



July 13, 2011

The Rt. Hon Kenneth Clarke QC MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
102 Petty France
London SW1H 9AJ

Dear Sir

The Legal Aid, Sentencing and Punishment of Offenders Bill 2011 (the “Bill”)

I am writing to you on behalf of the U.S. Chamber of Commerce Institute for Legal Reform (“ILR”) to express our deep concern over the provisions of the Bill which would liberalise the use of damages-based agreements (“DBAs”) in England and Wales.

A particular cause for concern is the potential for DBAs to be entered into in relation to collective litigation. In addition, the Bill does nothing to address the issue of third party litigation funding (“TPLF”). Both DBAs and TPLF have the potential to create incentives for speculative claims, especially in a collective context where they may enable lawyers and funders to generate profits which exceed the damages recovered by individual claimants. Adopting a ‘light touch’ approach in this area carries the risk of increasing the burden of expensive litigation. Accordingly, in ILR’s view it would run counter to the Government’s aim of reducing that burden.

The Bill should be amended so as to prohibit DBAs in collective litigation

The use of contingency fees in the United States has resulted in a number of problems, particularly in the context of class actions. In many class actions, the potential recovery for each individual class member is relatively small but the potential recovery for the entire class, consisting of hundreds or even thousands of members, may be large. Given that a lawyers’ fee will be calculated as a percentage of the total recovery, it may be huge in comparison to the compensation awarded to individuals.

The result can be that the litigation is run primarily to drive the lawyers' profits. This undermines the idea of class actions as a means of achieving justice for claimants. It may also drive the development of a class action industry in which lawyers are incentivised to enlist claimants to pursue claims and put defendants in a position where they will often settle due to the sheer scale of the liability confronting them. In some instances the scale of liability and the threat of negative publicity will lead defendants to settle regardless of the legal merits of the claims against them.

To reduce the risk of this situation being replicated in England and Wales, ILR strongly recommends that the Bill should be amended to prohibit the use of damages-based agreements in collective litigation.

The consequences of not doing so would be exacerbated if new procedures for collective redress are imposed at European Union level. ILR has consistently opposed such developments but fears that if new procedures are introduced then the Government's liberal approach to DBAs relative to many other EU Member States could make England and Wales a draw jurisdiction for mass claims.

In the alternative, the Bill should require detailed regulation of DBAs

If, despite our calls for a prohibition, damages-based agreements will be available in collective litigation then it is imperative that the Government takes the opportunity to put in place strict regulations to mitigate the risk of abuse.

In its consultation document of November 2010, the Government stated that it was not convinced of the need for detailed regulation despite Lord Justice Jackson's recommendation that the regulations now in place for employment matters should be adapted for that purpose.¹ ILR sincerely hopes the Government has changed its position. It is concerned, however, that there was no reference to regulations in the Government's response to the public consultation and the Bill does not currently require detailed regulations to be drawn up. The power to make regulations is available under section 58AA of the Courts and Legal Services Act 1990 and, in ILR's view, it would be a mistake not to exercise it.

The Bill should directly restrict the costs that successful parties which enter into DBAs may recover from the losing party

ILR is also concerned that the Bill leaves open the possibility of successful parties which enter into DBAs recovering all or part of the fee due under the agreement from the other party. In its current form, the Bill leaves the assessment of costs to

¹ Ministry of Justice, "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations", Consultation Paper CP 13/10, November 2010, paragraph 74.

be dealt with in rules of court without providing any direction as to the content of those rules. This is in marked contrast to the express prohibition which would be introduced by clause 41(4) of the Bill against costs orders allowing claimants to recover all or part of a success fee payable under a contingent fee agreement.

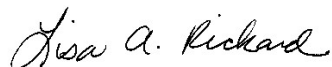
ILR can see no reason for this inconsistency and urges the Government to amend the Bill so that it implements directly the Government's stated policy of restricting the amount a successful party may recovery to its costs calculated according to its lawyers' hourly rates.²

The Bill should seek to address third party litigation funding ("TPLF")

ILR believes that while the Government is in the process of carrying through essential reforms of the civil justice system it should not neglect the issue of TPLF. Like DBAs, TPLF incentivises third party investors to promote litigation in order to achieve significant profits rather than compensation for claimants. Unlike solicitors, these investors are not even subject to professional conduct rules which would otherwise provide at least some protection in circumstances where their interests conflict with those of the claimants in whose cases they invest. Nor do these investors owe claimants any fiduciary duties. ILR believes that self-regulation, as envisaged by the Civil Justice Council's draft voluntary code, will be insufficient to guard against abuse and, in any case, it would represent a missed opportunity if the Government were to wait until the TPLF industry is further developed before taking the necessary steps of prohibiting TPLF in collective litigation and introducing strict regulation of its wider use.

These are extremely important issues for the businesses represented by the U.S. Chamber of Commerce and ILR would value the opportunity to discuss them further should it be of assistance to you or your staff.

Yours faithfully



Lisa A. Rickard

Copy:

The Rt. Hon Jonathan Djanogly MP
Parliamentary Under Secretary of State for Justice

² Ministry of Justice, "Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response", March 2011, paragraph 13.