

To:	Board	
Date of Meeting:	April 2011	Item: Paper (11) 31

Title:	Referral fees
Workstream(s):	Access to Justice
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Status:	Protect

Summary:
<p>This paper confirms the approach to the Board's oversight of Approved Regulators' (AR) regulation of referral fees. The Board's position in the light of consultation responses was:</p> <ul style="list-style-type: none"> • to maintain its view that a general ban could not be justified for referral fees, referral arrangements and fee sharing • to encourage greater transparency in markets where referral fees and referral arrangements operate • to improve compliance and enforcement • to undertake a thematic review, probably in 2012/13. <p>The Executive was invited to prepare the final documents for publication ahead of approval at this meeting.</p> <p>Annex A is the decision document, including:</p> <ul style="list-style-type: none"> • the summary of responses to consultation • the Board's response and final proposal • the prescribed outcomes to be achieved. <p>Annex B is the supporting guidance.</p>

Risks and mitigations	
Financial:	None identified.
FoIA:	Initial assessment – s36(2)(b).
Legal:	None identified.
Reputational:	Possibility of Government overriding decision for other economic, political or social reasons (see main paper).
Resource:	None identified.

Consultation	Yes	No	Who / why?
Board Members:	✓		David Wolfe and Barbara Saunders.

Consumer Panel:	✓		Steve Brooker.
Others:	N/A.		

Recommendation(s):

The Board is invited:

- (1) to consider and comment upon the Referral fees decision document (**Annex A**)
- (2) to consider and comment upon the Guidance (**Annex B**)
- (3) to agree to delegate the approval of the papers (after incorporating the Board's comments) to the Chairman and the Chief Executive.

LEGAL SERVICES BOARD

To:	Board		
Date of Meeting:	28 April 2011	Item:	Paper (11) 31

Referral fees, referral arrangements and fee sharing Decision document and Guidance

1. This paper follows the Board's post-consultation discussion of the regulation of referral fees at its March meeting. The Board considered a summary of consultation responses and the Executive's proposed way forward. The Board agreed that:
 - there remains no case for a general ban on referral fees
 - transparency to consumers is vital for building confidence where referral fees are allowed
 - transparency to the market can support compliance and aid competition
 - active regulation is vital to ensure that referral fees do not undermine the regulatory objectives.
2. The Board also agreed a shift away from prescribing specific regulatory requirements in favour of a more outcomes focused approach accompanied by Guidance.
3. The outcomes that each AR will be expected to secure are:
 - a. regulators have in place arrangements that:
 - i. reduce the likelihood of detriment to consumers as a result of allowing referral fees, referral arrangements and fee sharing
 - ii. can justify any ban or restriction on referral fees with reference to evidence, regulatory objectives and better regulation principles
 - b. consumers know when referral fees and/or referral arrangements are or may be in place in order to shape their choices.
4. Guidance is issued under s162 of Legal Services Act 2007 (**the Act**). ARs are not required to follow the guidance. However, s162(5) says that "When exercising its functions, the Board may have regard to the extent to which an approved regulator has complied with any guidance issued under this section which is applicable to the approved regulator." This relates to all the functions of the Board, including its rule approval and compliance and enforcement functions.
5. The Board will examine the extent to which an AR's regulatory arrangements deliver the outcomes during rules approval processes (both for individual rules and handbooks). The Board will also conduct a thematic review, probably in 2012/13. If the Board is dissatisfied with the regulatory arrangements that the AR has and its ability to defend them (for example the extent to which their position has been defended by evidence), it will be open for the Board to take enforcement action.

6. **Annex A** is the decision document and includes:

- the summary of responses to consultation
- the Board's response and final proposal
- the prescribed outcomes to be achieved.

7. **Annex B** is the supporting Guidance.

Communications

8. The Board's decision on referral fees will be announced via the publication of the attached decision document which will include the guidance. The Executive is developing an appropriate communication strategy to support the publication of this paper and will report orally at the Board. Publication is currently planned to take place on Thursday 12 May 2011.
9. The overall approach will be to continue to communicate widely and openly so as to ensure that the heat is taken out of any formal announcement. Consultees (a full list (minus those who asked that their response be kept confidential) is at the back of the decision document) will be informed of the publication. Ahead of publication, the Chairman will be invited to write to relevant Ministers to ensure they are fully briefed. Officials have been kept informed of the approach we are taking and were briefed fully after the last Board meeting. Although invited to comment if they wished the Board to consider any points before its final decisions, they have not done so.

Risks

10. The potential for Government involvement in this issue remains but is lessening. The Board's evidence based approach has been acknowledged and to some degree endorsed by the Ministry of Justice (**MoJ**), in its response to its own consultation on implementing Jackson LJ civil law reforms; MoJ Ministers in the debates around those proposals and the Select Committee for Transport in its review of motor insurance.
11. The Executive will continue to work with MoJ officials to ensure that they are fully informed.
12. Consumer Focus recently published research **In case of emergency: consumer analysis of legal expenses insurance**. The report highlights deficiencies in the market as low product knowledge, fragmentation, duplication, lack of information, lack of transparency and a need for better regulation. In relation to referral fees, they say that the SRA with the FSA should investigate whether referral fees paid by panel lawyers are properly disclosed to the insured. They have also expressed concern about the limitations of choice placed on consumers. The report attracted surprisingly little coverage and the Executive do not consider that it adds materially to the debate on referral fees. On initial analysis, we have some concerns that, if adopted, its conclusions may have an adverse effect on access to justice by driving up the cost of LEI.

Recommendation(s):

13. The Board is invited:

- (1) to consider and comment upon the Referral fees decision document (**Annex A**)
- (2) to consider and comment upon the guidance (**Annex B**)
- (3) to agree to delegate the approval of the papers (after incorporating the Board's comments) to the Chairman and the Chief Executive.