

Application made by the Solicitors Regulation Authority Board to the Legal Services Board under Part 3 of Schedule 4 to the Legal Services Act 2007, for the approval of changes to regulatory arrangements relating to the payment and receipt of referral fees in personal injury cases.

1. This is an application by the Solicitors Regulation Authority (SRA) for approval of changes to the SRA's regulatory arrangements, to give effect to the ban on referral fees in personal injury cases contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). The relevant provisions of LASPO (sections 56-60) are due to come into force on 1 April 2013.

A. Rational for change

2. Section 56 of LASPO prohibits the payment and receipt of referral fees in claims for personal injury or death by regulated persons, including individuals and entities regulated by the SRA. It also prohibits regulated persons, in the course of providing legal services, receiving a payment for arranging for a third party to provide services to the client; and the payment and receipt of referral fees in relation to other claims for damages arising out of circumstances involving personal injury or death.
3. Section 57(1) of LASPO requires the relevant regulators to ensure that they have appropriate arrangements for monitoring and enforcing the restrictions imposed by section 56 and allows regulators to make rules for that purpose. Although there is no obligation to make rules (in the form of mandatory outcomes), we believe that doing so will provide clarity for both the regulated community and for consumers. This is because the existing Chapters in the Code that deal with referrals are drafted on the basis that referral arrangements and the payment of referral fees are generally permitted (except in legal aid and criminal cases). It is therefore important to make clear that there are cases where they are not permitted; and that this is a regulatory as well as a legal issue.
4. In addition, section 57(8) provides that these rules may provide that certain payments will be treated as a referral fee unless the regulated person can show that the payment was for services or another reason and not for the referral. We believe that adopting this approach will be consistent with outcomes-focused regulation and that the SRA would need to make rules in order to do so.
5. We believe that the SRA has the requisite disciplinary and regulatory powers in order to fulfil its obligations under LASPO to monitor and enforce the ban.
6. We do not believe that creating rules that replicate, add to or attempt to clarify the prohibition in LASPO would be consistent with outcomes-focused regulation. Making the prohibition wider would be difficult to justify without evidence of

consumer detriment and adopting a narrower approach would not fulfil the SRA's obligations under LASPO.

B Details of the SRA's current regulatory arrangements

9. Since October 2011 the SRA has adopted an outcomes focused approach to regulation. This is a regulatory regime that focuses on the high level principles and outcomes that should drive the provision of services to clients. In the SRA Code of Conduct we have replaced detailed rules with mandatory outcomes. These set out the outcomes we expect the firms and individuals we regulate to achieve in particular contexts whilst allowing flexibility in how those outcomes are achieved.
10. Referral arrangements and referral fees are dealt with specifically in Chapters 6 and 9 of the Code of Conduct and are also subject to the 10 SRA Principles that underpin all regulatory issues. The most relevant principles are that those we regulate must:
 - uphold the rule of law and the proper administration of justice;
 - act with integrity;
 - not allow their independence to be compromised;
 - act in the best interests of each client;
 - provide a proper standard of service to their clients;
 - behave in a way that maintains the trust the public places in the regulated person/entity and in the provision of legal services.
11. The outcomes relating to referrals focus on independence, clients' best interests and transparency. For example, solicitors must ensure that:
 - their independence and professional judgement are not prejudiced by virtue of any arrangement;
 - clients interests are protected regardless of the interests of the introducer;
 - clients are in a position to make informed decisions about how to pursue their matter; and
 - clients are informed of any financial benefit or other interest which an introducer has in referring the client to the solicitor;
12. Other than legal aid and criminal matters, the SRA does not restrict the types of work in which referral fees can be paid and all types of work are subject to the same requirements.

C. Nature and effect of the proposed alterations to the SRA's regulatory arrangements

13. The (draft) SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013], which are set out in Annex 1, were made by the SRA Board on 23 January 2012, subject to approval by the Legal Services Board (LSB).
14. The effect of these rules will be to:
 - (i) add new outcomes and indicative behaviours into Chapters 6 (Your client and introductions to third parties) and 9 (Fee sharing and referrals) of the SRA Code of Conduct 2011. These prohibit those we regulate paying or receiving a "prohibited referral fee";

- (ii) add new definitions of terms used in the Outcomes, including “prohibited referral fee” to the SRA Handbook Glossary; and
 - (iii) amend the provisions in Chapters 6 and 9 of the Code that set out which of the outcomes apply in respect of *in-house* and *overseas practice*.
15. The SRA Board has agreed to insert the following new outcomes into the Code of Conduct:

Chapter 6

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

16. This will outcome will apply in relation to in-house practice but not to overseas practice.

Chapter 9

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

17. This outcome will apply in relation to in-house practice but not to overseas practice.
18. It is proposed that the terms in italics will be defined in the SRA Handbook Glossary as follows:

“LASPO

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

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.

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.”
19. It is proposed that the outcomes will be supported by the following additional indicative behaviours:

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.”

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;”

20. The proposed new outcomes will need to be read in conjunction with 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’.
21. This means that there will be some arrangements that, whilst not breaching the LASPO provisions, will still be considered a referral arrangement 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.

D Statement in respect of the Regulatory Objectives

22. The SRA must, so far as is reasonably practicable, act in a way that is compatible with the regulatory objectives set out in the Legal Services Act 2007, and in a way that it considers to be most appropriate for the purpose of meeting those objectives. Our policy in relation to referral fees in personal injury cases has been led by the government’s position, as reflected in the relevant provisions of LASPO. Our comments on the regulatory objectives therefore relate to our policy in implementing the ban, rather than the effect of the ban itself.
23. The SRA Board is satisfied that its proposals for implementing the ban are compatible with the regulatory objectives and represent the most appropriate means of meeting these objectives whilst fulfilling our obligations under LASPO. The SRA Board has not identified an adverse effect on any of the regulatory objectives as a result of the proposed amendments.
24. The amendments highlight the statutory context of the ban and ensures that those we regulate do not pay or receive referral fees where this is prohibited by law. The amendment therefore supports the constitutional principle of the rule of law.
25. The amendments do not prevent the payment and receipt of referral fees beyond the provisions of LASPO (save where these are already prohibited i.e. in criminal and legal aid cases). This is because we do not have evidence of harm to the interests of consumers or the public to justify going beyond the requirements of LASPO. We will continue to monitor the situation in accordance with the LSB’s guidance published in May 2010. Our proposals for implementing the ban

therefore have a neutral impact on the regulatory objectives of improving access to justice and protecting and promoting the interests of consumers.

26. The changes support the need for organisations (as well as individual lawyers) to be regulated, encompassing compliance with the regulatory objectives and the professional principles.
27. Our draft Supervision and Enforcement Strategy, which was included in the consultation and included in the SRA Board paper (see Annex 2) reflects our intention to apply a risk-based approach to enforcing the ban, which focused on the risks to the interests of clients and the wider public and to the regulatory objectives.

E Statement in respect of the Better Regulation Principles

28. The SRA considers that the proposed alterations fulfil our obligation under section 28 of the Legal Services Act to have regard to the Better Regulation Principles.
29. The proposals are proportionate and targeted in that they fulfil the SRA's obligation to enforce the ban, by requiring the firms and individuals it regulates to comply with their legal obligations under LASPO, but do not go further than that.
30. The SRA has consulted publicly on the proposed changes and taken account of the views of stakeholders in developing its approach. We intend to publish information for the profession on how we will supervise and enforce the ban and on how we will interpret LASPO for regulatory purposes. We are therefore being accountable and transparent in our approach to implementing the ban.

F Statement in relation to desired outcomes

31. The SRA's desired outcome is that the individuals and firms that it regulates comply with the ban on referral fees in personal injury cases, whilst at the same time complying with their regulatory obligations in relation to those arrangements that are not prohibited by LASPO.
32. We will assess these outcomes as part of our supervision and enforcement strategy.

G Stakeholder engagement

33. The SRA published a discussion document in June 2012, after LASPO had received Royal Assent, setting out our early thinking on how we should implement the ban. A formal consultation, setting out our proposals and taking into account the responses received to the discussion document, was published in October 2012. In addition we have held two stakeholder events and held a number of meetings with other regulators, members of the profession and businesses involved in personal injury referrals. A copy of the report on the responses to the formal consultation is included in the SRA Board paper attached at Annex 2.

H Statement in relation to impact on other Approved Regulators

34. The other approved regulator affected by the proposed ban is the General Council of the Bar, which is subject to the same requirements under LASPO as the SRA. Other regulators affected are the Financial Services Authority and the Claims

Management Regulator (which are relevant regulators for the purposes of LASPO). The SRA has been in discussion with all of these regulators since January 2011 and we do not believe our proposals give rise to any conflict between approved regulators.

I Implementation timetable

35.

4 February 2012	Application for approval of the SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013]
1 April 2013	Proposed change implemented in Edition 7 of the SRA Handbook

J SRA contact for matters relating to this application

36. If the Board have any queries in relation to this application please contact:

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Annex 1 draft SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013]

Annex 2 SRA Board paper on the ban on referral fees in personal injury cases, January 2013