

# Proposed ban on referral fees in personal injury cases

## *Proposed ban on referral fees in personal injury cases*

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An analysis of responses [responses] to the discussion paper was published on 4 September 2012.

### *Background*

1.

The purpose of this paper is to engage stakeholders in debate over how the SRA should implement the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) provisions on referral fees. The paper sets out our analysis of the issue and the potential effect on the sector. It also outlines our thinking on how the ban should be enforced in the context of risk based, outcomes-focused regulation.

2.

Our aim is to adopt a consistent and workable approach, informed by the views of all stakeholders. We particularly welcome views from the firms and consumers that we regulate, other regulators and those who refer work to lawyers. Once we have considered the responses to this paper we will set out our policy position in a formal consultation document. Any changes that we make to the regulatory framework will come into effect in April 2013.

### *Scope of this discussion*

3.

Although the wider policy debate that underpins the need for the LASPO Act will continue, the purpose of this discussion paper is not to debate the rights and wrongs of referral fees, nor the rights and wrongs of the Government's decision to ban them in personal injury cases. Our policy discussion should focus on developing a workable regulatory framework that ensures that the interests of consumers are promoted and protected and the rule of law upheld.

### *Why has the Government decided to ban referral fees?*



4.

In order to develop an outcomes-focused approach to the ban it is useful to understand what the Government wants to achieve.

5.

The Government announced its proposals to ban referral fees in personal injury cases in response to concerns about the high overall cost of civil litigation, rising motor insurance premiums, increasing numbers of claims and the perception of a "compensation culture" which encourages people to make claims for minor injuries or create fictitious injuries which are hard to dispute.

6.

It believed that banning referral fees, along with a variety of other policy measures will reduce costs in individual cases and prevent activities that encourage people to claim when they might not otherwise have done so, particularly those with weak or spurious claims. The proposed ban is part of a package of proposals designed to reduce costs in litigation. It remains to be seen whether these will reduce the incidence of referral fees if they result in less money being available to pay for them.

### *What does the LASPO Act say?*

7.

The relevant provisions can be found in sections 56 to 60. The main points are as follows:

The Act prohibits the payment and receipt of referral fees in personal injury cases by "regulated persons" (i.e. solicitors, barristers, claims management companies and insurers).

A regulated person will also be in breach of the ban if they arrange for another person to provide services to the client and are paid for making that arrangement.

For the purposes of the Act, a "referral" will be the provision by a person (other than the client) of information that a regulated person authorised to provide legal services would need, to make an offer to the client to provide legal services.

A referral fee can be any form of consideration other than reasonable hospitality.

The ban applies to legal services that relate to a claim or potential claim for damages for personal injury or death, or any other claim arising out of



circumstances involving personal injury or death.

The Act enables the Lord Chancellor to make regulations to extend the ban to other types of claim and legal services if the case is made for such an extension.

The Act requires the relevant regulators to have arrangements in place to monitor and enforce the prohibition. It also permits regulators to make rules and to use existing powers to enable them to monitor and enforce the prohibition.

The Act allows regulators to make rules providing for payments to be treated as a referral fee unless the regulated person can show that the payment was for the provision of a particular service or for some other reason, and not for the referral of a claim. The Lord Chancellor may make regulations specifying the maximum amount that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

### *What is the SRA's current approach to regulating referral fees?*

8.

Since October 2011 we have adopted an outcomes-focused approach to regulation. This takes account of LSB guidance of May 2011 to ensure our regulation reduces the likelihood of detriment to consumers and ensures transparency. It is a regulatory regime that focuses on the high level principles and outcomes that should drive the provision of services to clients. In the SRA Code of Conduct we have replaced detailed rules with mandatory outcomes. These set out the outcomes we expect the firms and individuals we regulate to achieve in particular contexts (such as client care, referrals etc.) whilst allowing flexibility in how those outcomes are achieved.

9.

Referral arrangements and referral fees are dealt with specifically in Chapters 6 and 9 of the Code of Conduct and are also subject to the 10 SRA Principles that underpin all regulatory issues. The most relevant principles are that those we regulate must

uphold the rule of law and the proper administration of justice;

act with integrity;

not allow their independence to be compromised;

act in the best interests of each client;

provide a proper standard of service to their clients;



behave in a way that maintains the trust the public places in the regulated person/entity and in the provision of legal services.

10.

The outcomes relating to referrals focus on independence, clients' best interests and transparency. For example, solicitors must ensure that

their independence and professional judgement are not prejudiced by virtue of any arrangement;

clients interests are protected regardless of the interests of the introducer;

clients are in a position to make informed decisions about how to pursue their matter; and

clients are informed of any financial benefit or other interest which an introducer has in referring the client to the solicitor;

11.

Other than legal aid and criminal matters we do not restrict the types of work in which referral fees can be paid and all types of work are subject to the same requirements.

### *The current SRA approach to authorisation, supervision and enforcement*

12.

Our outcomes-focused approach is reflected not only in the new Handbook of regulatory requirements but also in the way we authorise, supervise and enforce against those we regulate.

13.

When considering applications for authorisation by new firms, we require detailed information about the business's proposed referral arrangements. We can impose conditions on authorisation or even refuse to grant a licence if we believe the arrangements would breach our regulatory requirements. We believe that this approach may also be appropriate in relation to referral arrangements involving personal injury claims.

14.

Our approach to supervision and enforcement is risk-based and proportionate, enabling us to focus our resources at the issues that matter the most and cause the greatest risk to the public and the regulatory objectives. This includes the development of a risk framework for use by the



SRA to assess firms compliance based on appropriate indicators. As the approach develops we will gain a more accurate picture of where systemic issues may lie and target resources accordingly.

15.

This means that our response to apparent breaches of regulatory requirements will depend on a number of factors including the seriousness of the breach, its impact on clients and/or members of the public and whether the firm is willing to engage with us to put matters right. Where possible we will work with firms to improve compliance rather than take formal enforcement action. For more information, see SRA enforcement strategy [<https://www.sra.org.uk/sra/strategy/sub-strategies/sra-enforcement-strategy.page>] . In the past we have published draft supervision and enforcement strategies for specific issues such as conveyancing. We will consider doing the same in respect of referrals.

16.

We may also focus on priority areas by thematic work. Themes are likely to be selected because there appears to be a particular risk that we need to understand better or tackle directly.

17.

Notwithstanding the issues above, once the provisions of the LASPO Act come into force we will ensure that appropriate action is taken against firms that do not comply with both the letter and spirit of the law. We will view any breach of the law as a breach of our principles.

### *Risk assessment*

18.

According to SRA data from the 2010/2011 renewals exercise, a quarter of all solicitors' firms in England and Wales conduct personal injury work . Personal Injury work is worth approximately £1.8 billion yearly to the solicitors' profession, 7% of the total estimated market value in 2011.

19.

The relaxation in 2004 of the ban on paying referral fees to third parties created the possibility of an open market for paid referrals, leading to growth in the claims management industry. The largest area of business by far for Claims Management Companies (CMCs) has been Personal injury work, which by 2011 involved 2,533 CMC, more than three quarters of all

those authorised. 65% of the sector's turnover derives from personal injury work, a total of £377 million per annum.

20.

We recognise that the referral fee ban means that the CMC industry faces a challenging future. An industry whose niche has been the ability to profit from the ability and willingness of solicitors' firms to pay referral fees in return for case leads now faces the removal of that niche in its primary business sector.

21.

Preliminary analysis by the SRA Risk Centre in response to the announcement of the ban on paying referral fees established the existence of a large regional centre in the north west of England where solicitors firms are heavily dependent on personal injury work. We found a significant number of small firms across the rest of the country doing relatively small amounts of personal injury work, and a large number of small CMC's referring to single local firms, or small local networks. It is possible that it is in these areas that the most change could occur as large law firms look to pick up client leads from these existing small networks that are not able to respond to the coming ban. It is also possible that fierce competition could bring new ethical and compliance issues that require intensive regulation.

22.

If it is the smaller end of the personal injury market that suffers as a result of changes in the market, it is possible that even for small firms who do not do significant amounts of this work, the potential loss of revenues could add to the cumulative effect of difficult economic conditions, difficulties in maintaining adequate levels of bank financing and the impact of loss of other revenue through the continued stagnation in the housing market. The result could be a steep increase in the number of financial failures amongst small firms.

As implementation develops we will revise our risk assessment and communicate this to ensure that firms are continually aware of emerging risks.

### *Analysis of LASPO*

23.

Our analysis of the relevant sections of the Act suggests that there are three main aspects of any arrangement that will determine whether it contravenes the ban (assuming it involves personal injury matters):

(i)

whether there is a referral;

(ii)

whether there is a payment; and

(iii)

whether the payment is for the referral.

24.

We believe that (i) and (ii) are relatively straightforward as both are effectively defined in the Act. The difficulty will be establishing in (iii) whether the payment is for the referral, particularly where the introducer is providing services to the solicitor, such as marketing, vetting of claims or other claims management activities. This is likely to involve assessing what is a reasonable amount to pay for any services that may be offered by an introducer and is likely to involve detailed investigation. In any event we will be looking to ensure that firms arrangements are transparent.

25.

It is relatively clear that arrangements in which potential clients are given information to enable them to contact a suitable solicitor will not be caught by the ban. This is because this is not a referral within the terms of the Act (although it would be considered a referral for the purposes of our Code of Conduct and solicitors need to satisfy themselves that the arrangement complies with this). At the other end of the spectrum, any situation in which a third party, such as an insurance company, simply passes on details of someone known to have suffered an accident to a solicitor, in return for a fee, will be caught.

26.

Any arrangement that involves advertising is likely to be problematic. It is not the Government's intention to prevent joint advertising by groups of solicitors i.e. where solicitors pool their marketing resources to conduct an advertising campaign and enquiries are distributed amongst contributing firms. However, many claims management companies may legitimately argue that they are carrying out marketing for groups of firms and that they are not caught by the ban. Such activities may be under particular scrutiny as we will want to ensure that they are not being used to avoid the ban. One of the Government's expressed aims is to reduce activities that actively encourage people to make unnecessary or spurious claims when they



might not otherwise have done so. However, it is possible that the ban will not lead to this outcome because of the difficulty in definitions highlighted above.

27.

The experience of referral arrangements before the ban was lifted in 2004 was that some people and businesses would go to great lengths to justify their arrangements and a considerable amount of investigation was needed to get to the bottom of them. There may be attempts to "get round" the ban as well as cases where it is unclear whether or not there is a breach. We believe that our outcomes-focused approach will allow us to look at the substance of an arrangement, rather than just its form and focus on those arrangements that pose a real risk to the public interest.

### *Working with other regulators*

28.

A number of different regulators will be responsible for enforcing the ban and it is in the public interest that all the relevant regulators take a consistent approach. One scheme could involve several parties, all regulated by different regulators. We will continue to work closely with other regulators to ensure our approaches are consistent and particularly welcome their views on the content of this paper.

### *Alternative business structures (ABS)*

29.

Concern has been expressed that businesses may become ABSs in order to circumvent the ban. For example, a claims management company might join forces with a firm of solicitors to form an ABS, which would do all of the work previously carried out by the two different businesses within one entity. There would be no need for referrals, and therefore no referral fees would be paid. We believe that provided that all of the requirements for authorisation are met and the ABS complies with all of its regulatory obligations, we cannot seek to prevent such arrangements simply because they are set up to avoid being caught by the ban. An ABS is a legitimate form of business, supported by a strong statutory and regulatory framework. We may however impose conditions on the licence of an ABS, or even refuse authorisation, if we think the arrangements pose a threat to the public interest or the regulatory objectives.

### *Options*

30.

Going forward, possible options range from making no change to the regulatory framework (and relying on the principle requiring solicitors to comply with the law) to making detailed rules, specifying the circumstance in which firms may or may not pay for referrals. We do not believe that detailed rules would be consistent with outcomes-focused regulation. Based on the above analysis of the Act we believe the solution lies in between these two options: i.e. a set of mandatory outcomes and non-mandatory indicative behaviours which reflect the provisions/purpose of the Act.

31.

This means an outcome prescribing that firms cannot have referral arrangements that do not comply with the law, backed up by some illustrative indicative behaviours. We will consider any options proposed on how these might be drafted but have developed some potential options below.

#### **Examples**

*Outcome:* You only enter into referral arrangements that comply with the law

**or**

*Outcome (Chapter 6):* you do not receive payments for referrals in connection with personal injury matters

*Outcome (Chapter 9):* you do not make payments for referrals in connection with personal injury matters

*Indicative behaviours:*

(1)

you have effective systems in place to assess whether any referral fee arrangement under consideration is assessed against the statutory and regulatory requirements applying in personal injury matters;

(2)

effective systems are in place to ensure that any payments you make for services, such as marketing do not amount to the payment of unlawful referral fees;

(3)

records and management information are retained to enable you to demonstrate that any payments made are lawful.

### *Timescales and next steps*

32.

The SRA is aware of the continuing concern around the timing of the introduction of the ban, in particular that firms will not have time to prepare for it. We are conscious of the timescale and have already begun discussing the issues with stakeholders. We will do everything we can to ensure that we give those we regulate notice of any regulatory changes, but all those affected need think about any changes they will need to make to their business arrangements. The following table sets out our provisional timetable for implementing the ban. The intention to give firms as much notice as possible so that there is time to implement changes accordingly.

Event	Timing
Discussion paper consultation open	June–July 2012
Analysis developed in formal consultation	August 2012
Formal consultation process on our proposals	September–December 2012
Any changes to Regulatory Framework approved by LSB	Early 2013
Final version published	Early 2013
Implementation of ban	April 2013

We welcome comments on all aspects of the ban from anyone who wishes to contribute to the discussion. The following headings may help you to formulate your response.

Effect of the change in law on the legal services market including examples of what you consider will be the impact of the ban on your business

The scope of the ban and potential change to the regulatory framework to reflect the LASPO Act

Our regulatory approach to supervising and enforcing the referral fees ban

Outcomes- and risk-based regulation and its application

**As this document is not part of the formal consultation process which will come later in the year and the time for implementation of the LASPO Act is short, we have opted for a shorter response period.**

**Please could you therefore respond by 31 July 2012. A list of respondents may be published by the SRA after the closing date. While we do not intend to publish individual responses, it is SRA policy to comply with all FOI requests.**

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## *Analysis of responses to the discussion paper*

4 September 2012

In June 2012, the SRA published a discussion paper in order to seek stakeholder views on how the SRA should implement the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) provisions on referral fees in personal injury cases. The SRA recognises that there are likely to be a number of challenges associated with enforcing the ban and throughout this review our aim is to ensure that we adopt a consistent and practical approach which is supported by the views and experiences of the profession and other relevant stakeholders.

The paper identified issues that required consideration including the potential effect the ban would have on the legal sector. The paper also discussed options on how the ban would be implemented in a way that is practical, enforceable, reflects the intention of the legislation and is consistent with the SRA's outcomes-focused, risk-based, approach to regulation and the approach of other regulators.

The paper also sought feedback on how the SRA could develop a regulatory framework which would ensure that the interests of consumers were promoted and protected and that the rule of law was upheld.

The profession and stakeholders have for a number of years been divided in their views on referral fees and we have seen arguments for and against the payment of fees. This difference of opinion was clearly evident when in 2004 the ban on the payment of referral fees was lifted.

We sought comments in respect of the following key areas:

1.

Effect of the change in law on the legal services market including examples of what you consider will be the impact of the ban on your business;

2.

The scope of the ban and potential change to the regulatory framework to reflect the LASPO Act;

3.

Our regulatory approach to supervising and enforcing the referral fees ban;

4.

Outcomes-focused and risk based regulation and its application.

We are pleased to have received a number of responses to the discussion paper. A list of the respondents appears at Annex 1 [annex1]. Generally, the discussion paper and the options discussed received positive feedback from respondents. However, a number of respondents took the opportunity to voice concerns about how the Law Society had previously found it difficult to regulate the payment of referral fees. The SRA appreciates that there have previously been difficulties in managing referral arrangements and the payment of fees, however, we hope that by consulting with our stakeholders and working towards embedding outcomes focused regulation, practitioners will look to manage their businesses in a way which demonstrates that they comply with the law.

*"...we believe the overall approach advocated by the SRA to be a reasonable one..."*

## Analysis

### *A level playing field and cross-organisational liaison*

A number of respondents commented on the fact that, in addition to the SRA, there were other regulators who had been charged with enforcing the ban on referral fees in personal injury cases. If there was to be consistency and to avoid different interpretations this would require the SRA to work closely with the other regulators to have a *"...common approach to avoid the potential problems..."* as each will have adopted a different way to manage the implementation of LASPO.

Respondents asked how regulators would ensure that they were fully informed in respect of firms that acted contrary to the requirements set out in LASPO. One suggestion was the need for cross-organisational sharing of information beyond the terms of a memorandum of understanding which is able to deal with competing enforcement/organisational priorities having regard to the circumstances presented.

The SRA is working closely with the Ministry of Justice – Claims Management Regulator, the Legal Ombudsman, the FSA, the OFT and

other regulators/organisations to address concerns which have been raised by the profession/stakeholders. So far as possible, we will ensure that the ban is enforced consistently across sectors.

### *Policing the ban*

Operationally there is a concern that information collected at renewal confirming the number of referral arrangements regulated persons have in place would not be sufficient to manage the impact of LASPO and ensure adequate policing of the ban. Respondents have commented that previously some arrangements have gone unnoticed yet have caused the consumers the most harm. The SRA hopes that with its risk-based and outcomes-focused approach to regulation, regulated persons will themselves see this as an opportunity to manage their businesses in a way which is compliant with the law and also allows for risks to be mitigated. The SRA through constructive engagement hopes that regulated persons will be responsible in ensuring that their business models are not contrary to the requirements of LASPO. This will mean that the SRA will not have to deploy resource to an area which does not raise concern and this is a stance shared by respondents to the discussion paper.

*"...We also welcome the SRA's intention to work with firms to ensure compliance is within the spirit of the Act..."*

However, as has been stated by the SRA previously, where there are flagrant breaches of the SRA Principles and evidence of detriment to clients we will more than likely take enforcement action.

The SRA may consider, if appropriate, issuing a Compliance Strategy in respect of referral arrangements and the payment of fees in personal injury cases should this be needed. The SRA will continue to engage with firms through a variety of means including stakeholder/practitioner events, thematic reviews and webinars.

### *Clarity as to what arrangements will be compliant*

*"...Unless there is extremely full and easy to understand guidance and clarity provided it is difficult to see how any law firm can formulate a proper business plan to stay in this sector..."*

Outcomes-focused regulation provides for regulated persons to adopt business models without the need for prescriptive rules. In the circumstances, regulated persons should be able to determine from LASPO itself the sort of arrangements which will be acceptable and the risks associated in entering into arrangements for the referral of work with third parties. It is not the function of the SRA to provide regulated persons with 'safe harbour' guidance. However, given the interest in this issue, it is likely that the SRA will publish further guidance setting out our legal interpretation

of what is caught by the Act. Our preliminary view is that the definition within the Act is fairly wide ranging.

*"...it is appropriate for the profession to be given clear guidance illustrating what is believed by the regulator to be permitted and what is caught by the Act..."*

The responses received look for clearer, prescriptive guidance and confirmation of what will be deemed acceptable. This would represent a move away from outcomes-focused regulation to some extent. For this reason defined mandatory outcomes and indicative behaviours that reflect the provisions of LASPO will most likely form the basis of our approach. Where necessary, the SRA will seek to develop case studies and learning tools to assist compliance.

*"...the key outcome should be only to enter into arrangements that comply with the law. The more that is expanded, the more scope there then comes for argument..."*

A number of respondents have commented as to what should be included in the outcomes and indicative behaviours. The discussion paper aimed to seek the views of interested parties and the contents were not put forward as an agreed outcome/way forward. The SRA will consult further and look to achieve outcomes that embed the provisions of LASPO and also allows for the SRA to effectively regulate all regulated persons.

### *Joint marketing schemes*

Particular concern was raised in response to the discussion document on collective marketing/advertising arrangements. There is call for the SRA to look to Government to confirm what constitutes "*services for which payment may be made*". The SRA is working closely with organisations already operating within such schemes and will look to discuss concerns/issues raised so as to ensure that a clear and consistent message is delivered in the forthcoming months.

The Government and the SRA are particularly aware of the need to ensure that firms only enter into joint marketing arrangements which operate within the confines of LASPO. It should be noted though that LASPO has been drafted in such a way which makes some schemes vulnerable to being in breach. More specifically, the onus will be on firms to evidence that payment made for marketing/advertising services remain reasonable. Clear attempts to hide such fees in complex or hidden arrangements will present a risk to our regulatory objectives. Should this become prevalent then it is likely that we will ask the Legal Services Board (LSB) to recommend that fees paid for marketing/advertising are set by the Lord Chancellor for such services as allowed for in the Act.

### *Closure of smaller firms/sole practitioners*



*"... It is entirely possible that a number of businesses will either leave the market entirely or will simply cease to exist due to financial constraints ..."*

The responses received voice concerns over the survival of smaller practices who up until now have relied on referrals from, for example, claims management companies, as they themselves lack resource "... *to promote their businesses individually in a highly competitive marketplace ...*". There is a concern that certain practices will close or merge with larger firms or even form an ABS and whether this in itself will be of benefit to consumers if the primary objective of a business following this route is merely to circumvent the ban.

It is not for the SRA to take a view on whether the ban will be of benefit to consumers but simply to ensure that firms are acting in accordance with the law. The SRA recognises that ABS is an option that some will choose and emphasises that if a business model meets the authorisation requirements and the ABS complies with all its regulatory obligations then the SRA will not oppose such arrangements. ABS may be an option as are decisions to merge with or acquire already recognised bodies. As referrals would be internal in this case, the SRA does not consider ABS creation as a way to avoid the ban.

The SRA has worked and continues to work closely with groups such as the Sole Practitioners Group to discuss concerns and look to manage expectations. Discussions with interest groups/associations will help develop our approach and ensure that any changes made to the regulatory framework within which we operate are adaptable to all business models—again embedding the ethos of risk-based outcomes-focused regulation.

We hope that practitioner groups/organisations, for example, the Law Society will continue to support practitioners to the best of their abilities.

### *Next steps*

The SRA will now be working to issue its formal consultation on our proposals and will also look to meet with all those wishing to contribute to the SRA's strategy.

Any changes to the SRA's regulatory framework will need LSB approval prior to implementation. We will seek this approval in early 2013.

## *Annex 1*

### *Respondents to the discussion paper – Proposed ban on referral fees in personal injury cases*

- Cordell & Co
- Bradwell & Co
- Law Society of Scotland

- Weightmans
- National Accident Helpline
- Access to Justice Action Group
- Attwaters Jamesson Hill Solicitors
- Ralli Solicitors
- Association of Personal Injury Lawyers
- Ameland Solicitors
- Glaisyers Solicitors LLP
- Mr J Dunn
- Unison
- Association of Regulated Claims Management Companies
- The Law Society of England and Wales
- Spencers Solicitors
- Association of British Insurers
- Forum of Insurance Lawyers
- Unite
- Irwin Mitchell LLP
- Abbey Protection Group Ltd
- DAC Beachcroft LLP
- Stephenson's Solicitors
- Keoghs LLP
- Yorkshire Law Society
- Union of Shop, Distributive and Allied Workers (USDAW)