and first sentence in 4 which refers to CFAs should be changed so that it incorporates reference to CCFAs. Then 6 (a), (b) and (c) would not be required.

9. Thompsons

Reg 1 Definition of “funder” excludes circumstances where a membership organisation wishes to provide a framework for legal services to its members without being liable to pay the legal representative’s fees. Suggest concept of CCFAs be extended to include this – “Means a party to a CCFA whether or not, under that Agreement, that party is liable to pay the legal representative’s fees”.

Regs 3 & 4 These regs are clearly intended to apply to individual CFAs only. By now amalgamating the regulations into one, and in the absence of an express provision that regs 3, 4 & 7 (1) do not apply to CCFAs, they will apply. That would render CCFAs unworkable and clearly that is not the intention. New Reg should go in – “Regulations 3, 4, and 7 (1) do not apply to a CCFA”.

Reg 5 (3) the inclusion of risk assessments in this provision is new, unworkable and unnecessary. It is new because the 2000 regs refer (at reg 4 (1)) only to the CCFA not the statement/risk assessment, and the new 2004 regs refer (at reg 3 (2)) only to CFAs and not the statement/risk assessment. Solicitors already required by professional conduct rules to explain to clients their potential liabilities. The new regs recognise that and there can be no point in imposing a requirement that information which has to be given to client also has to be attached to the statement/risk assessment.

Reg 8 Attempt to cover both CFAs and CCFAs in same regulation is causing problems. Under this reg an amendment to a CCFA made under 2000 regs, even a minor one, to cover further proceedings, would render that agreement subject to 2004 regs. This would be unworkable. The 2000 regs do not require risk assessments in individual cases to state the % increase related to the postponement of fees and expenses. Reg 6 (c) of the 2004 regs does. The consequence is that any minor amendment to a pre-2004 CCFA the additional details would be required to comply with reg 6 (c). This would require all risk assessments already prepared to be themselves amended. We suggest splitting current 8:

“8 (1) Where a CFA is amended to cover further proceedings or parts of them, regulations 2, 3, 4 and 7 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment.

(2) Regulation 8 (1) does not apply to CCFAs.

(3) Where a CCFA is amended to cover further proceedings or parts of them regs 2, 5, 6 and 7 apply to the amended agreement as if it were a fresh agreement made at the time of the amendment, but only in respect of new instructions accepted after the date of the amendment.”

Section 30 Regs

Reg 2 – reference is made to agreements which is inconsistent with s30 of the A to J Act 1999 and existing practice. s30(1) refers to undertakings which are in accordance with arrangements satisfying prescribed conditions. There is no requirement for a specific separate agreement in each individual case. This is also inconsistent with 2000 regs which follow the wording of 1999 Act using terms “arrangements” and “undertaking”. Amend to read “These regulations shall apply to undertakings given on or after [date] and undertakings given before that date shall be treated as if these regulations had not come into force”.

Reg 4 (3) requirement to contain a statement concerning the liability of the member/other person to pay the costs of any proceedings is inconsistent with s30 A to J Act 1999. This provides only in respect of undertakings to pay the costs of the other parties to the proceedings. Whilst s30 remains limited to Defendants' costs the arrangements should only be required to set out the circumstances in which the member/other person may be liable to pay defendant's costs.

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10. Association of Personal Injury Lawyers (APIL)

Reg 1 Definitions – "client" is it necessary and in any case it does not specify a plural clause (i.e. more than one client and litigation friends).

Term "advocacy or litigation services" not appropriate as, if case does not go to proceedings and trial, lawyer will not be providing either. Suggest "legal services" more appropriate as it reflects the process pre and post issue.

"Funder" defined as being the only party liable to pay the lawyer's fees. Possible client may be liable for the fees in some circumstances. Redraft definition to read: "Funder means a party to a CCFA who, under that agreement, may be liable to pay the legal representative's fees".

"Legal representative" does not deal with a delegated legal representative adequately. Also unclear whether the "legal representative" signing the CFA needs to be an individual person, as stipulated in the regs, or the firm can sign. Clarification is needed here.

"Percentage increase" – unclear, badly drafted and redundant. Requirement that CFA must state the amount of fees is in primary legislation (Courts and Legal Services Act 1990 s58 (2)) does not need to be repeated in regs. Additionally the final mention of "agreement" within the definition must relate directly to a CFA. If definition is needed suggest: "percentage increase means that percentage by which the amount of the fees which would be payable if the retainer were not a CFA is to be increased under the CFA".

Reg 3 – replace "must specify" with "should identify". Use of the imperative "must" could lead to arguments about the non-inclusion of minor piece of information & attempt to invalidate CFA. Requirements must be kept to minimum.

"Proceedings" does not adequately define circumstances to which the regs need to apply, "claim" should be used in its place.

Reg 4 – again replace phrases as in Reg 3.

Reg 4 duplicates provisions within primary legislation & within current cost rules so is unnecessary. Do not complicate by including in regulations. If this regulation is retained should reflect fact that primary legislation does not require the reason for setting a percentage increase.

Reg 5 – we again believe this is unnecessary, duplicating primary legislation. If retaining then amend “proceedings” with “claim”. In any case 5 (2) is contradictory and redundant. It states there can be a CCFA if the client is named and if the client is unnamed.

Reg 6 – again replace “proceedings” with “claim” and “must” with “should”.

Reg 7 – replace “must” with “should” throughout.

Reg 9 – majority of the regulations can be subsumed into professional conduct rules. Redraft to say “Regulations 1–8 of the current proposed draft regulations should be deleted and inserted into the professional practice rules and all previous regulations be revoked”.

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11. Unison

Reg 3, 4 and 7 (1) redraft precisely so that CCFAs clearly do not apply in these regulations.

Reg 5 (3) needs to be amended to remove the reference to “any statement prepared under Regulation 6” as this complicates matters.

Reg 8 redraft to ensure it takes into account the nature of CCFAs and does not impact on older cases unnecessarily.

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12. Jeremy Morgan QC

Regs 3 & 4 – These should be expressly disapplied to CCFAs.

Regs 3 (2) & 5 (3) – Omit the words “or part of them” so the CFA has to state the circumstances in which all the lawyer’s fees under it are payable.

Reg 5 (3) – Confine the obligation to the CCFA by deleting the reference to a written statement.

Reg 6 – After the words “when accepting instructions” add “on conditional fee terms”.

Reg 7 (1) – Make provision for (a) signature by the person liable to pay the fees to suffice (b) where there is a signature by an indemnifier but not by an indemnified no objection is allowed based on the indemnity principle.

Reg 7 (2) – Make clear in the case of CCFAs Reg 7 (1) does not apply.

Reg 8 – serves no purpose.

Access to Justice (MO) Regs 2004

Reg 2 – For “agreement” substitute “arrangements made on or after”.

Reg 4 (3) – If not deleting this altogether then (1) limit the obligation to provide a statement, to circumstances in which the client may be liable to the funder for the costs of all or part of any proceedings.

Reg 5 – Make the cost of comparable insurance on the market not just the ceiling but also the yardstick for s30 sums.

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13. Irwin Mitchell

Reg 1 Definitions – Amend “legal representative” – after person insert “or the firm of solicitors”.

“Percentage increase” after fees delete and insert “payable by a client is to be increased under the CFA”.

Insert “Proceedings” means the investigation of a potential cause of action or defence and/or the pursuit of a claim or counter-claim.

Reg 3 After “must” delete “specify” and insert “, so far as is reasonably practicable, at the point in time when the agreement is signed, identify for the benefit of the client, the following:-”

Then (1) & (2) as per draft and insert after end of (2):

“Provided that:-

(a) There shall be no requirement for the Agreement to prescribe for every potential outcome which may arise in the course of litigation; and

(b) In the event of any minor infringement of this Regulation the CFA shall remain valid and enforceable.”

Reg 4 After 4 (c) insert “Provided that, if the CFA does not comply with this Regulation, the percentage increase shall cease to be payable”.

Reg 5 After (2) insert replace (3) with:

“(3) A CCFA must specify the circumstances in which the legal representative’s fees and expenses or part of them are payable.

(4) Any statement prepared under Regulation 6 shall specify the general circumstances in which the legal representative’s fees and expenses or part of them may become payable by the client.”

Reg 6 Delete (a), (b) and (c) and insert after “written statement” setting out the information in (2) below.

(2) A written statement prepared by the legal representative must contain the following information:-

(a) The amount of the percentage increase in relation to the specific proceedings;

(b) The reasons for setting the percentage increase at the level stated in the written statement; and

(c) If any of the percentage increase relates to the costs to the legal representative of the postponement of the payment of his fees and expenses, the amount of that percentage.

(3) If the legal representative fails to prepare and/or retain a written statement containing the information required in (2) above, the percentage increase shall cease to be payable.

Reg 7 At (1) after “must be signed by the client” insert “or, if the client is incapable of signing the agreement, by an agent or representative for and on behalf of the client, also by the legal representative”.

Reg 8 Specify that where there are relatively minor amendments they can be dealt with by way of correspondence between client and legal representative without invoking regs 2 to 7.

The Access to Justice (MO) Regs 2004

Reg 4 (3) (a) Before “circumstances” insert “general”, and after “proceedings” insert “; and”.

Reg 5 (1) After “body or other person” insert “who is a”.

Reg 5 (2) After “premium of an insurance policy” delete the rest and insert “to indemnify the member against any liability to pay the costs of other parties to the proceedings”.

Annex C: Media organisations – suggested rule changes

Media organisations – suggested rule changes

Introduction

Suggestion 1 explains the scope of these suggestions. Suggestions 2 to 6 propose methods for controlling the costs and recoverable success fees in publication proceedings, dealing with issues in the order they usually arise in the course of a claim. Suggestions 7 and 8 address the issue of ATE insurance. Suggestion 9 deals with the costs of costs assessment proceedings. References to CPD are references to the costs practice direction supplementing parts 43 to 48 of the Civil Procedure Rules.

Suggestion 1

For the purpose of these provisions, “publication” proceedings mean claims brought in defamation, malicious falsehood, breach of confidence and misuse of personal information, against the media or not, and Data Protection Act claims relating to the publication by or to the media of allegedly personal or sensitive personal data. In these suggested provisions, any reference to defendant should be taken, where appropriate, to be a reference to a person joined as a third party.

The listed claims comprise the causes of action, which most commonly have the potential to chill freedom of expression and where Conditional Fee Agreements are most commonly encountered. The awards of damages in breach of confidence and misuse of personal information cases have tended to be even more modest than those awarded in defamation, but the legal costs have tended to be very high and the success fees charged commonly of the order of 100%.[1] It is suggested that the concerns outlined by the Court of Appeal in *Musa King v Telegraph Group Limited* [2004] EWCA 613 (Civ) have equal application in relation to claims of this type. Since the decision of the House of Lords in *Campbell v MGN* [2004] 2 WLR 1232, the governing principles in claims relating to personal privacy should now be

[1] See, for examples of success fees allowed in defamation cases, *Walker v Newcastle Chronicle* (11/12/1): 95% (solicitors), 100% (counsel); *Rahamin v Channel 4 & ITN* (16/5/2): 95% (including on costs assessment).

relatively clear. Data Protection Act claims are commonly pleaded in the alternative to claims for the misuse of personal information, when in reality the claims stand or fall together. A concession to this effect was made by both parties in the Campbell appeal. The Data Protection Act is complex and alternative claims under the Act commonly add substantially to the recoverable costs without in any way affecting the outcome in terms of liability or damages. It is accordingly suggested that there is no reason to confine the application of these principles to defamation cases only. Other causes of action relating to freedom of speech, such as slander of title, are rare and therefore excluded from the definition.

Suggestion 2

In relation to costs, fees or expenses incurred by the solicitor of a claimant or prospective claimant prior (in defamation cases) to the making of an offer to make amends under section 2 of the Defamation Act 1996 or, where no offer of amends is made and in cases other than defamation cases, the service of a defence, the court may not award an additional liability in excess of 12.5%.

There is a strong public policy in favour of early and economic settlements. This has been the subject of endorsement by the Court of Appeal in the context of defamation proceedings both in *Musa King and Milne v Express Newspapers* [2004] EWCA (Civ) 664. The higher the allowable costs at these initial stages, the less likely are the prospects of prompt settlement. As Musa King makes clear, a claimant's solicitors should **not** be incurring very substantial base costs at the pre-action protocol stage. It is also relevant that a high proportion of claims of this type settle early. In RTA cases, which settle for less than £10,000 without proceedings being started, the fixed recoverable success fee is 12.5% (see CPR 45.11). Where a claim is issued in an RTA case, but is concluded before a trial has commenced, the percentage increase allowed in relation to solicitors' fees is 12.5% (which may be varied up or down in certain high-value cases) (see CPR 45.16 & 45.18). Other fixed uplifts now also apply to counsel's fees in RTA cases (see CPR 45.17 & 45.18) and to both solicitors' and counsel's fees in certain employers' liability claims (see CPR 45.21–45.22).

Suggestion 2 is more modest than the statutory schemes now in place for RTA and employers' liability cases in that it imposes a maximum success fee only until (at the latest) service of a defence. In two other respects Suggestion 2 differs from these schemes. Firstly, it preserves the 12.5% maximum in respect of the first stages of a claim even where the case progresses beyond those stages (whereas, under the other statutory schemes, 100% could be recovered in respect of the whole claim in those circumstances). Our rationale is that in an Article 10 context, there is an unacceptable ransom factor in demanding, say, 12.5% to settle with the threat of 100% if you do not. The sanction of a potentially higher success fee on the following costs should suffice as a sufficient encouragement to settlement. Secondly, in our suggestion, the 12.5% ceiling in the early stages of a claim and any higher rates thereafter are maximum uplifts, which it would always be open to a defendant to challenge by reference to the specific risk factors of an individual case, not (as in RTA and employers' liability cases) uplifts which are "to be allowed" subject only to a discretion in certain high-value claims.

The media understand that one of the principal claimant firms of solicitors say that they currently adopt a three-stage approach, setting different success fees for the period up to issue of a claim form, from that point until 45 days before trial, and thereafter until the end of the case. It is submitted that this scheme (if it exists) does not reflect the fact that the true "low risk" period extends at least up to the point at which a defence is served. It is understood that these solicitors charge an uplift of 25% for the initial period. In view of the high number of claims which are, in the media's experience, predictably disposed of at an early stage, this figure appears excessive.

Suggestion 3

In any case in which proceedings are initiated or pursued under a Conditional Fee Agreement [1], a master should in the absence of special circumstances [2] and unless otherwise agreed by the parties [3] make an order directing that the recoverable costs of the action should be limited to a specified amount inclusive of any additional liability [4]. Such a direction should be made as soon as reasonably practicable after the filing by the parties of allocation questionnaires but may be made at any other time when it appears to the court that it would be appropriate [5]. Such a direction may provide that if either party wishes to make any application that may significantly affect the costs of the action, it must apply to the court to vary the direction and must serve notice of its application on all other parties [6]; and that all parties must then serve updated estimates of costs pursuant to section 6 of the Costs Practice Direction within a specified time of such notice being given to enable the court to decide whether and to what extent it will vary this direction either before it permits this application to be issued [7] or when the application is heard [8]. A master may make such an order in any other case where justice and proportionality require it.

This direction substantially reflects the proposal made by Brooke LJ in *Musa King v Telegraph Group Limited* at paragraphs 92–94 and is based on s65 of the Arbitration Act 1996. The above draft has a number of refinements reflected in the numbered notes as follows:

> [1] In that it applies to all CFA cases and not just those where there is no ATE insurance in place, this suggestion goes beyond Musa King. We take the view that, while the prospect of having to pay its own costs even in the event of victory contributes to the chilling effect on a media defendant, the chilling effect even in a case where insurance is in place is substantial enough to justify the proposed cost-capping regime (not least because, in those circumstances, a defendant would be exposed to the risk of paying not just the claimant's costs plus percentage uplift, but also the premium the claimant has paid for his ATE insurance, which, in the current market, can be extremely high indeed). The final sentence of the draft clarifies that the cost-capping regime may be adopted as a matter of discretion in non-CFA cases as well.
>
> [2] It would seem sensible to provide some margin for discretion. There may be exceptional cases where no order or some more refined order is necessary.

[3] Clearly after filing of allocation questionnaires or close of pleadings, it may be possible for the parties to agree an appropriate “cap”. It is to be hoped that in time orders will provide precedents. Paragraph 104 of the Musa King decision refers to working out the appropriate details “on a case by case basis”.

[4] As matters presently stand the allocation questionnaire does not have to reveal the additional liability claimed (CPD 6.2(2)). Musa King (para 100) observes that it is not for the Courts to override CPD 19.1(1) and require a litigant to disclose the success fee to the other side. Paragraph 101 of the Musa King judgment, however, makes it clear that the cap should cover any additional liability. Paragraph 102 explains that it is an acceptable price to pay if the effect of cost capping is that CFA solicitors only accept cases in this class of case where there is a chance of success, which is significantly better than evens.

[5] CPD 6.4 requires the filing of an estimate of base costs and service of a copy on the other party. This therefore seems a logical time for a cost-capping direction to be made. It should, however, be noted that CPD 6.3 gives the court the power to require an estimate for costs at any time so as to be able to consider the cost management effects of any case management decision. The wording here also permits the court to make an order earlier. This may be of special importance in minor cases involving individuals (where the costs threaten to become disproportionate at an early stage); media cases, where few persons would identify the claimant and similar problems arise; and cases where the defendant from an early stage makes clear a willingness to apologise.

[6] [7] These provisions follow a suggestion made at paragraph 93 of the Musa King judgment.

[8] There is a danger that if the master is obliged to hear the application to vary the direction before the substantive hearing is heard (the procedure recommended in the last sub-paragraph of paragraph 93 of the Musa King judgment), this may proliferate hearings and increase the costs, which a defendant may ultimately be unable to recover. If, for example, a party seeks to make a substantial amendment, there is much to be said for the court which is determining that application (most likely to be one of the Judges who hears Jury List applications) to decide what variation (if any) should be made as to the recoverable costs. That assessment may be impossible to determine immediately and may turn on the extent to which factual amendments are

disputed by the other party. What is clear is that the Court must be in a position to assess the cost consequences before the substantive application is heard.

Suggestion 4

In determining the specific figure to which costs should be limited, the court must have regard to the maximum likely financial compensation which the claimant may recover, if successful, in determining a figure which is both reasonable and proportionate. To this extent, in proceedings initiated or pursued under a Conditional Fee Agreement, CPD 11.9 is disapplied. In making any cost-capping order in any circumstances, the court must have regard to the principles set out in CPR 44.3.

This reflects the last sentence of paragraph 101 of Musa King, which we read as clearly stating that CPD 11.9 should not be applied in CFA cases where there is no appropriate ATE insurance in place. However, as with Suggestion 3 and for the reasons set out in footnote [1] thereunder, we propose that the direction should encompass all CFA cases, whether or not ATE insurance is in place. The last sentence reflects paragraph 85 of the Musa King judgment.

Suggestion 5

In deciding whether a percentage increase is reasonable (whether generally or in respect of a particular item or items of costs or for a particular period or periods during which costs were incurred) the court will have regard to all the circumstances including (where appropriate):

(a) in an action or proposed action for defamation, any offer to make amends that has been made under section 2 of the Defamation Act 1996 and the stage at which it was made;

(b) any correction or apology that has been offered or made and the stage at which it was offered or made;

(c) any admission by the defendant or proposed defendant (whether of liability generally, or in respect of some fact or issue) and the stage at which it was made;

(d) any offer or agreement by the defendant or proposed defendant to participate in ADR in respect of any issue in dispute and the stage at which the offer or agreement was made;

(e) the nature and number of issues in dispute and the extent to which and the stage at which the issues were narrowed or reasonably sought to be narrowed prior to and/or during the course of proceedings;

(f) any failure to observe the Pre-action Protocol.

The level of risk to a claimant and his solicitor does not remain constant throughout the action, yet the apparently common awards of success fees in the region of 100% for the entirety of an action indicate that events in the proceedings which reduce the risk (or otherwise make it unreasonable to recover a high success fee) are not being given due weight. We therefore propose this express provision setting out a (non-exhaustive) list of common risk-reducing and other material matters which must be taken into account. Where a case is settled before service of defence (or making of an offer of amends), these (and other relevant) factors would serve to reduce the success fee below the maximum uplift permissible under Suggestion 2. Suggestion 9 is a related suggestion applying to costs proceedings.

The three-stage approach claimed to be taken by a principal claimant firm of solicitors (see Suggestion 2 above) is plainly not sufficiently flexible to reflect the many risk-reducing events (some of which are set out above) which may occur in the course of an action.

Suggestion 6

In considering whether any percentage increase is reasonable the court shall consider what other methods of financing the costs were available to the receiving party, including the extent to which the receiving party was in a position to finance the costs himself without recourse to a conditional fee agreement.

This rule, which must take precedence over CPD 11.8(1)(c) may go beyond the Practice Direction in terms of precisely what is to be considered, and certainly goes beyond it in the sense that it is a mandatory requirement, not a discretionary one. It is necessary to address the case of wealthy claimants (who are common in publication proceedings) for whom a CFA is unnecessary in order for them to achieve access to justice. In those cases the recovery of a success fee from an unsuccessful defendant will often be unreasonable and disproportionate.

Suggestion 7

A solicitor should not take out after the event insurance for his client's potential liability for the defendant's costs where the solicitor intends to seek payment of the premium by the defendant, if his client is successful, without (a) giving the defendant reasonable notice of his intention to do so, of the premium, the extent of the cover to be provided, the terms on which it is to be provided (including any exclusion clauses) and the stage or stages to be covered; (b) giving the defendant a reasonable opportunity to agree or object to such cover being taken out.

ATE insurance premiums can be very high indeed, leaving the defendant with a potential exposure for the claimant's base costs, 100% mark-up, and a premium close to the total of the defendant's likely costs. There will be claims, which are so strong that insurance is unnecessary. There may also be borderline cases, where a defendant would prefer not to be exposed to the risk of a premium, especially early in the proceedings, if there is a realistic prospect of settlement. The media understand that one of the principal providers of ATE insurance (Temple Legal Protection) insist upon a policy being taken out at the very outset of a claim, without waiting to see whether the defendant proposes to resist or make an offer of amends in a libel complaint.

In light of Lord Hoffmann's doubts and Lord Scott's strong dissent in *Callery v Gray* [2002] 2 WLR 2000, there has to be a very real question mark over whether this practice should continue (see, further, the notes under Suggestion 9, below), particularly in cases where (unlike Callery) Article 10 is engaged. The fact is that in certain cases it will be obvious from the outset (or, if later, the point at which ATE insurance is sought) that the claim is bound to succeed with a payment of damages and costs. In such cases there is, in reality, little or no risk to insure and a premium recoverable from a defendant is nothing but a penalty or tax on newspapers or broadcasters for the benefit of insurers. Media defendants should have the opportunity to challenge the need for, or terms of, the insurance prior to its being taken out.

Suggestion 8

In deciding whether the cost of insurance cover is reasonable, the court will take into account (a) the stage or stages of the proceedings for which the insurance cover has been taken out; (b) whether, where a case has been settled before trial, that stage had been reached or was imminent by the time of settlement; (c) the time at which the premium for the insurance cover falls to be paid and whether there are circumstances in which the claimant will not be required to pay any or some part of the premium; (d) the means of the claimant.

To a degree, this is already covered by CPD 11.10(2). Most defamation actions settle. The stages at which they settle vary considerably. The following represent the main procedural chapters of libel litigation for these purposes – the initial correspondence (where in cases of obvious error, liability is often conceded whether by an offer of amends under the Defamation Act or otherwise); after statements of case, when the parties detailed cases have been reduced to writing (normally by reference at least to the relevant documents held by the party drafting the statement of case); after disclosure (when the other party's documents are inspected and assimilated); after exchange of witness statements; and finally in the immediate run-up to trial. There is also a clear distinction between cases, where liability is in issue and those where the only issue is damages. In some cases, it may be appropriate to try mediation/arbitration early; in others, later. All these considerations are fact sensitive. However it is suggested that generally insurance cover should be taken out by stages, and media defendants should not be exposed to liability for expensive premiums covering later stages of the litigation, which may never in fact be reached. This concern is statistically sound in that the great majority of defamation claims settle before trial.

In an Article 10 case (and notwithstanding the decision in *Callery v Gray*, where Article 10 was not engaged) it will frequently be unreasonable for a claimant to recover the premium for ATE insurance taken out at the very outset of his claim and covering the initial period, where the claim is obviously strong and the defendant has not even indicated an intention to resist it (see, further, the notes under Suggestion 2 above). At the very least it is imperative that the courts insist on very steep discounts for such premiums where in fact, and predictably, the defendant swiftly acknowledges liability and a claim form is never issued. It is understood that Temple Legal Protection use a three-stage scheme for their insurance premiums mirroring that which some firms of solicitors say they employ for the CFA uplifts. The same observations about the inflexibility of such a scheme apply here.

Suggestion 9

In deciding what, if any, additional liability may be recovered in relation to costs proceedings, including any application for a cost-capping order, the court shall not have regard to the additional liability recoverable in the substantive proceedings, and shall have regard to precedent in costs proceedings generally.

It is common for high success fees to be charged by CFA solicitors in this field, and indeed commonly as high as the fee sought in the main proceedings. This is out of line with guidance from the Court of Appeal in other areas. In *Hardcastle v Leeds & Holbeck Building Society* (LTL 7/7/3), following the Court of Appeal's guidance in *Halloran v Delaney* [2002] EWCA (Civ) 1258, the court allowed a success fee of 50% in relation to the substantive claim up to settlement, but only 5% in relation to the disputed assessment of costs. We suggest that there is no reason in principle why success fees in costs proceedings in this class of litigation should be treated any differently from success fees in costs proceedings in other areas. Indeed, applying Musa King, there are positive reasons why success fees should be more strictly controlled, having regard to the special Article 10 considerations to which Musa King refers.

ANDREW CALDECOTT QC
AIDAN EARDLEY

September 2004

Annex D: List of respondents

Making Simple CFAs a Reality consultation paper (June 2004)

List of Respondents

1. Abbey Legal Protection
2. Accident Injury Claims Limited
3. Advance Legal
4. Allianz Cornhill Insurance
5. Association of Personal Injury Lawyers (APIL)
6. Association of Law Costs Draftsmen (ALCD)
7. Action against Medical Accidents (AvMA)
8. AXA Insurance
9. Bar Council (England and Wales)
10. Beachcroft Wansbroughs Solicitors
11. Berrymans Lace Mawer
12. Bristol Law Society
13. Carter Ruck
14. DAS Legal Expense Insurance Company
15. David Price Solicitors & Advocate – Adele Ashton
16. Davies Gregory Solicitors
17. Directline (Royal Bank of Scotland)
18. DLA Solicitors
19. Forum of Insurance Lawyers (FOIL)
20. Gordon Wignall – Barrister
21. Group Litigation Costs Services LLP
22. Institute of Legal Executives (ILEX)

23. Irwin Mitchell
24. Jeremy Morgan (Essex Street Chambers)
25. John Butcher
26. Karen Stewart
27. Keoghs Solicitors
28. Law Society of England and Wales
29. Master O'Hare – Costs Judge – Supreme Court Costs Office (SCCO)
30. Medical Defence Union
31. Motor Accident Solicitors Society (MASS)
32. Peter Hurst – Senior Costs Judge – SCCO
33. Reynolds Porter Chamberlain
34. Temple Legal
35. Thompsons
36. Tony Girling
37. Treasury Solicitor
38. Underwoods
39. Unison
40. Zurich Financial

Annex E: Draft statutory instruments

D R A F T S T A T U T O R Y I N S T R U M E N T S **D R A F T**

2005 No.

LEGAL SERVICES, ENGLAND AND WALES

The Conditional Fee Agreements (Revocation) Regulations 2005

Made - - - -	*xxxx 2005*
Laid before Parliament	*xxxx 2005*
Coming into force - -	*xxxx 2005*

The Secretary of State, in exercise of the powers conferred upon the Lord Chancellor by sections 58(3)(c), 58A(3), 119 and 120(3) of the Courts and Legal Services Act 1990[a] and now vested in him[b] makes the following Regulations:

Citation and commencement

1.These Regulations may be cited as the Conditional Fee Agreement (Revocation) Regulations 2005 and shall come into force on xxxx.

Revocation

2.Subject to Regulation 3, the Conditional Fee Agreements Regulations 2000[c] (the "**CFA Regulations**") and the Collective Conditional Fee Agreements Regulations 2000[d] (the "**CCFA Regulations**") are revoked[e].

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[a] 1990 c.41. There are relevant amendments in the Access to Justice Act 1999 c.22.
[b] Article 4, Schedule 1 and paragraph 8(1)(c) of Schedule 2 of the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003/1887).
[c] S.I. 2000/692.
[d] S.I. 2000/2988
[e] There are relevant amendments in the Conditional Fee Agreements (Miscellaneous Amendments) Regulations S.I. 2003/1240

Savings and transitional provisions

3.—(1) The CFA Regulations shall continue to have effect for the purposes of a conditional fee agreement entered into before xxxx.

(2) Paragraph (1) shall apply in relation to a collective conditional fee agreement as if there were substituted for a reference to the CFA Regulations a reference to the CCFA Regulations.

Signed

Name
Address — Parliamentary Under Secretary of State
Date — Department for Constitutional Affairs

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations revoke the Conditional Fee Agreements Regulations 2000 and the Collective Conditional Fee Agreements Regulations 2000 in respect of conditional fee agreements and collective conditional fee agreements entered into after xxxx.

DRAFT

D R A F T S T A T U T O R Y I N S T R U M E N T S **D R A F T**

2005 No.

LEGAL SERVICES, ENGLAND AND WALES

The Access to Justice (Membership Organisation) Regulations 2005

Made - - - -	*xxxx 2005*
Laid before Parliament	*xxxx 2005*
Coming into force - -	*xxxx 2005*

The Secretary of State, in exercise of the powers conferred upon the Lord Chancellor by sections 30(1) and (3) to (5) of the Access to Justice Act 1999[(a)] and now vested in him[(b)] makes the following Regulations:

Citation and commencement

4.These Regulations may be cited as the Access to Justice (Membership Organisation) Regulations 2005 and shall come into force on xxxx.

Revocation and Transition

5.—(1) Subject to paragraph (2), the Access to Justice (Membership Organisation) Regulations 2000[(c)] (the "**2000 Regulations**") are revoked.

(2) The 2000 Regulations shall continue to have effect for the purposes of arrangements entered into before xxxx as if these Regulations had not come into force.

Bodies of a prescribed description

6. The bodies which are prescribed for the purpose of section 30 of the Access to Justice Act 1999 (recovery where body undertakes to meet costs liabilities) are those bodies which are for the time being approved by the Secretary of State for that purpose.

Requirements for arrangements to meet costs liabilities

7.—(1) Section 30(1) of the Access to Justice Act 1999 applies to arrangements which satisfy the following conditions.

[(a)] 1999 c 22.
[(b)] Article 4, Schedule 1 and paragraph 11(1)(c) of Schedule 2 of the Secretary of State for Constitutional Affairs Order 2003 (S.I. 2003/1887).
[(c)] S.I. 2000/693.

(2) The arrangements must be in writing.

(3) The arrangements must contain a statement specifying the circumstances in which the member may be liable to pay costs of the proceedings.

Recovery of additional amount for insurance costs

8.—(1) Where an additional amount is included in costs by virtue of section 30(2) of the Access to Justice Act 1999 (costs payable to a member of a body or other person party to the proceedings to include an additional amount in respect of provision made by the body against the risk of having to meet the member's or other person's liabilities to pay other parties' costs), that additional amount must not exceed the following sum.

(2) That sum is the likely cost to the member of the body or, as the case may be, the other person who is a party to the proceedings in which the costs order is made of the premium of an insurance policy against the risk of incurring a liability to pay the costs of other parties to the proceedings.

Signed

Name
Parliamentary Under Secretary of State
Department for Constitutional Affairs

Address
Date

DRAFT
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations revoke the Access to Justice (Membership Organisation) Regulations 2000 in respect of arrangements entered into after xxxx, and make new provision for the purposes of arrangements entered into after that date.

Annex F: Final regulatory impact assessment

Simplifying CFAs – final regulatory impact assessment

Title of proposal

1. The Government's conclusion and proposals following a formal public consultation by the Department for Constitutional Affairs (DCA) on *Making Simple CFAs a Reality*.

Purpose and intended measure

Objective

2. The aim is to make CFAs simpler, clearer and more transparent both for the individuals using them and the solicitors advising individuals about their cases and whether to use CFAs.

Devolution

3. This change applies to England and Wales only.

Background

4. Conditional Fee Agreements (CFAs), Collective Conditional Fee Agreements (CCFAs) and the Membership Organisation Regulations 2000 made significant changes to the way in which personal injury cases are funded by introducing the concept of being able to recover success fees and after the event (ATE) insurance premiums from opponents.

5. The consultation paper issued in June 2003[2] examined the key issues and perceived problems concerning conditional fee agreements and the related regime, and sought views, comments and proposals on what, if anything, needed to be changed. Following consultation, the Government will revoke the existing CFA and CCFA regulations and focus client care and contractual responsibilities in the Law Society's practice rules and costs information code. The perceived problems were as follows:

    - Existing CFA regulations are too complex and extensive.
    - Existing regulations encourage technical challenges from the losing party.
    - Existing CFA regulations are difficult for individuals to understand.
    - Existing CFA regulations duplicated the requirements of the Law Society's Professional Conduct Rules.

6. The consultation paper *Making Simple CFAs a Reality* issued in June 2004 provided a summary of responses to the consultation paper published in June 2003. It set out DCA's proposals to reform the secondary legislation governing the operation of CFAs and published a set of new draft regulations for consultation.

7. The paper also stated DCA's response and, where appropriate, proposed action on a number of other issues raised during the 2003 consultation period, including: the regulation of claimed management intermediaries; the indemnity principle; the impact of recoverability; and the potential for the use of CFAs in cases run on a pro bono basis. The paper also discussed the impact of CFAs and costs more generally in defamation cases and invited respondents to comment on the problems identified and on potential solutions.

8. Respondents were also invited to comment on the partial regulatory impact assessment.

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[2] *Simplifying CFAs – The Conditional Fee Agreement regime including the Conditional Fee Agreements, Collective Conditional Fee Agreements and Membership Organisation Regulations – CP 09/03*.

9. The consultation was widely welcomed, and respondents included the legal professional bodies, trade unions, media groups, the judiciary, individual practitioners and the insurance industry. In addition, a round table event on issues raised by the consultation paper was held on 8 July 2004. This was hosted by the DCA Minister David Lammy, was attended by a range of key stakeholders, and provided a forum to discuss the implications of the consultation paper.

10. Respondents generally agreed with the proposal that the CFA regulations should be simplified and client care moved to the Law Society Professional Conduct Rules. Some suggested that it was essential that provision be made within the Professional Conduct Rules to describe the penalties for failure to comply with the rules.

11. The proposed changes are as follows:

- To remove the client care and costs information requirements from the CFA regulations and to focus the client care and contractual responsibilities in the Law Society's Professional Conduct Rules and client care and costs information code.

- To revoke the existing CFA and CCFA regulations for all new cases and to rely on the primary legislation (Access to Justice Act 1999) to provide the minimum government legislative framework for the use of the CFAs by the legal profession by Autumn 2005.

- To work with the Law Society to make any necessary revisions to the Law Society costs information code and the development of a new model CFA for solicitors' use by Autumn 2005.

- To simplify the Membership Organisation Regulations to the extent that primary legislation will allow.

- To introduce consequential amendments to the Civil Procedure Rules in respect of changes to the regulations after the CFA legislation is amended.

Rationale for government intervention

12. Retaining the existing CFA regulations with their complexities would minimise the use of CFAs and deny access to justice to people with genuine claims, and would hamper the development of CFAs as a preferred means of funding litigation.

13. The main risks identified are that the complexity of the current CFA requirements has made it more than necessarily difficult for solicitors to explain their application to their clients and has also made the process less transparent. All respondents agreed that the current CFA secondary legislation is unnecessarily complex and should be simplified, and that the regime should be made more transparent. They believed the very detailed nature of the requirements had led to enormous problems in the application of CFAs, which are virtually impossible to explain to clients.

14. There is duplication of regulation of solicitors in client care matters, which has caused some concerns among the professionals. This has made CFAs susceptible to technical challenges from third parties, has put unnecessary burdens on professionals and has caused wasted time and costs. Advice agencies have seen an increase in clients coming to them for advice on CFAs and their application. Revoking the current CFA regulations would reduce unnecessary regulations, improve the current legislation and achieve greater stability, simplicity, transparency and higher standards, which would help both the clients and the professional bodies. The majority of the respondents agreed that the proper place for regulating the behaviour of solicitors and for looking after the interests of consumers was in the Law Society's rules rather than in secondary legislation, which had instead become a target for payment avoidance tactics by losing defendants.

Scaling the issues

15. There is a lack of data on the number of claims brought under a CFA. This information is not collected centrally. It has been suggested by the liability insurance industry and other major defendant organisations in personal injury cases that CFAs have contributed to the general increase in legal costs. There is also the fear of CFAs being challenged, and this has led to more costs and undue strain on the viability of businesses. No data has been forthcoming from the respondents to the consultation.

16. CFAs are at risk of legal challenge. Defendant solicitors have brought legal challenges on the grounds that the CFA the claimant solicitors had entered into with their clients was materially breached. Different legal challenges may well focus on different aspects of the CFAs, causing a rise in the number of cases being brought to court. Courts may also experience a rise in the number of claims on costs issues. No respondents commented or provided any data or further information on this subject.

17. Most respondents believed that consumers should have access to justice and that legal costs involved in bringing an action should be reasonable. Liability insurers are frequently paying out on legal costs and the success fee of a CFA. This has the knock-on effect of making insurance more expensive for everyone, which is particularly unfair on the vast majority of consumers who do not make a claim.

Options

18. The main options are:

    Option 1 – Do nothing: make no changes to the CFA regulations

    This option would retain the existing CFA regulations with their complexities, minimising the use of CFAs, denying access to justice to people with genuine claims, and hampering the development of CFAs as a preferred means of funding litigation.

    Option 2 – Simplify the CFA regime

    This option would replace the existing complex CFA and CCFA regulations with a simpler set of requirements contained in one set of regulations that would form the minimum statutory framework. Simplifying the CFA regime would also focus client care and contractual responsibilities in the Law Society’s practice rules and costs information code.

Option 3 – Revoke the existing CFA regulations

The consultation process has helped make it clear that simplification can be taken further than originally proposed by revoking the existing CFA regulations for all new cases and relying on primary legislation to provide the government legislative framework. Client care would be more appropriately and effectively covered in the Law Society's Professional Conduct Rules. Regulations duplicating the requirements of the Law Society's Professional Conduct Rules would cease.

Benefits

19. Option 1 – Do nothing: There would be no clear benefits. The objective of making CFAs simpler, clearer and more transparent both for individuals and the solicitors would not be achieved.

20. Option 2 – Adopt the proposed changes to simplify the CFA regime: This option would remove the detailed client care and costs information requirements from the current CFA regulations. It would revoke the CFA regulations introduced in 2000 and replace them with one set of regulations for both CFAs and CCFAs. Lawyers and clients using CFAs in bringing claims should find the process easier and more straightforward.

21. Option 3 – Adopt the proposed changes to revoke the CFA regime: This option should make the process simpler for both lawyers and clients who wish to bring a claim. The proposed changes should also remove the lack of clarity and transparency from the CFA regime, build trust and confidence among the lawyers and small businesses using CFAs, maintain stability of CFAs and reduce legal challenges in the courts on CFAs and their application.

22. The bodies we consulted did not provide any quantification of the possible benefits the proposals would achieve. However, all welcomed the proposals to replace the existing CFA regulations with a simpler set of requirements making the regime more transparent. Overall there may be some marginal reduction in costs for small businesses because revoking the CFA regulations would remove a complex regime with its lack of clarity and transparency. The Small Business Service did not provide any information on the savings small businesses might experience.

23. Many stakeholders from the legal profession have commented that generally simplifying the CFA regime would mean less expense and time for solicitors explaining the CFA – an average saving of one hour per case and, in terms of monetary value, approximately £150.00. The changes should also improve access to justice for claimants and defendants, as the regime should be less complicated.

24. The value of the benefit is difficult to quantify. Although information was invited from consultees as to the probable level of savings, none was received. We believe the removal of the regulations for new cases should enhance the benefits identified and be a major step towards better regulation. The removal of the regulations would also be consistent with the Better Regulation Task Force's current report *Regulations – Less is More. Reducing Burdens, Improving Outcomes* aimed at considering how Government can take deregulation much more seriously and boost the process of removing unnecessary and outmoded regulations.

25. Those benefiting from the proposals are as follows:

Main beneficiaries

- consumers
- the legal profession (solicitors and other legal providers)

Other beneficiaries

- advice agencies (in general)
- trade unions

26. For the consumers the proposed reforms would have the following benefits:

- Consumers would be able to receive clearer, more transparent, simpler and more accurate information from their solicitors and advisers about agreement on CFAs. This would help them make an informed decision about their claim.
- Consumers who are well informed are better able to make decisions based on the best option according to their circumstances and case. This is likely to reduce the number of consumers entering into agreements that they do not fully understand.

27. The following benefits to the legal profession from the proposed reforms were identified:

    - The current CFA requirements have led to some problems in their application and are difficult for solicitors to explain to clients. The legal profession believed that simplifying the current CFA regulations would reduce these problems and help to save time and expense – an average of one hour per case or approximately £150.00 per case. The proposed changes may lead to fewer cases being taken to courts on costs issues. We have consulted the departmental economists who carried out a forecasting of claims. They concluded that the number of cases going to courts had declined considerably since 2004 due to the effects of new costs rules relating to CFAs. Revoking the CFA regulations may further enhance the downward trend.

    - Regulations governing the behaviour of solicitors and client care are duplicated in the Law Society's practice rules and costs information code. Removing the client care protection from the secondary legislation in favour of the Law Society's rules should make CFAs less susceptible to technical challenges from third parties.

28. For the advice agencies the proposed reforms would have the following benefits:

    - The advice agencies have experienced a large number of cases where people with genuine claims have had difficulty in understanding the risks and liabilities they are exposing themselves to, as CFAs have not been clearly explained to them at the outset. The agencies also expressed their concerns about the ways in which claims intermediaries have exploited the CFA regime and pressured consumers through high-pressure sales tactics into agreements that they do not understand. The advice agencies believed that simplifying the CFA regime would reduce the number of customers entering into agreements which they do not understand and which may not necessarily be the best option for them. They also believed that simplifying the CFA regime would provide access to effective redress.

29. Trade unions would benefit from the proposal to remove the detailed client care and costs information required from the current CFA. Trade unions believed that the current CFA secondary legislation was unnecessarily complex and should be simplified.

Costs

Business sectors affected

30. The legal profession (small and large firms), advice agencies in general, individuals and DCA are likely to be affected by the proposed changes wherever civil litigation involves the use of CFAs and CCFAs. If the proposal to revoke the regulations is adopted then the burden on these groups should be reduced. DCA will have to revoke the regulations to reflect the changes, and the costs will be marginal. Fewer cases will go to court on costs issues. DCA believe that the downward trend in the number of cases going to court will be accelerated if the CFA regulations are revoked. The Law Society will need to revise its Professional Rules to include the client care component.

31. Changes to policy wordings and the model conditional fee agreement may be needed.

Costs for a typical business

32. The changes should impose no new requirements or costs on legal practitioners. Respondents did not provide information about any new costs they thought might arise from the changes.

Equity and fairness

33. Option 1 – Do nothing: Duplication of regulating solicitors and client care will continue. Those solicitors wishing to use CFAs would still be required to adhere to both the CFA regulations and the Law Society's Rules. The existing CFA regime is complex. The difficulty solicitors have in explaining to clients the CFA regime would result in clients being less likely to fully understand the process and being misled. This imbalance between the legal profession and client would continue.

34. Option 2 – Simplifying the CFA regime would mean solicitors would not have to spend as much time explaining the CFA to clients because it would be much simpler. Focusing client care and contractual responsibilities in the Law Society's Professional Conduct Rules and client care and costs information code would remove duplication and potential unfairness whereby the solicitor has to follow both the regulations and the Law Society's Rules.

35. Option 3 – Revoking the existing CFA regulations and minimising the statutory framework would result in parties concerned being better informed and clearer about the CFA process. This will create a level playing field between claimant and defendant lawyers as well as removing the unfairness to consumers who make poorly informed decisions. Revoking the regulations entirely would take this simplification to its ultimate conclusion and would be a major step in removing unnecessary legislation.

36. The proposals to revoke the CFA regulations will not affect any racial group unfavourably.

Compliance

37. It is believed that any compliance costs would be marginal. The legal profession currently complies with the existing CFA regulations and the Law Society's costs and information code. No figures or comments were received from the exercise, although further information on costing was sought as part of the consultation process.

Sensitivity analysis

38. The proposals are deregulatory and it is not anticipated that they will increase costs for businesses. Information to further improve assessment of the costs of the proposals was not forthcoming from respondents.

Consultation with the Small Business Service

39. We have consulted with the Small Business Service (SBS) who agreed that reforms to the existing CFA regulations should favour small businesses. The SBS commented that clients (businesses, claimant and individual) would receive adequate legal information on claims before agreeing to sign any document. The SBS also commented that all legal advisers would be required to focus on client care and contractual responsibilities in the Law Society's practice rules and costs information code.

40. It is unlikely that small businesses would be affected by any increase in costs. We do not believe that revoking the existing CFA regulations would have any financial implication for small businesses. The SBS did not provide any information on costs to small businesses. Respondents did not provide any information about any cost implications associated with the proposed changes.

Competition assessment

41. It is not anticipated that Option 3 would have any impact on competition. The competition filter was completed and indicated no impact on competition.

Enforcement and sanctions

42. The Law Society regulates solicitors through the professional practice rules and costs information code and would therefore oversee conduct and compliance. Failure to comply with the rules may result in solicitors being subject to disciplinary action. If a CFA is not materially compliant with the Law Society's rules and model agreements the courts may find that a CFA is unenforceable and solicitors will lose their costs.

Monitoring and review

43. The Law Society would monitor the operation of the new set of rules. The operation of the proposal to revoke the CFA regulations would be reviewed three years after implementation.

Consultation

44. The consultation paper was published on 29 June 2004 and closed on 29 September 2004. Forty responses were received. They included responses from the legal professions, the judiciary, insurance industry, media organisations, trade unions and individual practitioners. In addition a round table event hosted by the DCA Minister was held on 8 July 2004. The event, attended by a range of key stakeholders, provided a forum to discuss the implications of the consultation paper.

45. We also consulted with other government departments and agencies including Cabinet Office, Department of Trade and Industry, Department for Work and Pensions, HM Treasury and Office of Fair Trading. HM Treasury responded favourably.

46. The consultation was also published on the DCA website at: www.dca.gov.uk

47. All but one of the forty respondents favoured the proposal to simplify CFA regulation and to move client care to the Law Society Professional Conduct Rules. One respondent felt that on balance it would be better to keep the existing regime.

Summary

48. The consultation paper *Making CFAs a Reality* (code CP 22/04) published on 29 June 2004 set out the Department for Constitutional Affairs' (DCA) proposals to reform the secondary legislation governing the operation of Conditional Fee Agreements (CFAs) and published a set of new draft regulations for consultation.

49. The changes would be achieved by a number of secondary legislation reforms within the existing primary legislative framework, which do not create or require any new primary legislation. These include removing the detailed client care and costs information requirements from the current CFA regulations, revoking the CFA regulations introduced in 2000 and replacing them with one set of regulations for both CFAs and CCFAs. We are working with the Law Society to ensure that appropriate revisions to the Law Society's practice rules and costs information code are made. The Law Society is also working on producing a new model CFA for solicitors' use. The new regime will come into force in November 2005.

50. Legal representatives and clients using CFAs to bring claims should find the process easier and more straightforward. Advice agencies may experience a reduced number of customers approaching them for advice or help on bringing a claim under a CFA. Those who responded to the partial regulatory impact assessment commented that simplifying the CFA regime would mean solicitors would not have to spend as much time explaining the CFA to clients because it would be a much simpler document. The decision to revoke the regulations entirely will take this simplification to its ultimate conclusion and will be a major step in removing unnecessary secondary legislation.

Recommendation

51. We recommend Option 3 – the proposal to revoke the CFA regulations. This should make the process simpler for all parties concerned, remove lack of clarity and transparency from the CFA regime, and reduce legal challenges in the courts on CFAs and their application. Overall, the benefits of the proposal outweigh any costs and relieve all parties of the burden of the current regime's complexity.

Option	Costs to DCA	Total benefit per annum
1. Do nothing	A rise in the number of cases being brought to courts	Nil
2. Simplify the CFA regime	Negligible – We will have to amend the CFA regulations to reflect the changes	Less expense and time for solicitors explaining the CFA Duplication removed
3. Revoke the CFA regime	Negligible – We will have to amend the CFA regulations to reflect the changes	Less expense and time for solicitors explaining the CFA Duplication removed Better informed customers Fewer cases going to courts Improved access to justice

Option 3 is recommended as this delivers the full set of proposals.

Declaration

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed

Baroness Ashton of Upholland

Date 10 August 2005

Consultation Co-ordinator contact details

If you have any complaints or comments about the **consultation process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622 or email him at consultation@dca.gsi.gov.uk

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

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor, Selborne House
54–60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Produced by DCA
August 2005
CP (R) 22/04