

Annex B

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 - draft guidance on how we will interpret the relevant provisions of LASPO for regulatory purposes; and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;
 - 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:
 - 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 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.

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.
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
- 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.