



## BRIEFING PAPER

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# Referral fees in personal injury cases

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## Summary

A referral fee is a payment made for the referral or introduction of a client or potential client. Referral fees and arrangements can take different forms. Although they are also used in other commercial relationships, they have attracted particular attention when they involve the legal profession.

It has been argued that referral fees have added to the high costs and volume of personal injury litigation; this is one of the factors associated with increases in motor insurance premiums.

Since 1 April 2013, it has been a regulatory offence in England and Wales to pay or receive referral fees in personal injury cases. The law was changed by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO). This ban applies to regulated persons including solicitors, barristers, legal executives and claims management companies, and to insurers.

The Legal Services Board (LSB), which is the independent body responsible for overseeing the regulation of lawyers in England and Wales, has published guidance which is relevant for other types of case. This requires regulatory bodies for lawyers to ensure that consumers know when referral fees are in operation and to whom they are being paid.

The Government has consulted recently on introducing a statutory ban on the payment of referral fees to advocates in publicly funded criminal defence cases. The consultation closed in November 2015. The Government has not yet published a response.

In Scotland, advocates are prohibited by their professional rules from entering into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work.

There is a restriction on the payment of referral fees by solicitors but not a ban.

The final report of the Taylor Review of the costs and funding of litigation in Scotland, published in 2013, did not recommend a ban on referral fees or payments in kind for solicitors in Scotland. It also did not recommend a financial limit on permissible referral fees or services amounting to payments in kind. However, Sheriff Taylor did make recommendations relating to the future regulation of referral fees and recommended a ban on cold calling of potential clients by claims management companies.

The Scottish Government committed to consulting with the Law Society on the topic of referral fees.

Sections 1 to 3 of this briefing paper deal with the law in England and Wales. Section 4 deals with the position in Scotland.

# 1. What is a referral fee?

Referral fees and arrangements can take different forms and involve a range of different parties. Although they are also used in other commercial relationships, they have attracted particular attention when they involve the legal profession.<sup>1</sup>

The Legal Services Board (LSB) is the independent body responsible for overseeing the regulation of lawyers in England and Wales. It has adopted the following definition of referral fees:

Any payment made for the referral or introduction of any client or potential client.<sup>2</sup>

The LSB highlighted the difficulty of defining them:

As we have seen from earlier restrictions on referral fees, it is possible to blur definitions through using sub-contracting arrangements, payment in kind and marketing costs as a cover for the referral fee. It is important to recognise the difference between clear-cut referral fees, referral arrangements and fee-sharing agreements.

- Referral fees exist where a lawyer makes a payment to an introducer for the opportunity to represent a client in a variety of circumstances. In this situation, the client contracts directly with the lawyer.
- A referral arrangement may exist where a firm may introduce clients in return for free or discounted services.
- In a fee-sharing arrangement, the introducer receives the full amount of the relevant fee. The introducer then passes on a proportion of this fee to the referred lawyer.<sup>3</sup>

A referral fee is a payment made for the referral or introduction of a client or potential client.

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<sup>1</sup> Legal Services Board, [Referral fees, referral arrangements and fee sharing](#), September 2010, p16

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

## 2. England and Wales: ban on referral fees in personal injury cases

### Summary

It has been argued that referral fees have added to the high costs and volume of personal injury litigation; this is one of the factors associated with increases in motor insurance premiums.

Since 1 April 2013, it has been a regulatory offence to pay or receive referral fees in personal injury cases in England and Wales.

Since 1 April 2013, there has been a ban on the payment and receipt of referral fees in personal injury cases in England and Wales as a consequence of the implementation of [sections 56 to 60](#) of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO).

### 2.1 Background to ban

Even before the implementation of the relevant provisions of LASPO, the payment or receipt by a barrister of a referral fee, for the purpose of procuring professional instructions, was forbidden under their Code of Conduct.

Other legal professionals were allowed to use referral fees, subject to compliance with rules set out by their regulatory bodies.

In March 2004, the Solicitors' Conduct Rules were amended to allow solicitors to pay referral fees. This followed a report by the Office of Fair Trading, published in 2001, [Competition in professions](#), which considered that the ban on referral fees at that time might be hampering (among other things) the development of an online marketplace that could bring clients and solicitors together.

### The Jackson review: referral fees in personal injury cases should be banned

In November 2008, the Master of the Rolls at that time appointed Lord Justice Jackson to conduct a review of legal costs. The purpose of the review was "to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost".<sup>4</sup> Lord Justice Jackson published a [Preliminary Report](#) on

Lord Justice Jackson considered that referral fees contributed to the high costs of personal injuries litigation

<sup>4</sup> Judicial Communications Office news release, "Lord Justice Jackson appointed to undertake review of civil costs", 3 November 2008. The terms of reference for the review are set out in the [Review of Civil Litigation Costs: Final Report](#), p2

8 May 2009, and a [Final Report](#) in January 2010.<sup>5</sup> One of his recommendations was that referral fees in personal injury cases should be banned. Lord Justice Jackson considered that referral fees contributed to the high costs of personal injuries litigation.

## Coalition Government consultation on reform of civil litigation costs

On 15 November 2010, the Ministry of Justice launched a consultation, [Proposals for reform of civil litigation funding and costs in England and Wales](#).<sup>6</sup> This sought views on implementing a package of Lord Justice Jackson's proposals for reforming conditional fee agreements and other aspects of civil litigation funding and costs.<sup>7</sup>

However, the Coalition Government did not consult on the issue of referral fees. Although, when it was introduced in June 2011, the *Legal Aid, Sentencing and Punishment of Offenders Bill* included provisions intended to implement other proposals made by Lord Justice Jackson, it did not include any provision intended to ban referral fees. The Government recognised that this was a contentious issue but said that it would await the outcome of work being done by the Legal Services Board before deciding how to proceed.<sup>8</sup>

## Legal Services Board: no outright ban, but increased transparency obligations

In November 2009, the Legal Services Board (LSB) began a review of referral fees, referral arrangements and fee sharing. The Law Society had approached the LSB and set out the views of its Council that there should be a ban on all forms of referral fees across all the regulated legal profession.

On 27 May 2011, following consultation,<sup>9</sup> the LSB published its response, [Referral fees, referral arrangements and fee sharing: Decision Document](#). The LSB confirmed that it would not seek an immediate outright ban. Instead, it wanted to strengthen transparency obligations. It argued there was not enough evidence of consumer detriment to support a general ban in the legal services market.

The LSB published new statutory guidance and said it required approved regulators<sup>10</sup> to make sure that consumers knew when referral fees were in operation and to whom they were being paid. The LSB said that approved regulators would also need to improve regulatory policing of

The Legal Services Board favoured strengthening transparency obligations and did not seek an outright ban

<sup>5</sup> For information on other recommendations made by Lord Justice Jackson, see Library Research Paper RP11/53, [Legal aid, Sentencing and Punishment of Offenders Bill](#), 27 June 2011

<sup>6</sup> [Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations](#), CP 13/10, Cm 7947, November 2010

<sup>7</sup> Further information about the consultation and the Government's response is provided in a Library briefing paper, [Legal aid, Sentencing and Punishment of Offenders Bill](#), RP 11/53, 27 June 2011

<sup>8</sup> [Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Implementation of Lord Justice Jackson's Recommendations](#), CP 13/10, Cm 7947, November 2010, p81

<sup>9</sup> Legal Services Board, [Referral fees, referral arrangements and fee sharing](#), September 2010

<sup>10</sup> Approved regulators are the regulatory bodies for lawyers

lawyers' obligations.<sup>11</sup> The guidance set out the issues that approved regulators might wish to take into account in assessing how to deliver the necessary outcomes.<sup>12</sup>

## Transport Committee consideration of problems associated with referral fees

The House of Commons Transport Committee held a long running investigation into the cost of motor insurance. Among other things, the Committee looked at the extent to which the cost of motor insurance had been influenced by the prevalence of road accidents, insurance fraud, legal costs and the number of uninsured drivers. The Committee also considered ways of reducing the number and costs of whiplash claims.

In a report published in 2011, the Committee noted that there was general agreement that premiums had increased because of the increased number of personal injury claims arising from road traffic accidents.<sup>13</sup> It considered the role played by the payment of referral fees at that time, with some speaking of the payments being a "merry-go-round":

24. Over 40% of personal injury lawyers pay referral fees to receive work from insurers or claims management firms. Fees range on average from £200 to £1,000 per referral and there can be several referrals in relation to a single insurance claim. Fees may be paid and received by insurance firms, vehicle repairers, rescue truck drivers, credit hire firms, claims and accident management firms, law firms and medical experts. Swiftcover.com sent us evidence that some police forces charge fees for collecting vehicles which are unfit to drive following an accident. ABP Club, which represents vehicle repairers said "innocent policyholders are often 'encouraged' by their own insurer to pursue a claim as their insurer will gain financially from this in the form of a referral fee from the lawyer they pass the case to." It referred to this practice as a "great merry-go-round with each insurer gaining at the cost of another insurer". Insurers Aviva said that solicitors' marketing costs, including referral fees, can now total as much as 40% of their base costs, which are reclaimable under conditional fee arrangements. John Spencer of MASS said "there are large amounts of insurance company income deriving from the very referral fees that are complained about".<sup>14</sup>

The Transport Committee noted, however, that views were divided on referral fees. Some witnesses described them as a form of marketing cost, which had no impact on premiums:

25. Mark Boleat argued strongly that referral fees were a form of marketing cost and did not add to overall costs in the insurance industry. APIL said "there are no circumstances of which we are

The Transport Committee found that views on referral fees were divided

<sup>11</sup> Legal Services Board press release, *Regulation of referral fees for legal services*, 27 May 2011 [accessed 10 March 2015]

<sup>12</sup> Legal Services Board, *Guidance on Referral Fees, Referral Arrangements and Fee Sharing to Approved Regulators*, p3

<sup>13</sup> House of Commons Transport Committee, *The cost of motor insurance*, 11 March 2011, HC 591 2010-11, p3

<sup>14</sup> *Ibid*

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aware which would result in referral fees generating an increase in insurance premiums".<sup>15</sup>

The Committee considered that referral arrangements should be more transparent to consumers:

28. In our view, consumers are largely unaware of how much money moves around the insurance industry when they make a claim, particularly if they were not at fault for the accident. We suspect consumers are often confused about why their insurer insists that they use a specific vehicle repairer or solicitor and about whether they are entitled to make their own choice. The Legal Services Board has made recommendations about the transparency of referral fee arrangements in the legal sector which we consider should form the basis for a transparency regime throughout the motor insurance market. Insurers should publish on their websites a list of the firms with which they have referral arrangements, an indication of the level of the fees paid, and a clear explanation of how referral arrangements work and their purpose. Policy holders should be sent this information with their insurance documents. When claims are made, insurers should make it clear to claimants that they need not use the solicitor, vehicle repairer or credit hire firm which is recommended by the insurer. We look to the insurance industry to implement a more transparent regime for referral fees by the end of next year and to the Government to step in, with legislation if necessary, if the industry is unwilling or unable to agree on this.<sup>16</sup>

### Government announcement that ban would be introduced

On 9 September 2011, the Coalition Government announced that referral fees in personal injury cases would be banned.

Jonathan Djanogly, who was then a junior Justice Minister, said that current arrangements had led to the growth of an industry that actively encouraged individuals to bring cases, regardless of the merits of their claim. The Government, he said, strongly believed that it was not in the public interest for potential claimants to be sought out and encouraged to make claims by people who profited from their claims being pursued. He indicated that the Government believed that referral fees added to the high costs and volume of personal injury litigation, one of the factors underpinning increases in insurance premiums.

Jonathan Djanogly said that the ban on referral fees would contribute to the then Government's plans to tackle the compensation culture.<sup>17</sup>

On 1 November 2011, at report stage in the House of Commons, Government amendments to the *Legal Aid, Sentencing and Punishment of Offenders Bill* were agreed to add new provisions relating to referral fees.<sup>18</sup>

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<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

<sup>17</sup> [HC Deb 9 September 2011 c32WS](#)

<sup>18</sup> [HC Deb 1 November 2011 cc822-849](#)



## 2.2 The ban

### Regulatory offence

It is now a regulatory offence (rather than a criminal offence) in England and Wales to pay or receive referral fees, in specified types of legal business. This means that breach of the ban may give rise to enforcement action by the relevant regulator.<sup>19</sup> A regulated person also breaches the provisions in LASPO if they arrange for another person to provide services to the client and they are paid for making that arrangement.

Ban on referral fees in personal injury cases introduced by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

### Extent of ban

The prohibition applies to claims or potential claims for damages for personal injury or death and to any other claim or potential claim for damages arising out of circumstances involving personal injury or death.

The prohibition may be extended to other types of legal business of a description prescribed in regulations made by the Lord Chancellor. In November 2011, Jonathan Djanogly said that there were no plans at that time to extend the scope beyond personal injury.<sup>20</sup>

The Act defines what is meant by 'referral of prescribed legal business', 'legal services' and 'client'. Payment includes 'any form of consideration', whether the benefit is received by the regulated person or by a third party, but not the 'provision of hospitality that is reasonable in the circumstances'.

A contract to make or pay for a referral or arrangement is unenforceable.

A payment, which would otherwise be regarded as consideration for the provision of services of any description, may be treated as a referral fee if it exceeds the amount specified in relation to services of that description in regulations made by the Lord Chancellor.<sup>21</sup>

### Regulators and regulated persons

The Act specifies both the regulators who are required to monitor and enforce the ban and the regulated persons who are subject to it. It also enables the Lord Chancellor, by regulations, to specify additional regulators and regulated persons to whom the relevant provisions of LASPO will apply.<sup>22</sup>

The relevant regulators are the Financial Conduct Authority;<sup>23</sup> the Claims Management Regulator; the General Council of the Bar; the Law

<sup>19</sup> For example, the Solicitors Regulation Authority has published information about its approach to enforcement in [Supervision and enforcement strategy for the ban on referral fees](#), 25 March 2013 [accessed 8 September 2016]

<sup>20</sup> [HC Deb 1 November 2011 c843](#)

<sup>21</sup> Section 57(9)

<sup>22</sup> Section 59(1)

<sup>23</sup> [The Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(Referral Fees\) Regulations 2013](#), SI 2013/1635, provide for enforcement of the rules on referral fees by the Financial Conduct Authority in relation to financial firms regulated by the Financial Conduct Authority. These regulations apply the rules against referral fees principally to those conducting insurance and insurance mediation and those in the same group as such persons

Society; and, since December 2014, the Chartered Institute of Legal Executives.<sup>24</sup> The ban applies to regulated persons including solicitors, barristers, legal executives and claims management companies, and to insurers.

Regulators must have appropriate arrangements for monitoring and enforcing the ban and may make rules and use existing powers for this purpose. These rules may provide for a payment to be treated as a referral fee unless the regulated person shows that the payment was made as consideration for the provision of services, or for another reason, and not as a referral fee.

### 2.3 Regulation of the ban

On 21 August 2012, Chris Kenny, the then Chief Executive of the LSB, wrote to all approved regulators and emphasised the extent of the prohibition:

*S57 of LASPO 2012 states that "The relevant regulator must ensure that it has appropriate arrangements for monitoring and enforcing the restrictions imposed on regulated persons by section 56." With regard to 'rules against referral fees' in personal injury matters, it will be important to ensure that such rules do not go beyond the obligations in LASPO. That legislation bans referral fees, but does not prohibit, for example, new alternative business structures that effectively do away with the need for referral. A liberal approach that supports the regulatory objectives of the *Legal Services Act 2007*, while properly delivering the legislative intent of LASPO, will therefore be crucial in making sure that both pieces of legislation are implemented effectively.<sup>25</sup>*

In December 2013, in a written answer, the then Justice Minister, Lord McNally, said that establishing an Alternative Business Structure or collective marketing scheme was not a way to get around the prohibition:

*ABSs allow for increased competition and the provision of more cutting-edge services, helping to lower costs whilst maintaining high standards. This is a strictly regulated area and any ABS is required to comply with both the rules of its licensing authority and the law in respect of the ban on referral fees. The Government is monitoring the operation of the ban and is confident that if it became apparent that a firm's business model was not compliant, the regulator would deal with any breach appropriately.<sup>26</sup>*

### Solicitors Regulation Authority

The Solicitors Regulation Authority (SRA) regulates solicitors in England and Wales.

Following consultation on proposals for implementing the ban on referral fees in personal injury cases, the SRA amended its Handbook which sets out the standards and requirements solicitors are expected to

Regulators have published information about regulation of the ban

<sup>24</sup> [The Referral Fees \(Regulators and Regulated Persons\) Regulations 2014](#), SI 2014/3235

<sup>25</sup> Legal Services Board, [Letter from Chris Kenny, Chief Executive to all approved regulators – Referral fees](#), 21 August 2012 [accessed 8 September 2016]

<sup>26</sup> [HL Deb 2 December 2013 c20WA](#)

achieve and observe. The amendments included two new mandatory outcomes in the [Code of Conduct](#):

Outcome 6.4: you are not paid a prohibited referral fee

Outcome 9.8: you do not pay a prohibited referral fee

More detailed information, including definitions of the terms used, is provided on the SRA website: [Our approach to the ban on referral fees in personal injury cases](#).<sup>27</sup>

The SRA has also published further guidance and other information about the ban on referral fees, including:

- [The prohibition of referral fees in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 \(LASPO\) Sections 56-60](#);
- [Warning notice: Referral fees, LASPO and the SRA Principles](#), issued on 11 October 2013;
- [Referral fees FAQs](#);
- [Is my referral fee prohibited by LASPO 2012?](#)<sup>28</sup>

## Bar Council

The Bar Standards Board Handbook includes [Guidance on Referral and Marketing Arrangements for Barristers Permitted by the BSB](#).<sup>29</sup>

In addition, in December 2011, the Ethics Committee of the Bar Council published [The Prohibition of Referral Fees](#).<sup>30</sup> This reminded barristers that the payment by a barrister of a referral fee for the purpose of procuring professional instructions is forbidden under the Code of Conduct. It also set out the general nature of the ban on referral fees for barristers:

3. You are also reminded that the payment (or receipt) of a referral fee (whether or not it is disclosed to the lay client) is potentially both a civil wrong and a criminal offence, whether or not it is also prohibited in connection with personal injury work by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

## Claims Management Regulator

A [Claims Management Regulation Referral fee ban guidance note](#), from the Ministry of Justice, is available on the Gov.UK website.<sup>31</sup>

## Financial Conduct Authority

The Financial Conduct Authority states that it has established a “robust working relationship” with its regulatory counterparts, the Solicitors Regulation Authority and the Claims Management Regulator:

These relationships are formally underpinned by memoranda of understanding (MoUs) as well as working documents that facilitate information sharing, evidence gathering and

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<sup>27</sup> Accessed 8 September 2016

<sup>28</sup> Information available on the SRA website [accessed 8 September 2016]

<sup>29</sup> January 2014

<sup>30</sup> Originally issued, October 2012, last reviewed, July 2015 [accessed 8 September 2016]

<sup>31</sup> July 2015

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enforcement action; this ensures effective regulation of all firms and markets within our remit.<sup>32</sup>

The [Referral Fees Regulations \(Enforcement Guidance\) Instrument 2013](#) provides further information about powers exercised by the Financial Conduct Authority.<sup>33</sup>

### 2.4 Effect of regulation

In December 2013, a written answer indicated the enforcement action which regulators had already taken at that time, noting that some non-compliance or suspected breaches had been identified:

Mike Weatherley: To ask the Secretary of State for Justice (1) whether regulatory bodies have found any evidence of referral fees for personal injury claims being described as marketing fees in response to the ban on such fees;

(2) what enforcement action has been taken to date to ensure compliance with the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on payment and receipt of referral fees for personal injury claims.

Mr Vara: Four approved regulators are responsible for ensuring compliance and enforcement of the ban on referral fees in personal injury cases, which came into effect on 1 April 2013 in England and Wales.

The Claims Management Regulator (CMR) has found evidence of some claims management companies (CMCs) adapting business models to provide marketing services. The CMR has taken steps to identify non-compliance with the ban, which has involved visits to over 800 CMCs, and detailed analysis of their business models. If any breaches are identified, the CMR will investigate and take appropriate enforcement action.

The Solicitors Regulation Authority (SRA) has also visited a number of firms to assess suspected breaches of the ban and investigations have been launched into firms that may be in breach. The SRA has also written to around 900 firms with a majority personal injury caseload to remind them of their duty to comply with the ban. While no enforcement action has yet been taken, the SRA works closely with firms to ensure compliance.

The Financial Conduct Authority and the Bar Standards Board have not found any evidence of referral fees being described as marketing fees and no enforcement action has yet been taken.

Government action has already seen the number of claims firms operating drop by more than 1,000 since a peak of 3,400 in 2011 to 2,250 now. The number of CMCs operating in the personal injury claims sector has fallen by around 40% since the implementation of the ban and wider reforms to civil litigation.<sup>34</sup>

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<sup>32</sup> Financial Conduct Authority, [The Referral Fee Ban: a coordinated approach to regulation](#), 1 August 2013 [accessed 8 September 2016]

<sup>33</sup> FCA 2013/69

<sup>34</sup> [HC Deb 10 December 2013 cc124-5W](#)

## 3. What about referral fees in other legal matters?

### 3.1 Statutory ban under LASPO applies only to personal injury cases

At present, the statutory ban on the payment and receipt of referral fees under LASPO applies only to personal injury cases.

The letter of 21 August 2012 from the then Chief Executive of the LSB, Chris Kenny, to all approved regulators, considered the interrelation of the provisions in LASPO, relating to referral fees in personal injury cases, with the LSB's more general guidance on referral fees issued in 2011:

You will be aware that our guidance on referral fees applies across all segments of the legal market whereas the new legislation applies more narrowly to personal injury. We are therefore expecting regulators to continue to review their regulatory approach to referral fees, with due regard to our guidance, with particular reference to s162 (5) and (6) of the [Legal Services Act 2007].<sup>35</sup> In particular, regulators will need to justify any ban on the payment or receipt of referral fees that remains in place with clear supporting evidence (in respect of personal injury, Regulators will, of course, wish to rely on the justification provided by the provisions of sections 56 to 60 of LASPO 2012) and to take proper account of the rest of the guidance, notably the requirements on transparency for both individual consumers and the wider public.<sup>36</sup>

The statutory ban applies only to personal injury cases. LSB guidance is relevant for other types of case

The Law Society has previously expressed disappointment that the ban on referral fees in personal injury cases was not to be extended more widely - for example into the area of conveyancing.<sup>37</sup>

However, in 2013, the CLC (the Council for Licensed Conveyancers) said that a review it had conducted found no justification for a ban on referral fees in conveyancing. The CLC said that, during its review, it found that the biggest threat to the consumer interest posed by referral arrangements was the level and timing of information given to consumers. As a result, the CLC made additions to its Disclosure of Profits and Advantages Code to ensure greater transparency.<sup>38</sup> Anna Bradley, Chair of the CLC welcomed the LSB's decision to grant the CLC's application to make these rule changes, saying:

Our review of referral fees in conveyancing found no evidence of consumer detriment – an assessment shared by the LSB and Legal Services Consumer Panel following their own past research. The outright ban on referral fees that some have called for could not possibly be justified on the evidence. We proposed, and the LSB has granted, a proportionate regulatory response. The enhanced

<sup>35</sup> Section 162 of the *Legal Services Act 2007* allows the LSB to give guidance as specified

<sup>36</sup> Legal Services Board, [Letter from Chris Kenny, Chief Executive to all approved regulators – Referral fees](#), 21 August 2012 [accessed 8 September 2016]

<sup>37</sup> Law Society website, [Law Society statement on referral fees](#), 9 September 2011 [accessed 8 September 2016]

<sup>38</sup> Neil Rose, "[Conveyancers face new referral fee disclosure rules but no ban](#)", *Legal Futures*, 8 August 2013 [accessed 8 September 2016]

transparency requirements we are putting in place empower the consumer to manage the low level of risk themselves.<sup>39</sup>

## 3.2 Consultation on extending ban to criminal advocacy

On 1 October 2015, the Ministry of Justice published a consultation paper, [\*Preserving and Enhancing the Quality of Criminal Advocacy\*](#).

Among other things, the consultation sought views on the introduction of a statutory ban of referral fees paid by an advocate in exchange for instruction in publicly funded criminal defence cases. The Government acknowledged that such fees were already prohibited by the Bar Standards Board, restricted by the Solicitors Regulation Authority and banned in the Legal Aid Agency's Standard Contracts. Nevertheless, there was anecdotal evidence that referral fees were frequently paid and received. The Government was concerned that this could deny clients the potential choice of a suitable high quality advocate:

4.4... the government firmly believes that financial incentives cannot be allowed to dictate the choice of advocate. Quality and suitability of the advocate to the client and case should be the key factors. We want to ensure that advocates are instructed because they are operating at a high level of competence and have the right experience to do the job well - not because of their relationship with an instructing litigator, or because they were prepared to pay a fee to secure that instruction.

The Government is proposing to end any current ambiguity about existing prohibitions by using the provisions in LASPO to introduce a statutory ban of referral fees in publicly funded criminal defence cases:

4.5 Part of the reason that existing prohibitions are ineffective appears to be that they are not consistent. This inconsistency has led to some confusion as to what behaviour is captured by the prohibitions.

4.6 We propose to end any current ambiguity and strengthen the existing position by introducing a statutory ban of referral fees in publicly funded criminal defence cases. We propose to do this by making regulations under section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) [footnote: LASPO currently bans only one type of referral fee – those relating to personal injury cases.] This would provide clarity, send a very strong signal about the government's stance on this issue, and ensure that all other contracts, guidance and restrictions reflect the position in law. We also consider that banning this practice in law might help change the behaviour of advocates and litigators. We would expect the regulators to respond quickly to any allegations in breach of the proposed statutory position.

The consultation asked for views on improving the reporting of breaches of prohibitions in order to gain evidence of the problem and to ensure the effectiveness of any statutory ban.

The Government is proposing to use the provisions in LASPO to introduce a statutory ban of referral fees in publicly funded criminal defence cases.

<sup>39</sup> CLC, [\*Legal Service Board approves CLC's approach on referral fees\*](#), 8 August 2013 [accessed 8 September 2016]

The Government is also considering how best to identify and prevent disguised referral fees, and how dividing lines might be drawn between permitted and illicit financial arrangements:

4.8 The Bar and other advocates have also expressed concern that payments are being made which effectively amount to referral fees – although they are described in different ways. These can include ‘administration’ or ‘management’ fees paid by advocates, for services provided by litigators. These financial arrangements are not problematic if they represent services honestly sought and provided. If in practice these payments are required to secure instruction, they are unacceptable.

4.9 There will be circumstances in which administration services are genuinely being offered and paid for in a legitimate fashion. This might be, for example, where a firm offering litigation services provides administration services to a self-employed advocate. The government has no objection to business models developing in this way.

4.10 However, it is worth stressing that the process of instructing an advocate is already remunerated as part of the fee paid to litigators. Clearly, as a point of principle, litigators should not be charging advocates for services for which they are already being remunerated.

4.11 It is difficult to guard against such disguised referral fees. These financial arrangements are not captured by the existing referral fees prohibitions and would not be caught by our proposed statutory ban. However the government would welcome views on what, if any, steps could be taken in order to make it more difficult for such arrangements to persist.

The consultation ended on 27 November 2015. The Government has not yet published a response.

## 4. Referral fees in Scotland<sup>40</sup>

### 4.1 The current position

The Scottish equivalent of a barrister is an advocate. The position in Scotland with regards to referral fees differs for advocates and solicitors.

#### Advocates

In 2008 the [Faculty of Advocates](#) (the professional body for advocates) issued an explicit rule prohibiting advocates from entering into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work.<sup>41</sup>

#### Solicitors

##### A restriction but no ban

There is a restriction on the payment of referral fees by solicitors but not a ban. The restriction arises from the prohibition, under the practice rules issued by the Law Society of Scotland, on solicitors sharing with any unqualified person any profits or fees which come from any business transacted by them.<sup>42</sup>

##### Flat rate fees

Nevertheless, solicitors may pay a fee to be included on a panel to which referrals will be made, provided that the fee is not expressed as a proportion of the fees generated for the business referred. In other words, a flat fee is not in breach of the rules.<sup>43</sup>

##### Referrals of a single case

A solicitor may also pay the fee for the referral of a single case, and express it as such. This is always providing that the fee is identified as an outlay in the account rendered by the solicitor to the client.<sup>44</sup> Essentially, the client ends up paying the referral fee which brought the client into contact with the solicitor in the first place.

##### Payments in kind

It is fairly common in Scotland for solicitors' firms which receive a regular flow of work from a particular place to offer free advice, representation and other services in return. For example, some firms of solicitors provide free representation at employment tribunals for members of a trade union. In return, the trade union directs their members who have sustained a personal injury to that firm to pursue a personal injury claim. For the purposes of referral fees, such

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<sup>40</sup> Information provided by SPICe (Scottish Parliament Information Centre)

<sup>41</sup> Rule 9.12 states: "Counsel may not enter into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work, or for recommending or introducing counsel to the client or an instructing agent." Faculty of Advocates, *Guide to the Professional Conduct of Advocates* (5<sup>th</sup> ed. 2008).

<sup>42</sup> The Law Society of Scotland. (2011) *The Law Society of Scotland Practice Rules 2011*, Rule D9.2.

<sup>43</sup> Review of Expenses and Funding of Civil Litigation in Scotland. (2013) *Report of the Expenses and Funding of Civil Litigation in Scotland* (the report of the so-called 'Taylor Review'), para 4.

<sup>44</sup> *Op cit*, para 5.



arrangements are usually referred to as 'payments in kind'. These arrangements are not banned in Scotland.

## 4.2 The Taylor Review

In 2011 the Scottish Government asked Sheriff Principal James Taylor<sup>45</sup> to undertake a review of the costs and funding of litigation in Scotland. The final report was published in 2013: [Taylor Review](#).

Chapter 10 of the report covers how referral fees (and payments in kind) should be dealt with in Scotland. This chapter includes a discussion of the position in England and Wales. It also includes consideration of how the existing market for referrals operates in Scotland, as well as the policy considerations associated with any change in the relevant law and practice.

### No ban recommended

Ultimately, Sheriff Principal Taylor did not recommend a ban on referral fees or payments in kind for solicitors in Scotland. He also did not recommend a financial limit on permissible referral fees or services amounting to payments in kind. His reasoning included that such measures would be difficult to police in practice (see especially chapter 10, paras 63 and 76). He also thought that existing practices in the referrals market were different in Scotland as compared to its southern neighbour. For example, he did not find any evidence that unmeritorious claims were being raised as a result of referrals (chapter 10, para 63).

### Regulation – obligation to provide written information to the client

However, Sheriff Taylor did make recommendations relating to the future regulation of referral fees. For example, when a solicitor receives a referral from a third party agency it was recommended that that solicitor should be obliged to provide detailed written information to the client in question. This included, for example, the information that the service was available elsewhere, for example, from a firm that does not have an arrangement with the referring party (chapter 10, para 68 and recommendation 72).

### Claims management companies

Sheriff Taylor noted that there was a particular aversion amongst respondents to his consultation paper to the way some claims management companies obtained their business. Accordingly, his report also recommended a ban on cold calling of potential clients by such companies. It also recommended that an obligation should be placed on solicitors who obtain clients from such companies to satisfy themselves that the claims management company does not obtain clients via cold calling (chapter 10, para 70, recommendations 74 and 75).

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<sup>45</sup> A sheriff principal is a type of senior judge who operates in the local courts in Scotland. See: <http://www.scotland-judiciary.org.uk/35/0/Sheriffs-Principal>

## Comparison with the Jackson Review

On his approach compared to the approach of Lord Justice Jackson, Sheriff Principal Taylor commented:

“On occasion, I appear to have arrived at a radically different conclusion than Lord Justice Jackson, such as with regard to referral fees. More careful inspection, however, may reveal that Lord Justice Jackson’s recommendation with regard to the prohibition of referral fees in England and Wales differs little from current practices in Scotland’s referral market. Once again, our apparent differences reside in quite different starting points. Hence, considerable caution must be exercised in comparing the two Reports”<sup>46</sup>

## Next steps by the Scottish Government

The Scottish Government published its response to the Taylor Report in 2014: [Review of Expenses and Funding of Civil Litigation in Scotland: A Report by Sheriff Principal James A Taylor. Scottish Government Response.](#)

In this response the Scottish Government committed to consulting with the Law Society on the topic of referral fees.

In its response, the Scottish Government also considered the wider question of the regulation of claims management companies, a topic linked to Sheriff Principal Taylor’s referral fee recommendations. On regulation of claims management companies it said:

The Scottish Government will consider the question of whether claims management companies should be regulated as part of a wider review of legal services regulation. The Scottish Government intends to turn its attention to this issue following the delivery of primary legislation to implement Sheriff Principal Taylor’s recommendations on damages based agreements, speculative fee agreements and QOCS.

In the meantime the Scottish Government will consider whether further action should be taken to curb unacceptable practices and if so the nature of that action.

The [Scottish Government's Programme for Scotland 2016-17](#) includes information about a proposed Expenses and Funding of Civil Litigation Bill.<sup>47</sup>

A Scottish Government official has recently provided the following update on progress on referral fees and the Taylor report more generally:

“The Scottish Government intends to consider the position of referral fees alongside our consideration of the regulation of claims management companies as part of ongoing work to review the regulation of the legal profession. We will also consider referral fees in conjunction with the Law Society of Scotland who would require to change its rules on referral fees.”<sup>48</sup>

No timescales were available for any future work.

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<sup>46</sup> Foreword to the report

<sup>47</sup> 6 September 2016, p11

<sup>48</sup> Personal communication to Sarah Harvie-Clark, Senior SPICe Researcher, from the relevant Scottish Government policy team on 24 August 2016

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