

SRA BOARD
23 January 2013



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Ban on referral fees in personal injury claims

1. This paper asks the SRA Board to make changes to the SRA Code of Conduct and the SRA Glossary in order to implement the forthcoming ban on referral fees in personal injury cases. The ban is set out in sections 56-60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which is due to come into force on 1 April 2012.

Background

2. The Government announced its intention to ban referral fees in personal injury cases in September 2011 amid concerns about rising costs in litigation, increased insurance premiums and a perceived "compensation culture". A ban had been recommended by Lord Young in his 2010 report on his review of civil litigation costs, but this was not originally included in the changes set out in the LASPO Bill. LASPO received Royal Assent in May 2012. LASPO makes the relevant regulators responsible for enforcement of the ban.

Consultation

3. In June 2012 we published a discussion paper on the SRA website, seeking stakeholder's views on how the SRA should implement the ban and how the ban might affect the personal injury market.
4. In October 2012 we published a formal consultation, setting out proposals for implementing the ban. These included proposed amendments to the SRA Code of Conduct in the chapters dealing with referrals (Chapters 6 and 9), in the form of new outcomes and indicative behaviours; and amendments to the SRA Glossary to support the changes to the Code. A copy of the consultation document is attached at **Annex 1**.
5. The closing date for responses was 18 December 2012, 49 responses were received from a wide variety of stakeholders. Attached at **Annex 2** is a report on the responses. The Law Society response is attached in **Annex 3**.
6. The most common theme arising from the responses was the need for clarity about the activities that will be permitted and prohibited and there were a number of requests for the SRA to pre-approve arrangements before the ban comes into force. Most of the detailed comments received referred to the draft guidance i.e. how the SRA will interpret LASPO for regulatory purposes and asked for clarity on particular aspects of the ban. It was clear from the responses that there is scope for interpreting the provisions in LASPO in different ways and for argument about the activities that are prohibited. We are continuing to develop the guidance to deal with the issues raised by the consultation, particularly on issues where respondents have disagreed on our interpretation of the provisions of LASPO. We will develop further examples/case studies and ask the Standards Committee to approve the guidance at its February or March meeting. However, we will continue to develop the guidance as our knowledge of different schemes increases, to ensure that where we form a view on particular issues we share this with all stakeholders.

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7. There were few comments on the wording of the proposed new outcomes and indicative behaviours, although several respondents felt they should be much more detailed or replaced by prescriptive rules.
8. There continues to be concerns about alternative business structures (ABSs), both in terms of the effect these may have on the market and access to justice and the perception that they will have unfair commercial and regulatory advantages over traditional law firms and will be used as a way of “getting round” the ban.
9. There were also comments on the draft supervision and enforcement strategy, including concerns about the SRA’s ability effectively to enforce the ban. We are continuing to refine the strategy and to liaise with other regulators and we believe that the SRA will be ready to enforce the ban once it comes into force. The SRA’s responses to issues raised are set out in the report on the responses.

Stakeholder engagement

10. In addition to publishing the discussion paper and formal consultation, we have been involved in a considerable amount of stakeholder engagement including meetings with the Ministry of Justice and other regulators and stakeholders and holding stakeholder events in January and November.

Proposed response

11. We continue to believe that detailed rules would not be consistent with outcomes-focused regulation. It is therefore proposed that new Outcomes should be included in the relevant chapters of the Code, prohibiting the payment or receipt of a “prohibited referral fee”, and that this term, as well as “payment” and “LASPO” should be defined in the Glossary. The proposed changes to the SRA Handbook are attached in **Annex 4**.
12. These proposed new outcomes will need to be read alongside the other outcomes in chapters 6 and 9, as well as the SRA Principles and other relevant outcomes, such as those relating to client care and conflicts of interests. It is intended that our definition of a referral, for the purposes of Chapter 9, will remain the same i.e. “includes any situation in which another person, business or organisation introduces or refers a client to your business, recommends your business to a client or otherwise puts you and a client in touch with each other”.
13. It is recommended that the SRA Board makes the amendments to the Code and the Glossary, subject to the LSB approval.

Impact Assessment

14. The Government has assessed the potential impact of the ban as part of the process of implementing the legislation, and it is not the responsibility of the SRA to impact assess the ban itself, which is a fait accompli. However, we will carry out a full impact assessment of our implementing provisions after they come into force, focusing on the impact on consumers of legal services, those we regulate, and the SRA. This will include an equality impact assessment. We intend that the flexibility provided by our outcomes-

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focused approach to the implementation of the ban will help to mitigate some of the adverse impacts, particularly in relation to access to justice.

15. We expect that the SRA will need to employ more resources in order to supervise and support those firms that may be adversely affected by the ban: these resources will be met by the redeployment of existing resources, on a risk basis.

Recommendations

16. The SRA Board is invited to:
- a) note the report on the responses to the consultation on implementation of the ban on referral fees in personal injury cases; and
 - b) make the SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013], subject to the approval of the Legal Services Board.

Annexes

- Annex 1** Consultation document issued on 22 October 2012
- Annex 2** Report on responses to the consultation
- Annex 3** Law Society Response 13
- Annex 4** Draft SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013]
- Annex 5** SRA Board risk assessment

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Date 11 January 2013

This paper is for policy decision.

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Consultation on the ban on referral fees in personal injury cases

Part 1 - discussion

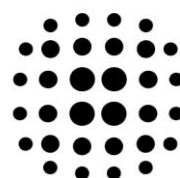
1. This consultation invites views on our proposals for implementing the ban on referral fees in personal injury cases, which is set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and is expected to come into effect in April 2013. It builds on the foundations laid in the discussion document we published in June, outlining our early thoughts.
2. We are grateful to those who responded to the discussion document. The responses provided us with a wide spectrum of views, from both claimant and defendant lawyers, and their representatives, trade unions and introducers.
3. In this formal consultation we:
 - discuss the responses to our June discussion document and how we propose to deal with the issues raised;
 - set out our proposals for implementing the relevant provisions of LASPO, including revised/new outcomes and indicative behaviours;
 - include information for the profession about how we will interpret the provisions of LASPO for regulatory purposes;
 - set out our draft strategy for supervision and enforcement
4. Any changes that we make to the regulatory framework will come into effect in **April 2013**.

Scope of this consultation

5. The profession and stakeholders have for a number of years been divided in their views on referral fees and we have seen credible arguments both for and against them. However, the purpose of this consultation is to discuss how the SRA can adopt a consistent and workable approach to implementing the ban, informed by the views of all stakeholders.
6. We particularly welcome views from the practitioners and firms we regulate, consumers of legal services, other regulators and those who refer work to lawyers.

Responses to the discussion document

7. The June discussion paper set out options for implementing the ban 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. In particular, we asked for views on:
 - the effect of the ban on the legal services market and the impact it may have on regulated entities;
 - the scope of the ban and potential changes to the regulatory framework;
 - our approach to supervising and enforcing the ban; and



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- outcomes-focused and risk-based regulation and its application.

Themes arising from the responses

Lack of clarity in LASPO

8. It is clear from the responses that there is scope for interpreting the provisions in LASPO in different ways and that there is some lack of clarity about which practices and business models which might be affected by the ban, particularly in relation to issues such as “pooled marketing resources” and payments for services. Many respondents felt that the SRA should provide clarity, either through prescriptive rules or detailed guidance describing exactly the kinds of arrangements that will or will not be acceptable.

“...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...”

“...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...”

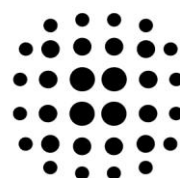
“The issue is not one that be simply dealt with by leaving it to firms to apply OFR since government have asked regulators to give effect to the legislation.”

9. However, it was also recognised that the more detail provided in rules/guidance the more scope there would be for argument about its meaning and application.

“...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...”

SRA response

10. Regulated persons should be able to determine from LASPO itself the arrangements which will be prohibited and the risks associated with entering into referral arrangements. The SRA does not intend to provide regulated persons with ‘pre-approval of business models. However, we accept that a lack of clarity is not helpful, either to the profession or to clients and the wider public who need to be able to have confidence in the profession and the way it is regulated. We have therefore, produced our own interpretation and analysis of the relevant provisions of LASPO and how these might affect various kinds of arrangements. (See Part 3 of this consultation)
11. Ultimately, in an outcomes-focused regulatory landscape, it will be for practitioners themselves to ensure their own compliance with their legal and regulatory requirements and we expect firms to make their own decisions on whether their arrangements are compliant. LASPO specifically puts the burden of proof to evidence this on the individual firm. Our analysis of the Act is intended only to show practitioners how we will interpret the Act in complying with our obligations to monitor and enforce the relevant provisions of LASPO. We cannot advise on every possible scenario, and it is as much the way an arrangement is carried out in practice, as how it is described, that determines whether it complies with the legal and regulatory requirements.



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Policing the ban

12. A number of respondents expressed concerns about the SRA's ability to police the ban and the likelihood that arrangements would simply be "rebadged" to appear compliant or be set up in a deliberately complex way to evade proper investigation.

"The ban on referral fees is likely to remove the existing transparency and simply drive arrangements underground."

13. Many of these concerns are linked to fears that attempts will be made to "get round the ban" by people trying to disguise referral fees as something else. Reference was also made to the difficulties experienced by the Law Society in regulating its ban on referral fees prior to it being abolished in 2004.

SRA response

14. One of the objectives of outcomes-focused regulation is to enable the regulated community to take responsibility for their own compliance with legal and regulatory requirements. This allows the SRA and the regulated community to have a constructive relationship which encourages compliance and leads to changes in behaviour where appropriate.
15. We intend to issue a Supervision and Enforcement Strategy in respect of referral arrangements in personal injury cases, which sets out our broad approach. A draft of this strategy forms part of the consultation.
16. The experience of referral arrangements before the ban was lifted in 2004 was that some businesses went to great lengths to justify their arrangements and a considerable amount of investigation was needed to fully understand 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. We will assess as high risk arrangements which have been "dressed up" to appear compliant, when the underlying purpose of the arrangement is something different. In this regard we would remind those we regulate of the Principles that underpin our regulatory regime, in particular the need to act with integrity and to behave in way that maintains the trust the public places in them and in the provision of legal services.
17. Further, section 57 of LASPO allows regulators to treat certain payments as referral fees unless the regulated person can show that the payment was for the provision of a particular service or for another reason, and not for the referral. We intend to make use of this provision and therefore the onus will be on the regulated person to show that a payment that is said to be for services is reasonable and does not include the payment of a referral fee.

A level playing field and liaison between regulators



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18. A number of respondents commented on the need for consistency between the relevant regulators and for regulators to work together on investigations.

SRA response

19. We continue to work closely with the other relevant regulators, in particular the claims management regulator to ensure a consistent approach, as far as possible and that we work together in investigating any arrangements that cause concern.

Effect of the ban on firms

20. In the discussion paper we asked about the impact stakeholders believed the ban would have on their business and the market.

“...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...”

21. Some respondents voiced concerns over the survival of smaller practices who have 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...”*. A number of respondents were concerned about the impact of ABSs on the market, for example that they would lead to the disappearance of small firms, who would either be taken over or unable to compete, which in turn would reduce access to justice and choice for consumers.

SRA response

22. These issues raise wider questions than just how we will implement the ban. Our own analysis of the information we hold about firms indicates that some firms are highly dependent on personal injury referrals, and may be at risk not just from the ban, but from a likely shrinkage of the personal injury market over the next few years, as a result of factors such as the changes to the costs regime.
23. Our Supervision function, when engaging with firms, are seeking comments from practitioners as to their future plans, especially where the firm's area of work is personal injury and they are heavily reliant on referral arrangements.
24. We appreciate that the ban will inevitably bring with it issues that pose a risk to the regulatory objectives. We have in particular identified the following issues:
- financial stability;
 - integrity/independence; and
 - undesirable business models.
25. We will look to engage with firms/individuals to ensure that these, and any other risks we identify, are being mitigated.

Alternative Business Structures (ABS)



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26. As well as concerns about the impact of ABSs on the market, respondents were also concerned that ABSs would allow firms and CMCs to “get round” the ban.

SRA response

27. An ABS is a legitimate form of business, supported by a strong statutory and regulatory framework. It is not an easy option. It will be a “regulated person” for the purposes of LASPO and any referrals made or received by the ABS will still be subject to the legislation and our regulatory requirements - including referrals made between different entities within a group structure.
28. We will look closely at applicants’ proposed referral arrangements. Where, for example, a firm and a CMC apply to become an ABS, we will carefully scrutinise the application and the proposed business model. Models which suggest an intention to continue as more than one business, with referrals being made between them, may not be licensed, if we believe the referral arrangements will be unlawful. Applicants will need to demonstrate that they are truly operating as one entity and if referrals are made to another part of the business within a group structure, that these comply with LASPO and our regulatory requirements.

Joint marketing/advertising schemes

29. A number of responses discussed the arrangements they have in place with third parties involving advertising/marketing and whether they would be caught by the ban.

SRA response

30. Many firms have arrangements with third parties who provide marketing/advertising services. Some of these arrangements have also involved referrals of clients. The Government has stated publicly that it was not their intention to prevent firms pooling their marketing resources, although LASPO does not deal specifically with payments for marketing/advertising and there is no definition of a “joint marketing scheme”.
31. However, section 57(8) provides that referrals by or to a firm or an arrangement which appears to the SRA to be a referral fee may be treated as such unless the firm can show that the payment was made as consideration for another service and not for the referral. We are likely to look beyond arrangements merely titled as ‘marketing agreement/joint marketing schemes’ and examine what service(s) the firm receives for the payment made.

Equality impact

32. We are considering the equality impact of our proposals for implementing the ban and regulating arrangements in personal injury cases. The impact of LASPO has required us to review our approach to regulating firms who have arrangements for the referral of work in personal injury cases and dealing with the associated risks. We will focus on the potential equality impact of our approach on the profession generally, firms that undertake personal injury work and those who source such work from introducers.
33. The ban could have an impact on consumers as they may experience difficulties in finding a suitable solicitors where previously they have relied on CMCs contacting solicitors on



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their behalf. The impact on consumers is to be considered further. However, it is not envisaged that any changes made to our regulatory approach will have an impact on consumers.

34. It has been suggested that smaller firms/sole practitioners will be forced out of the legal services market as they may not be in a position to secure client leads without the benefit of referrals. These firms may reconfigure their business model, for example, diverting their resources to other areas of work or merging with other practitioners. We will continue to work with the Sole Practitioners Group and other representative groups to discuss views and opinions.
35. Another concern raised is that the ban will lead to an increase in the cost of regulation and that the profession will have to bear these costs. At present, no evidence has been presented which suggests that the profession will be subjected to increased costs. Firms may have to reconsider their marketing/advertising strategies; however, it is not envisaged that these costs will be substantially higher than the referral fees paid at present.
36. We envisage that we will need to assess the equality impact of the ban in further detail once it comes into force and a full equality impact assessment will then be carried out.

Timescales and Next Steps

Formal consultation process on our proposals	23 October 2012 – 18 December 2012
SRA referrals symposium	19 November 2012
Code changes to be approved by SRA Board	23 January 2013
Changes to Regulatory Framework approved by LSB	Mid February 2013
Final version published	Early March 2013
Implementation of ban	April 2013

Please respond by 18 December 2012. Please email responses to consultation@sra.org.uk. 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.

Part 2 - Proposed changes to the SRA Handbook

1. We do not believe that detailed rules would be consistent with outcomes-focused regulation; nor that creating a provision in the Code of Conduct duplicating section 56 of the Act would be appropriate or helpful. Making the prohibition wider than required by the Act would, in the absence of evidence of public detriment sufficient to make such a regulatory intervention, be precipitate. Adopting a narrower approach would be unlikely to comply with our obligations under LASPO.
2. As we have said, section 57 of LASPO, allows regulators to make rules to the effect that some payments by or to a regulated person may be treated by the regulator as a referral fee, unless the regulated person can show that the payment was for the provision of a



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particular service or for another reason. We intend to make use of this provision and incorporate it into the outcomes in the Code of Conduct.

3. We therefore propose to include the following new mandatory outcomes in Chapters 6 and 9 of the SRA Code of Conduct:

Chapter 6

Outcome: you are not *paid a prohibited referral fee*;

Chapter 9

Outcome: you do not *pay a prohibited referral fee*;

4. The terms in italics will be defined in the SRA Handbook Glossary as follows:

- *prohibited referral fee* means:

a *payment* prohibited by section 56 of LASPO; or
pursuant to section 57(8) of LASPO, a *payment* made to or by you which appears to the SRA to be a referral fee for the purposes of section 57(7) of LASPO, unless you show that the *payment* was made as consideration for the provision of services or for another reason and not as a referral fee.

- *paid* has the same meaning as it does in section 56 of LASPO and “pay” and “payment” shall be construed accordingly.

- LASPO means the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

5. These outcomes will be supported by indicative behaviours, which will indicate the kinds of behaviour that will tend to show whether or not the outcomes have been achieved. For example:

- (i) *having effective systems in place for assessing whether any referral arrangement complies with statutory and regulatory requirements;*
- (ii) *having effective systems to ensure that any payments you make for services, such as marketing, do not amount to the payment of unlawful referral fees;*
- (iii) *retaining records and management information to enable you to demonstrate that any payments made are lawful;*
- (iv) *ensuring that payments made for products and services to a referrer or connected party are made at the current market rate.*

6. These proposed new outcomes will need to be read alongside the other outcomes in chapters 6 and 9, as well as the SRA Principles and other relevant outcomes, such as those relating to client care and conflicts of interests. Our definition of a referral, for the purposes of Chapter 9, will remain the same i.e. “includes any situation in which another person, business or organisation introduces or refers a client to your business,



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recommends your business to a client or otherwise puts you and a client in touch with each other”.

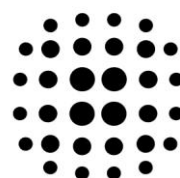
7. This means that there will be some arrangements that, whilst not breaching the LASPO provisions, will still be considered a referral for the purpose of the Code of Conduct and will still be subject to the relevant outcomes. This is because we believe that our wider definition provides important consumer protection by ensuring transparency, and the primacy of the client’s interests, in relation to a wider range of arrangements. For example, we consider it important that where a third party recommends a particular firm, the client is aware of any financial arrangement and can make an informed decision about the recommendation.

Part 3: Draft guidance - The prohibition of referral fees in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) Sections 56-60

1. As of 1 April 2013, LASPO prohibits the payment or receipt of referral fees in claims for damages following personal injury or death.
2. This document provides an overview of the approach the SRA will adopt in determining whether or not a regulated person has paid a referral fee contrary to section 56 of LASPO. This document should be read in conjunction with the SRA’s supervision and enforcement strategy for the ban on referral fees.
3. The information provided within this document is intended to facilitate an understanding of the SRA’s approach in this area and should not be relied upon as legal advice. Regulated persons will need to satisfy themselves of compliance with the requirements of LASPO and may be required to demonstrate compliance to the SRA.
4. This document does not form part of the SRA Handbook and is not mandatory, but the SRA may have regard to it when exercising its regulatory functions. This note will be reviewed periodically.

Application of the ban

5. A regulated person will be in breach of the LASPO if that person:
 - (a) refers ‘prescribed legal business’ to another person or is referred ‘prescribed legal business’ by another person; and
 - (b) pays or is paid for the referral. (See section 56(1))
6. For example, if a solicitor is referred a client who is instructed in connection with prescribed legal business and the solicitor pays for the referral, this will be a breach of LASPO.
7. A regulated person will also be in breach of LASPO if in providing legal services in the course of ‘prescribed legal business’ that person arranges for another person to provide services to the client and is paid for making that arrangement (Section 56(2)). For example, if a solicitor is acting for a client in respect of ‘prescribed legal business’ and receives a payment from an insurance company for arranging after the event insurance for the client, this will be a breach.



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What is a regulated person?

8. "*Regulated person*" for the purpose of the ban is a CMC, any person authorised by the Law Society to carry on reserved activities within the under the Legal Services Act 2007, Insurers (subject to the Treasury making regulations to enable the Financial Services Authority to monitor and enforce the ban) and any other person specified in regulations made by the Lord Chancellor.

What is prescribed legal business?

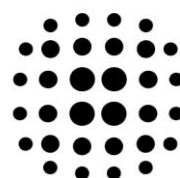
9. "*Prescribed legal business*" is defined as business which involves the provision of legal services to a client in respect of:
- a claim or potential claim for damages for personal injury or death;
 - any other claim or potential claim for damages arising out of circumstances involving personal injury or death (ancillary claims); or
 - other claims or business specified in regulations made by the Lord Chancellor. (At the time of publishing this document no such regulations have been made.)
10. LASPO therefore, not only prohibits the payment and receipt of referral fees for claims for damages for personal injury, but also for other claims for damages arising from the same circumstances. For example, if a personal injury claim resulting from a road traffic accident is referred to a solicitor, together with a claim in relation to uninsured loss recovery resulting from the same accident, the solicitor could not pay a referral fee in relation to either claim. In other words it is not possible to claim that a referral fee is for a related claim rather than for the personal injury claim.

Client

11. "*Client*" is defined for the purpose of section 56(4)(a) as the person who makes or would make the claim. Although not specifically stated in the Act, we believe this definition is intended to apply also to section 56(2) of LASPO. We do not consider that the payment of a fee in connection with a defended claim for personal injury or death will ordinarily be prohibited by LASPO (though care should be taken in case there is a counter claim in a matter).

What is a referral?

12. There is a referral of prescribed legal business if –
- (a) a person provides information to another;
 - (b) it is information that a provider of legal services would need to make an offer to the client to provide relevant services; and
 - (c) the person providing the information is not the client.
13. Sections 56(5) and 56(6) of LASPO provide definitions of "relevant services" and "legal services".



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14. We consider that the communication of a client's name and contact details to or by a regulated person would amount to a referral, as this information would enable the recipient to make an offer to the client to provide relevant services.

15. Example: An insurance company has an agreement with a firm of solicitors for the referral of clients. The insurance company is contacted by the claimant who notifies the Insurer of a claim involving personal injury. The client's details are provided to the firm, who write to the claimant/client offering their services. There is a payment for each client referred.

This would be regarded as a prohibited referral fee.

16. Example: A website offers to find a suitable firm of solicitors for members of the public. The potential client is required to input their postcode and the area of law in which they need help. They then receive an email providing contact details of a suitable firm in their area. The firm pays a fixed annual fee to be part of the scheme and a further payment in respect of each potential client who is given the firm's details.

17. We do not consider that this amounts to a referral within the terms of LASPO as the potential client's details are not being provided to the firm. (However, the transparency requirements set out in Chapter 9 of the SRA Code of Conduct 2011 would still apply.)

What is a payment?

18. Payment includes any form of consideration, whether the benefit is received by the regulated person or a third party. Reference to payment to a third party has been included to prevent the situation where, for example, a regulated person sets up a subsidiary another entity to receive referral a fee, or otherwise arranges for someone else to receive the payment.

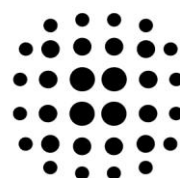
19. Payment does not include the provision of hospitality that is reasonable in the circumstances. What is reasonable will be considered on a case by case basis.

When is there a payment for a referral?

20. Our view is that where there is a referral of a matter to or by a regulated person, or an arrangement for another person to provide services, a payment will be prohibited to the extent that it is being paid for the referral or arrangement. Where a payment is for the provision of other services or for another reason, the payment or that part of the payment would not be in breach of section 56 of LASPO.

21. Example: a group of SRA regulated firms get together to advertise their services. They set up a separate not for profit company, which is wholly owned by the regulated firms/persons, to carry out the advertising under the flag "Midlands Law". Enquiries are made to a call centre, details of potential clients are passed to member firms on a rota basis and each firm pays an equal share of the costs of advertising and operating the scheme.

22. This is unlikely to involve an unlawful referral fee. On the other hand, if the advertising/marketing was carried out by a commercial entity and the fees paid by the regulated firms depended on the number of clients referred rather than the cost of the advertising/marketing campaign, this would suggest that the payment was for the referral.



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23. If it appears to us that a payment **may** have been made for a referral or for making an arrangement, we will treat that as a prohibited referral fee for the purposes of LASPO, unless the regulated person can show that the payment was made for services or for another reason and not as a referral fee. Where you advertise jointly and pay only for that service, you are unlikely to breach the provisions of LASPO - however, you will need to be satisfied that the arrangement does not contain a referral fee element.
24. Example: A CMC advertises in local newspapers in its own name and has a panel of firms to which they refer cases. When a potential client contacts the CMC, the CMC takes brief details and asks a standard set of questions to ensure the claim is not time barred. The client is told that a solicitor will contact them within the next 24 hours. Firms pay a fixed fee in respect of each client referred. The CMC says that the payments are for advertising, operating the call centre and vetting potential claims.
25. A firm in this situation would need to show that the payments were genuinely for the services described. In this case the vetting would appear to be minimal and it is difficult to see how the payment for advertising could be genuine as it is being paid “per client” rather than reflecting the actual cost of advertising. It is therefore likely that the payment would include a referral fee element.
26. When determining whether referral fees are being paid, we will take into account all of the circumstances but the following factors will generally indicate a prohibited referral fee:
- payment for services which are in excess of the normal market rate for such services;
 - an arrangement where receipt of referrals is conditional upon payment;
 - payments that are made per referral or which are otherwise linked to the number of referrals;
 - evidence that a genuine service is not being provided.
27. Where it appears to us that a referral fee may have been paid, the onus will be on the regulated person to demonstrate that the payment was not for the referral (reference section 57(7) of LASPO). Firms should therefore fully investigate all relevant matters before making or receiving referrals of prescribed legal business.

Effect of the ban

28. Contravening the ban on referral fees is a regulatory breach; it does not make a person guilty of a criminal offence and does not give rise to a right of action for breach of statutory duty. The SRA may require you to demonstrate how you have achieved compliance with section 56 of LASPO in order to show that you have complied with the SRA Principles and achieved the relevant outcomes in the SRA Code of Conduct.
29. A breach of LASPO does not make anything void or unenforceable. However, a contract to make or to pay for a referral or an arrangement which is in breach of section 56 of LASPO is unenforceable.

Further information

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30. A flowchart is attached¹ to this note designed to help practitioners examine whether an arrangement is in breach.
31. Further advice on the SRA Principles and the SRA Code of Conduct can be obtained from the Ethics Helpline - call 0870 606 2577 (inside the UK), 09.00 to 17.00, Monday to Friday (International telephone enquiries – +44 (0)1527 504450).

Information about the SRA can be found at www.sra.org.uk

Part 4 - Draft Supervision and Enforcement Strategy for the ban on referral fees

About this strategy

- 1 This strategy sets out how we intend to monitor and enforce compliance with the ban on the payment of referral fees in personal injury cases, introduced in sections 56 - 60 of Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) which came into force on 1 April 2013. We shall refer to this as 'the ban' in this document. The strategy sets out how we will monitor arrangements for the referral of work in personal injury cases with a view to identifying and responding to evidence of practice that is inconsistent with LASPO, our Principles or the Outcomes in the SRA Code of Conduct 2011.

Our approach set out below will apply also to referrals between regulated persons.

As you are required to comply with the law you should carefully read for yourself the relevant sections of LASPO.

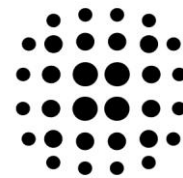
- 2 This strategy is subject to our overarching enforcement strategy which sets out our approach to ensuring a credible deterrence for those who deliberately breach our rules or who refuse to engage with us constructively [www.sra.org.uk/sra/strategy/sub-strategies/sra-enforcement-strategy.page].

Background

- 3 The main focus of our action is protection of the consumer as well as the wider public interest in ensuring that by complying with the law, confidence in those who deliver legal services, is maintained. One of the objectives of outcomes-focused regulation is to enable the regulated community to take responsibility for their own compliance with legal and regulatory requirements. This allows the SRA and the regulated community to have a constructive relationship which encourages compliance and leads to changes in behaviour where appropriate. You will therefore, have to satisfy yourself that any arrangements you have are not only compliant with the law and the outcomes set out in Chapter 6 and 9 of the SRA Code of Conduct but also with the overriding principles such as acting with integrity, not allowing your independence to be compromised and acting in your client's best interests.
- 4 As a risk-based regulator, the SRA focuses on the risks to consumers and the regulatory objectives² posed by:

¹ The flowchart is not attached to this Board paper

² The regulatory objectives are set out in section 1 of the Legal Services Act 2007



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- activities undertaken by firms and individuals;
- the areas of law in which they practice; and
- the business model of the firm.

Firms who have in place arrangements for the referral of work in personal injury cases may pose a risk to the regulatory objectives, specifically:

- the promotion and improvement of access to justice;
- the protection and promotion of the interests of the consumer;
- the protection and promotion of the public interest;
- encouraging an independent, strong, diverse and effective legal profession; and
- the promotion and maintenance of adherence to the professional principles.

- 5 The SRA Handbook sets out the 10 core overriding principles which must be adhered to by all those we regulate, together a number of mandatory outcomes in the SRA Code of Conduct 2011. The outcomes set out in Chapter 6 and 9 of the Code will apply to all referral arrangements. The most relevant principles are:

SRA Principles

1. uphold the rule of law and the proper administration of justice;
2. act with integrity;
3. not allow your independence to be compromised;
4. act in the best interests of each client;
5. ...
6. behave in a way that maintains the trust the public places in you and in the provision of legal services;
7. comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and cooperative manner;
8. run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles;
9. ...
10. ...

SRA Code of Conduct 2011

Chapter 6 - Your client and introductions to third parties

Outcomes

You must achieve these outcomes:

- O(6.1) whenever you recommend that a client uses a particular person or business, your recommendation is in the best interests of the client and does not compromise your independence;



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O(6.2) clients are fully informed of any financial or other interest which you have in referring the client to another person or business;

O(6.3) if a client is likely to need advice on investments, such as life insurance with an investment element or pension policies, you refer them only to an independent intermediary.

Personal injury cases

O(6.4) you are not **paid a prohibited referral fee**.

Chapter 9 - Fee sharing and referrals

Outcomes

You must achieve these outcomes:

O(9.1) your independence and your professional judgement are not prejudiced by virtue of any arrangement with another person;

O(9.2) your clients' interests are protected regardless of the interests of an introducer or fee sharer or your interest in receiving referrals;

O(9.3) clients are in a position to make informed decisions about how to pursue their matter;

O(9.4) clients are informed of any financial or other interest which an introducer has in referring the client to you;

O(9.5) clients are informed of any fee sharing arrangement that is relevant to their matter;

O(9.6) you do not make payments to an introducer in respect of clients who are the subject of criminal proceedings or who have the benefit of public funding;

O(9.7) where you enter into a financial arrangement with an introducer you ensure that the agreement is in writing.

Personal injury cases

O(9.8) you do not **pay a prohibited referral fee**.

6 The mandatory outcomes are supported by a number of indicative behaviours that set out the types of behaviours which are likely to demonstrate whether or not the outcomes have been achieved. Failing to achieve these outcomes may also be regarded as breach of the SRA Principles. A definition of '*prohibited referral fee*' and '*paid*' are included in the SRA Handbook Glossary

7 In addition, because this is a new and potentially complex area, we have issued separate guidance which sets out our interpretation of the relevant sections of the LASPO as well as some scenarios which should be of assistance when considering if a particular type of arrangement contravenes our rules. The guidance, which will be periodically reviewed



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and updated as our understanding of the nature of the types of arrangements develops, can be found here [\[insert link\]](#).

Supervision/Monitoring

- 8 The ban will inevitably bring with it issues which pose a risk to the regulatory objectives. We have identified issues which will need to be considered by firms/individuals:
- financial stability - it is envisaged that the reduction in the Claims Management Companies (CMC) industry in personal injury work will result in the loss of client leads which firms previously sourced from referrers. Firms who derive a significant proportion of their turnover from personal injury and with a high proportion of referred business will be affected heavily by the ban. Firms will need to consider whether their financial stability is at risk and what systems and controls need to be in place to continually monitor their financial stability.
 - integrity/independence - arrangements which are financially valuable may compromise a firm's integrity, professional judgement and/or independence.
 - undesirable business models - it is envisaged that firms will look to reconfigure their business model and/or apply to become an ABS. Firms currently regulated by the SRA are required to notify us of the proposed changes to their structure and all ABS applications will be assessed on a case by case basis. Where the SRA considers that changes to a business and/or proposals to become an ABS are undesirable, authorisation will not be granted.
- In all circumstances, firms will need to determine that they are complying with the Principles and achieving the Outcomes.
- 9 Firms with arrangements in place for the referral of personal injury work will need to consider what impact LASPO has had on their business and any associated risks. Firms will need to have in place appropriate systems to mitigate any risks and ensure compliance with the SRA's regulatory provisions.
- 10 As a risk-based regulator with limited resources we target our action at those who present the highest risk to consumers, the public and the regulatory objectives³.
- 11 For example, in higher risk areas where issues of concern are disclosed we may:
- use our formal investigatory or regulatory powers; including requests for documentation and attendance of individuals at formal interview;
 - working alongside other approved regulators with a view to sharing information and concerns and identifying firms which look to contravene LASPO/our regulatory provisions;
 - use our full range of supervisory approaches.

³ Section 28(3) of the Legal Services Act 2007 requires approved regulators to take action only in cases where it is needed and that all regulatory activity should be transparent, accountable, proportionate, consistent and targeted.



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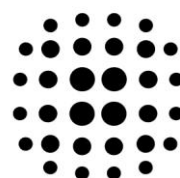
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In lower risk areas, we are likely to use tools such as for monitoring compliance, such as questionnaires designed to enable firms to assess whether their arrangements comply with LASPO and our regulatory requirements. Firms may be required to submit confirmation of their assessment to us.

- 12 These tools will be used in a proportionate, consistent and targeted manner and action may be taken in conjunction with or referred to another regulator where necessary.

Enforcement

- 13 Our overriding enforcement strategy makes it clear that not all breaches will require enforcement action and sets out factors that we will consider on a case by case basis when deciding if action is required. We will look at the substance of an arrangement rather than just its form and focus on those arrangements which pose a real risk to the public interest.
- 14 Our action will be fair, targeted, proportionate and transparent. We have a wide range of tools available to us where firms/individuals materially breach our rules and/or when they fail to engage with us. Decision making criteria in respect of each has been published.
- 15 These include:-
- findings but no action;
 - rebukes (<http://www.sra.org.uk/solicitors/handbook/discproc/content.page>);
 - fines of up to £2000 for law firms or up to £250m for ABS;
 - conditions on a certificate or a license;
 - revocation of authorisation or license;
 - referral of the individual or entity to the SDT which has the power to issue an unlimited fine or suspend or strike from the roll;
 - Intervention;
 - and in most cases a direction to pay our costs of the investigation.
- 16 The regulatory outcome will depend upon the seriousness of the misconduct, which will include whether harm has been caused.
- 17 The following factors are indicative of more serious misconduct:
- significant detriment to the interests of the client;
 - a failure to take steps to assess whether payments made in respect of a referral arrangement are prohibited by LASPO;
 - a failure to remedy the breach once identified;
 - the passing of unnecessary costs, such as artificially inflated charges or referral fees, to clients or third parties such as defendants;
 - repeated contraventions of the ban;
 - taking steps to disguise or hide payments in an attempt to pay or receive referral fees contrary to LASPO, which may be evidence of dishonesty;
 - an intentional or reckless contravention of the provisions set out in LASPO.



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- 18 Our aim in taking enforcement action will be to deter those who have breached the Principles and failed to achieve the Outcomes and from doing so again and to deter others in the same position. For the most serious of cases where firms or individuals are deliberately flouting our requirements and therefore the law, we may consider removal from practice.

All decisions made may be published in line with our publication policy.

Please use www.sra.org.uk/referrals to link to this page

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Implementation of the ban on referral fees in personal injury cases

Report on the responses to the SRA consultation issued in October 2012

Introduction

1. This report follows the SRA's recent consultation on how it should implement the ban on referral fees in personal injury cases, which is set out in sections 56 to 60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and includes the SRA's responses to the issues raised by respondents.
2. The consultation set out the SRA's proposals for implementing the ban on referral fees in personal injury cases, which is due to come into force on 1 April 2013. It followed a discussion document published in June 2012 setting out our early thoughts. The consultation included:
 - discussion of the responses to our June discussion document and our responses to the issues raised;
 - proposed amendments to the SRA Code of Conduct and the SRA Glossary;
 - draft guidance on how we will interpret the relevant provisions of LASPO for regulatory purposes; and
 - a draft supervision and enforcement strategy, describing our proposed outcomes-focused, risk-based approach to enforcing the ban.
3. The consultation did not contain specific questions, but instead invited stakeholders to comment on a range of issues. Respondents commented on many different aspects of our proposals and these comments are summarised below.

Responses received

4. 49 responses were received from a wide variety of stakeholders, including individual solicitors and firms of varying sizes; practitioners involved in both claimant and defendant personal injury work; claims management companies and businesses that carry out marketing for firms; insurance companies; organisations representing insurers and firms and practitioners; the Legal Ombudsman and the Law Society. A list of respondents is attached at the end of the paper.

Themes arising from the responses

5. The following are the themes that arose from the responses:

The need for clarity

6. The most common theme was the need for clarity, which was raised in almost all of the substantive responses. It was clear that people have different views about what is or should be caught by the ban. The following reasons were given for further clarity being needed:
 - to ensure/assist with compliance;

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- to provide certainty, consistency and fairness;
 - to enable businesses to plan ahead and implement changes before the ban comes into force;
 - to ensure consistency between regulators;
 - the SRA must provide clarity in order to comply with its statutory obligations to monitor and enforce the ban;
 - the SRA needs to be transparent about what it considers acceptable - if it has a view on a particular arrangement, or type of arrangement, this should be shared with the profession and other interested parties;
 - to stop firms adopting an over cautious approach and opting out of arrangements which the SRA may subsequently decide are not prohibited by LASPO
7. There were various suggestions as to how further clarity might be achieved. Whilst some felt that the outcomes should include more detail, or that prescriptive rules should be introduced, the majority felt that the draft guidance should be extended and include more examples, particularly on the types of arrangement known already to exist. Others called for the SRA to give “safe harbour” guidance, by approving firms’ proposed business models.
8. The Law Society was in favour of further clarity being provided, particularly on where the line will be drawn between legitimate payments advertising and illegal referral fees, and what sort of ABS arrangements solicitors will be able to enter into with referrers of business such as insurers and claims management companies:

“We are pleased that the SRA has taken a positive approach by providing guidance and giving examples for solicitors who will need to comply with the ban under LASPO. However, we maintain that LASPO is ambiguous and difficult to interpret. ... We recognise that the SRA cannot provide a definitive ruling. However, as the body enforcing the Act, it is important that it should be clear about what it regards as breaching the provisions and consistent as to how and where it will use its enforcement powers.” The Law Society

SRA response:

9. We appreciate that there is uncertainty over the precise activities that are prohibited under LASPO and will continue to develop our guidance on how we will interpret the Act for regulatory purposes, taking into account the views expressed and queries raised in the consultation, as well as any discussions we have with practitioners about their referral arrangements. We agree that where we form a view on a particular issue we should share this with the profession. However, we remain of the view that prescriptive rules would be inconsistent with outcomes-focused, risk-based regulation and may encourage businesses to adapt their arrangements to fit within rules, without considering whether they comply with LASPO and the SRA Principles or whether they achieve the right outcomes for clients and the wider public.

The draft guidance/interpretation of LASPO

10. Responses raised queries on the application of the Act in relation to specific scenarios and asked for the SRA’s view to be clarified. These included:

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- when a third party is providing information to a regulated person e.g. if calls are automatically transferred;
 - transitional arrangements e.g. if the referral is made before 1 April but the payment is made afterwards;
 - the extent to which firms can pay third parties to market the firm.
11. One respondent was particularly concerned that charities should not suffer as a result of the ban and suggested that arrangements involving charities should be able to obtain pre-approval from the SRA.
 12. Some respondents specifically disagreed with aspects of the draft guidance, in particular: our analysis of the application of section 56 to commissions received for arranging after-the-event insurance; the extent of the information that needs to be provided for there to be a referral; and our view that the ban applies to claimant work only.
 13. There were suggestions that some of the examples given were confusing, in that they contained several elements and it was not clear which of those elements determined whether or not the arrangements described were likely to be considered compliant.
 14. There were also suggestions that the SRA's approach to the ban will effectively "water it down" and that all payments should be banned, including those for marketing and that the only form of advertising that should be allowed is by individual firms in their own name.
 15. The Law Society felt that the draft guidance was helpful as far as it went but there were important issues, a number of which were foreseeable and/or happening already, and where it was not clear what the SRA's approach would be.

SRA response:

16. We will continue to develop our guidance taking into account the issues raised. Where there are suggestions that our interpretation of LASPO is wrong we will review those aspects of the guidance. However, we believe that LASPO clearly envisages some payments legitimately being made to businesses that refer claims to practitioners and this must be reflected in our guidance.

ABSs

17. Various concerns about ABSs were raised, in particular that they would be used to "get round" the ban, that they would defeat the Government's objectives and that ABSs would have unfair commercial and regulatory advantages over other firms. One respondent expressed the view that ABSs involving insurance companies would defeat the Government's objectives in introducing the ban. Others, including the Law Society suggested that further guidance should be provided on the types of ABS model the SRA considers acceptable.

SRA response:

18. ABSs are legitimate structures, provided for by statute and subject to stringent regulatory requirements. We will consider carefully the proposed referral arrangements of any

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applicant and potential applicants are encouraged to discuss their proposed arrangements before submitting an application.

Draft Supervision and Enforcement Strategy

19. The majority of those who commented on the strategy agreed with the proposed outcomes-focused, risk-based approach and the SRA's willingness to engage with firms to rectify breaches rather than necessarily taking enforcement action. However, it was also suggested that the strategy implied that the SRA would be taking a "light touch" approach, which contradicted other statements suggesting that we would be robust in our approach to dealing with breaches. Some responses raised concerns about the SRA's ability to enforce the ban effectively, citing limited resources and the existence of higher priorities as reasons for this:

"What is required from the SRA is strong, accountable and prescriptive regulation so that regulated businesses are aware of what is expected of them and the certainty of how this may be achieved. Whilst we appreciate that the SRA has moved to an OFR approach, good regulation will on occasions, such as this, require prescriptive regulation where to do otherwise would create uncertainty."

"This 'suck it and see' investigative approach will leave many who want to comply in breach and many who do not happy to take the risk because of the ambiguity and uncertainty." A defendant firm.

20. The Law Society broadly support the strategy but believe that the SRA will have to do some investigation itself to avoid hidden referral fee arrangements being entered into placing firms that comply with the requirements at a disadvantage. The Society was also concerned that OFR would allow the SRA to superimpose its judgement over that of firms that have been acting in good faith.

SRA response:

21. We feel that in general the draft strategy accurately reflects our proposed approach, which provides for flexibility in how we deal with possible breaches, particularly where firms have acted in good faith and are willing to engage with constructively. However, when finalising the strategy we are taking into consideration comments we have received. We are confident that we will be in a position to implement and enforce the ban from 1 April.

Effect of the ban on the market

22. There was concern that some firms are heavily reliant on paid-for referrals and this will provide an incentive for people to try to get round the ban in order to sustain their business. There was also concern that the market will be dominated by large providers and ABSs and that this will reduce consumer choice.
23. The Sole Practitioners Group was concerned that their members would be particularly vulnerable and asked that they should be given more time to adapt and that they should be given more help to do so.

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SRA response:

24. We are conscious of the impact that the ban may have on some firms and we have identified, and begun to engage with, those firms that appear to be heavily reliant on referrals of personal injury work and whose future may be at risk.
25. We do not believe that it would be appropriate to provide special concessions to sole practitioners, but will continue to liaise with the Sole Practitioners Group on these issues

SRA response:

Proposed new outcomes and indicative behaviours

26. Few respondents commented on the wording of the proposed new outcomes and indicative behaviours, other than to say that they should be more detailed, for example by specifying the activities that the SRA considers to be in breach of LASPO. One respondent suggested that the proposed changes do little more than remind practitioners of the need to comply with the law and do not alleviate the uncertainty.
27. There appears to be some confusion over the difference between a “prohibited referral fee” and other financial arrangements that firms may have with an introducer. A small number of respondents suggested that the current definition of a referral for the purpose of the Code, which is wider than that given in LASPO, will cause confusion
28. A small number of respondents objected to the SRA incorporating provisions under 57(8), (which allows regulators to treat certain payments as referral fees unless the regulated person can show that the payment was for the provision of services or for some other reason), suggesting that this may lead to unfairness and arbitrary decisions by the SRA. Others welcomed this approach, believing it to be appropriate that it should be for firms to satisfy the SRA that their arrangements did not breach LASPO.
29. The Law Society felt that the approach in the outcomes was broadly right but remained concerned that clarity should be provided as to the activities that will be caught by the ban. They felt that the proposed indicative behaviours are broadly appropriate but concentrate on having systems for compliance and could be more helpful, for example by concentrating on some of the obvious elements that might disguise referral arrangements. They suggested additional indicative behaviours dealing with payments for services which are compulsory if a referral is to be made and payments for marketing which are directly linked to the number of cases referred. They also felt, as did some other respondents, that the reference to “current market rates” in the indicative behaviours is unhelpful and doubt that the SRA is in a position to assess what those rates are.

SRA response:

30. We consider the wider definition of referral, for the purpose of applying the transparency requirements, provides important protections for clients who are referred or recommended to a firm. The position will be further clarified in the guidance.

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31. We believe that the indicative behaviours suggested by the Law Society are too specific to particular situations to appear in a Chapter that deals with all types of referral arrangements and could cause confusion in relation to areas of work in which referral fees are permitted. We will consider, however, whether these issues can be clarified in the guidance. In response to comments received, we have removed the draft indicative behaviour that referred to “current market rates” as we do not consider this to be helpful and it overlaps with other indicative behaviours.
32. We believe that by invoking the powers provided for by section 57(8) we can avoid time consuming and costly investigations into arrangements that appear to us to involve prohibited referral fees.

Timescale

33. Concerns were expressed about the time available for firms to change their arrangements for acquiring business prior to the ban coming into force, to ensure they are not in breach. There were particular concerns about the short amount of time between the SRA publishing the final changes to the SRA Code of Conduct and the ban coming into force.

SRA response

34. We are conscious of the tight timescale for implementing the ban and will take this into account where we come across firms that appear to be in breach of the ban but are taking active steps to put matters right and are willing to engage positively with the SRA. However, we have always made it clear that our approach to implementing the ban would be to require practitioners to comply with the provisions of LASPO, which received Royal Assent more than a year ago. The details of the ban should not, therefore, have come as a surprise to practitioners.

Views on the ban

35. Some respondents simply reiterated their opposition to, or agreement with, the ban, rather than commenting on our proposals for implementation. Many of those who supported the ban called for referral fees to be banned in all areas of legal work, not just personal injury.

SRA response:

36. Whilst we appreciate that there are strongly held views in relation to referral fees in general and the Government’s decision to impose a ban, our immediate concern is to implement the ban in accordance with our obligations under section 57 of LASPO. We will be reviewing our requirements in relation to referral arrangements generally in accordance with the Legal Services Board’s guidance to approved regulators published in 2010.

List of respondents

- Aubrey Isaacson Solicitors
- Thornycroft Solicitors
- Clifford James Consultants (regulated by Claims Management Regulator)
- Access to Justice Group



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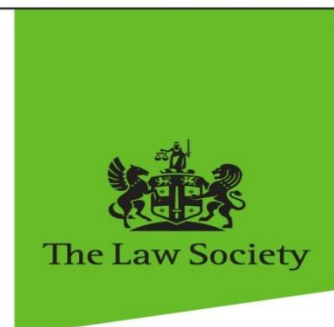
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- Eile Gibson (Solicitor), Tower Bridge Tax Practice
- Andrew Wood (in-house solicitor)
- Lansbury Worthington Solicitors
- Thurstan Hoskin Solicitors
- Baldwin and Co, solicitors
- Lee Southern
- Gordon Bishop, GB Solicitors
- Vikki Hubbert (Solicitor)
- John Roberts, Whiskers LLP
- Irwin Mitchell
- City of Westminster and Holborn Law Society
- Association of Personal Injury Lawyers
- John Spencer, Spencer Solicitors
- Helen Drewery, Graham and Rosen Solicitors
- Sole Practitioners Group
- Keoghs Solicitors
- New Law Solicitors
- National Accident Helpline
- Hodge Jones and Allen LLP
- DAC Beachcroft Claims Ltd
- Smith Jones Solicitors
- Cardiff and District Law Society
- AXA Insurance
- Zurich Insurance
- Manchester Law Society
- Yorkshire Law Society
- Co-op Insurance
- Liverpool Law Society
- Simpson Millar LLP
- Association of British Insurers
- Allianz
- Unison
- Legal Ombudsman Service
- First4Lawyers Ltd
- Motor Accident Solicitors Society
- Forum of Insurance Lawyers
- Browne Jacobson
- ProLegal Limited
- Ramiz Wahid (trainee solicitor)
- The Law Society
- USDAW
- Unite the Union

N.B. There were two anonymous responses.

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SRA Consultation on the ban on referral fees in personal injury cases

**Law Society response
December 2012**



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Consultation on the ban on referral fees in personal injury cases

This response has been prepared by the Law Society, the representative body for more than 140,000 solicitors in England and Wales. The Law Society negotiates on behalf of the profession, and lobbies regulators, Government and others.

The Law Society welcomes the opportunity to comment on the Solicitors Regulation Authority's (SRA) consultation on the ban on referral fees in personal injury cases under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

While the Society supports the principle of a ban on the payment of referral fees, as we have made clear, we have reservations about the way in which the prohibition is drafted in LASPO and believe that it will potentially capture activities which are not problematic and which have been identified as non problematic by the Society, its members and by others. Nevertheless, we accept that the SRA's job is to implement the law as it stands.. We think that the SRA's approach is along the right lines, though we have a number of areas of concern and suggestions that we believe would improve the start that has been made.

As the SRA notes, referral fees play an important part in the business models of many firms which undertake Personal Injury work. Such firms find that paying referral fees is an efficient way of sourcing work. They will need to find alternative ways of doing so following implementation of the Act and it is particularly important to them that they do so in a way which complies with LASPO.

As we have explained before, there is a fine line between perfectly appropriate and legitimate advertising and the payment of an illegal referral fee. Most advertising will involve an element of payment by results and it may therefore be difficult to ascertain precisely where the boundary is crossed. Similarly, it is clear that a firm operating as an ABS that took a marketing function in-house, for example by merging with a claims management firm, would probably not infringe the ban. Given that there are potentially a number of business models that are possible in respect of joint ventures firms will need to be clear how far they can go with insurers or claims managers in such arrangements. Firms will expect with some justification a degree of certainty about what is and what is not permitted under the new regime.

We are pleased that the SRA has taken a positive approach by providing guidance and giving examples for solicitors who will need to comply with the ban under LASPO. However, we maintain that LASPO is ambiguous and difficult to interpret. A strict interpretation is likely to go wider than was intended by Government and may well prohibit perfectly legitimate arrangements. We recognise that the SRA cannot provide a definitive ruling. However, as the body enforcing the Act, it is important that it should be clear about what it regards as breaching the provisions and consistent as to how and where it will use its enforcement powers.

We remain concerned that the SRA's approach does not go far enough and that there is scope for additional detail. We recognise that the SRA cannot provide guidance to cover every situation but we think that it could provide more than is provided in the draft and could commit to providing ongoing information to the profession. We are heartened by the SRA's proposals on enforcement, which appear to us to take a proportionate approach that we can

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support. The proposals recognise the element of uncertainty that will exist. The SRA can reduce that uncertainty further and the application of a consistent approach is vital to the credibility and reputation of the profession.

1. Proposed changes to the Handbook

- 1.1 We agree that it is broadly right for the SRA to reproduce the LASPO provisions and that it is inappropriate to seek to expand or narrow them. The fact remains, however, that those provisions are broad and do not demarcate well the distinction between advertising with an element of payment by results and a referral fee. If the former is to be completely prohibited then there needs to be guidance which makes that clear.
- 1.2 We are glad that the rules will enable solicitors to demonstrate that some types of fee arrangement do not amount to referral fees. We assume that this would cover, for example, answering services where there is a payment per call taken and, incidental to that details of potential claimants are passed on. There may well be others where the referral element is more remote and we believe that guidance or indicative behaviours should make that clear.
- 1.3 The indicative behaviours proposed by the SRA appear to us to be broadly appropriate. It is notable that they concentrate on having “systems” for assessing whether arrangements comply. In our view, these could be more helpful. For example, they could elaborate on some of the obvious elements that might disguise referral arrangements. For example, one behaviour might read:
 - “Payments are not made to claims handlers or insurers for services, such as screening or IT programmes, which are compulsory if work is to be received.”
- 1.4 We doubt that the reference to the “current market rate” is helpful. Many services that may legitimately be paid for may be bespoke, or there will be a wide range of rates depending on the quality of the service chosen. A firm may well decide to pay a premium for a particularly successful method of marketing without that necessarily amounting to an improper referral element. Moreover, we doubt that the SRA is equipped to judge an appropriate market rate and should not seek to inhibit the workings of the market. In our view an alternative wording might read:
 - “Payments for advertising services, where the advertiser passes the information directly to the firm, are not directly related to the number of cases received from the advertiser.”

2. Guidance

- 2.1 We are pleased that the SRA intends to provide guidance for the profession. However, it is not clear what its status will be as it will not form part of the SRA Handbook, and nor will it be mandatory. The consultation paper states that the SRA “may have regard to it when exercising its regulatory functions”. We hope that it would also follow that solicitors can be sure that the SRA will act consistently with this guidance until any further guidance is issued to replace it.

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2.2 The guidance provided in the draft is useful, as far as it goes, but there are clearly going to be a number of areas which the guidance does not cover. We accept that it is impossible for the guidance to cover every situation, but there are a number of situations which are foreseeable or which are happening already, where it is not clear what the SRA's approach will be. We set out some of these below:

What is a referral?

2.3 Outsourced tele-services

We have referred above to schemes whereby a firm outsources its telephone answering service on a pay-per-message basis, and where claimants' details are communicated by the outsourced firm to the outsourcing firm. We assume that this would be covered, as suggested above by the "services" provision, but we believe that this should be made clear.

2.4 Web-based advertising

It is not clear to us whether a web-based system whereby information keyed in by a potential claimant is passed from the advertiser's server to the firm would amount to a referral for these purposes. It would be helpful if this could be made clear.

What is a payment?

2.5 The guidance appears to address business structures rather than the question of what amounts to a payment. There are a number of possible models that need to be considered:

- Quid pro quo arrangements whereby a Trade Union or other such body refers personal injury work to a firm in return for pro bono advice on other matters. There are a number of possible scenarios, ranging from "a case for a case" to looser models. The arrangements may be informal "understandings" or more formal documented agreements. We doubt that a firm providing occasional pro bono advice to employees of a good client would fall foul of the ban, but there are more formal arrangements which might, and guidance on this would be helpful.
- Discounts or rebates applied to normal levels of costs might be thought to fall foul of the ban. In our view it is unlikely that a discounted rate in return for bulk work would do so, but the wording of LASPO is wide and solicitors should be able to deal with such matters with certainty.
- Panel membership fees ought to be considered. Many insurers operate panels of firms to whom they pass their PI work. It is conceivable that insurers, like lenders, might charge a fee for membership of the panel. Without membership, firms would not receive the work, but there is an equal argument that there are some administrative arrangements which it might be appropriate for solicitors to contribute towards. The SRA ought at least to provide guidance as to what it would consider appropriate here.

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When is there a payment for a referral?

- 2.6 There are a number of areas where it is likely that there will be uncertainty as to whether there is a payment for a referral, and we do not find the guidance helpful in dealing with many of these areas. This is partly because there are a number of different elements in the examples and it is not clear enough which elements are likely to be crucial in deciding whether a scheme complies with the law. Examples are as follows:
- Paragraphs 15 and 16 provide clear cases, but suppose, in the case of paragraph 16, the website passed the client's details directly to a firm but there were no payment per case, and instead the solicitor only paid an annual fee?
 - Paragraphs 21 and 22 provide examples with a number of different features without indicating which parts are likely to cause problems. How crucial is it, in the example at paragraph 21 that all the firms are regulated by the SRA? Or that the arrangement is not for profit? In the Law Society's view, the crucial difference is that payment is based on the volume of cases. If it is legitimate for solicitors to pay a flat fee for an uncertain but equal number of cases, we do not see why it matters whether or not the firm was set up to make a profit or involves either wholly or in part unregulated individuals.
 - We agree with the analysis of the example in paragraph 24 but we wonder whether the answer would be different if the CMC, instead of charging per client, charged a fixed fee. Would it, indeed, be problematic if there were stepped fees so that a firm might be charged a set amount for up to, say, 500 cases, with a higher amount for up to the next 500 etc?
- 2.7 Our point is that these are all readily identifiable situations and the SRA needs to be clear about how it will approach the various permutations and consistent with other regulators. The SRA has gone some way towards providing some overarching guidance at paragraph 26 but we do not think this goes far enough. In particular, firms would welcome guidance on:
- How far payments that are not linked, or only partially linked to numbers of cases are permissible;
 - How far solicitors can involve themselves in profit-making marketing schemes;
 - How far a solicitor needs to go to establish whether a charge is so high that it would cause the SRA to assume that there is a referral fee.
- 2.8 We believe that the latter point is particularly difficult and would urge the SRA to reconsider its view of this. The concept of a "market rate" will be difficult and may even operate to artificially inflate prices. A high charge may reflect a number of different things: inefficiency by the provider, an expensive, high quality bespoke service, or a highly successful and sought-after service that can command a premium. In the latter case, it is likely that the fact that a firm will gain substantial business as a result of using the service is built into the price. But it does not seem to

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follow to us that it is possible to identify from this that the firm is paying a particular identifiable price for the referral of an individual case.

Business Models

- 2.9 The SRA has indicated that an ABS which does its own marketing will not, of itself, fall foul of the ban. It has also indicated that there may be a number of joint venture arrangements which might be acceptable.
- 2.10 We believe that the guidance needs to provide more information about the approach that the SRA will be taking when asked to approve such arrangements. At the seminar on 19th November, it was clear that the SRA would be asking a number of questions about such ventures and would be looking, quite rightly, at a range of other potential problems, not necessarily related to the referral question. Many of the points raised there are no different from those faced and managed by individual firms currently. However, we believe that the SRA ought to set out its likely concerns in respect of:
- ABSs where solicitors and claims managers work together in a single firm;
 - Joint venture agreements between solicitors, CMCs or insurers where there is a separate business involved.
- 2.11 Gaining approval for an ABS is an expensive and time-consuming exercise and firms are entitled to be assured that they are not wasting their time on business models which are unlikely to be approved

For the Future

- 2.12 We think that it is also likely that there will be a number of schemes which the SRA will decide are legitimate. We believe that the SRA ought to publish details of those schemes so that firms are aware of what is available to them.
- 2.13 Finally, we recognise that a number of unforeseen situations will arise. The SRA should ensure that the guidance is a living document and encompasses new arrangements and decisions.

3. Enforcement

- 3.1 We broadly support the proposed enforcement strategy and the factors set out at paragraph 17. However, we believe that:
- The SRA may well need to do some investigation itself to avoid hidden referral arrangements being entered into and firms that are compliant being placed at a disadvantage through activity by firms which does not comply;
 - The SRA needs to be clear about what does and does not breach the Act – one of our concerns with OFR is that enables the SRA to superimpose its judgement over that of firms who have been acting in good faith. This has the potential to damage firms.

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- 3.2 We reiterate our concerns about the “current market rate”. It is likely to be difficult to establish what that rate would amount to in different contexts, or how the SRA will be placed to adjudicate.
- 3.3 For example, if a service is charged for under a “price per lead” scheme, would a firm avoid being penalised if it could show that the price reflects the fair cost of marketing, advertising, administration and profit for generating that lead? The SRA would need to understand how internet marketing works in order to enforce this.

4. Definitions

- 4.1 The full extent of the ban is unclear in the absence of a clear definition of ‘personal injury work’. Damages arising from an accident are very different to clinical negligence cases. If it is to be an all-encompassing ban, the SRA should commit to that;
- 4.2 ‘Independent’ intermediary should be defined; while ‘independent’ means working alone in commercial terms, for solicitors it refers to parties that have not been influenced by third parties and inducements;
- 4.3 Use of the terms ‘received’ and ‘provided’ in the flow chart on the last page of the consultation document is misleading. The SRA should specify what it is referring to, as well as to and from whom.

5. Transfer of information

- 5.1 We believe that for clarity, the SRA should place instructive focus on what the payment is for in any given arrangement. The SRA should therefore firmly state in its guidance that if a client receives information about a firm, rather than the converse, that would be permitted. Where there is real ambiguity with regards to information passed between intermediary and consumer, this should be explored and the approach fed back to the profession.

6. Transition period

- 6.1 We remain concerned about the short timeframe for firms to adjust to the ban and new guidelines issued by the SRA. It was disturbing that both the SRA and the Claims Management Regulator indicated that the first few months would, essentially be “transition”, meaning, we suspect, that they will turn a blind eye to non-compliance. This is not satisfactory. We have already asked the Government to extend the timetable. It is also noteworthy that the pending Competition Commission’s investigation of the motor insurance industry might impact on timing, and might have bearing on Government’s perception of the extent to which insurance premiums are affected by referral fees.

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Draft Amendment Rules

Draft SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013]

Preamble

Rules dated [date of approval by the Legal Services Board]

made by the Solicitors Regulation Authority Board under sections 31, 79 and 80 of the Solicitors Act 1974, sections 9 and 9A of the Administration of Justice Act 1985, paragraphs 2 and 3 of Schedule 14 to the Courts and Legal Services Act 1990, section 83 of, and Schedule 11 to, the Legal Services Act 2007 and section 57 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007.

Rule 1

The SRA Code of Conduct 2011 shall be amended as follows:

(a) in Chapter 6, at the end of O(6.3) replace “.” with “;” and insert:

“O(6.4) you are not *paid a prohibited referral fee*.”;

(b) in Chapter 6, at the end of IB(6.2) replace “.” with “;” and insert:

“IB(6.3) having effective systems in place for assessing whether any *arrangement* complies with statutory and regulatory requirements;

IB(6.4) retaining records and management information to enable you to demonstrate that any *payments* you receive are not *prohibited referral fees*.”;

(c) in Chapter 6, renumber IB(6.3) and IB(6.4) as IB(6.5) and IB(6.6);

(d) in Chapter 6, under the heading “Overseas practice”, replace “The outcomes in this Chapter” with “Outcomes 6.1 to 6.3”;

(e) in Chapter 9, at the end of O(9.7) replace “.” with “;” and insert:

“O(9.8) you do not *pay a prohibited referral fee*”;

(f) in Chapter 9, at the end of IB(9.6) replace “.” with “;” and insert:

“IB(9.7) having effective systems in place for assessing whether any *arrangement* complies with statutory and regulatory requirements;

IB(9.8) ensuring that any *payments* you make for services, such as marketing, do not amount to the *payment of prohibited referral fees*;

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IB(9.9) retaining records and management information to enable you to demonstrate that any *payments* you make are not *prohibited referral fees*;

- (g) in Chapter 9, renumber IB(9.7) to IB(9.9) as IB(9.10) to IB(9.12);
- (h) in Chapter 9, under the heading “In-house practice”, replace “9.7” with “9.8”;
and
- (i) in Chapter 9, under the heading “Overseas practice”, replace “The outcomes in this chapter” with “Outcomes 9.1 to 9.7”.

Rule 2

The SRA Handbook Glossary 2012 shall be amended as follows:

- (a) after the definition of “**knowledge**” insert

“**LASPO**

means the Legal Aid, Sentencing and Punishment of Offenders Act 2012.” ;

- (b) after the definition of “**part-time**” insert

“**payment**

includes any form of consideration whether any benefit is received by you or by a third party (but does not include the provision of hospitality that is reasonable in the circumstances) and “pay” and “paid” shall be construed accordingly.”;

- (c) after the definition of “**professional services**” insert

prohibited referral fee

means

- (i) a *payment* prohibited by section 56 of LASPO; or
- (ii) a *payment* made to or by you which appears to the SRA to be a referral fee for the purposes of section 57(7) of LASPO, unless you show that the *payment* was made as consideration for the provision of services or for another reason and not as a referral fee.

Rule 3

These amendment rules shall come into force on 1 April 2013 or the date of approval by the Legal Services Board, whichever is the later.

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SRA Board Risk Assessment

Summary of issues for consideration

This paper asks the Board to:

- a) note the report on the responses to the consultation on implementation of the ban on referral fees in personal injury cases; and
- b) make the SRA Amendment to Regulatory Arrangements (Referral Fees) Rules 2013, subject to the approval of the Legal Services Board.

Report is for

Noting/information

Decision

Approval

Proceeding with the proposal will ensure that the SRA complies with the requirements of sections 56-60 LASPO. The Glossary definition of "prohibited referral fee" effectively puts the onus on the regulated community to show that payments made or received are not prohibited. This should limit the scope for legal argument about what does or does not amount to a "prohibited referral fee".

Finance

Additional resources are likely to be required to enable us to supervise and support firms that have been heavily reliant on referrals of personal injury work and may have difficulties in sustaining their practice once the ban comes into force.

Communications

It will be necessary to engage with the regulated community to ensure that there are not any misunderstandings about the meaning or impact of the changes to the Code of Conduct and the Glossary.

Equality and diversity implications

We will assess the equality impact of the ban, and our provisions for implementing it, once it comes into force and a full equality impact assessment will then be carried out. We will focus on the potential equality impact of our approach on the profession generally, firms that undertake personal injury work and those who source such work from introducers.

Author Agnieszka Scott

Date of report/paper being drafted 11 January 2013