# Legal Services Board consultation: Referral fees, referral arrangements and fee sharing

## *Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing*

# Response on behalf of the Claims Standards Council

**CHAPTER 5**

**CONCLUSIONS – PERSONAL INJURY AND CONVEYANCING**

1. Do you agree with our analysis of the operation of referral fees and arrangements?

2. Do you have additional evidence about the operation of referral fees and arrangements that should be considered by the LSB?

**Response**

This response focuses primarily on issues relating to personal injury. The CSC welcomes the Legal Services Board conclusion, that there is no compelling case for a ban on referral fees in personal injury work.

We agree with the LSB's findings in relation to personal injury that:

- the level of referral fees paid today is linked to the services provided by introducers as well as to issues such as economies of scale and bargaining power;

- there was no evidence that increases in referral fees had led to an increase in the price of legal services;

- there was also no evidence that referral fees are causing consumer detriment through a reduction in the quality of services. It was observed that success rates had remained fairly constant and compensation levels were found to be rising;

- consumer evidence has supported the link between marketing and making additional claims which would not otherwise have arisen. The increase in claims has probably led to higher insurance prices although it is difficult to describe this as causing consumer detriment where consumers have valid claims;

- referral fees have aided access to justice.

We would add the following arguments.

There can be no doubt whatsoever that within a free, modern and commercial marketplace, the existence of referral fees is both sensible and beneficial.

Generally speaking, solicitors are not particularly competent at marketing their services. Members of the public are either uninformed about their legal rights, or too nervous to approach solicitors direct, especially due to concerns about costs risks, and often both.

Studies have shown that far from there being a “compensation culture” only one third of likely successful personal injury claimants come forward: two thirds of compensatable accident victims do not even go so far as to seek legal advice.

Assuming that the Government has no plans for a public information campaign to ensure that our fellow citizens are informed of their rights (indeed the trend from the

Government if anything is in the opposite direction, bearing in mind Lord Young's report) nor plans its own arrangements to help the public find competent lawyers when in need, there must be in place an alternative system to help lawyers reach out to the public to inform them of the possibilities open to them, and how to access advice and assistance.

Believing that members of the public will find a good solicitor through internet web-sites run by specialist membership organisations like APIL or MASS (of which the public are unlikely to be aware), the Law Society or by casually walking off the street does not to provide the answer.

. What are the possibilities open to solicitors in these circumstances?

1. Direct individual advertising at the local or national level.
2. Advertising through collective arrangement with other solicitors, such as National Accident Helpline.
3. Employing "business development managers" whose task is to get business through making and exploiting relevant contacts.
4. Paying fees to businesses that are able to introduce cases that in turn have used one or more of these methods more economically.

For many firms, the fourth option, outsourcing to the most cost effective provider, (in all likelihood a claims management company (CMC)) provides the best solution.

Referral fees in these arrangements have developed a very broad definition, to include not just what would be generally recognised as a referral fee but also what are called acquisition costs, marketing fees, introduction fees, and so on. The distinction between referral fees and advertising can also be blurred.

If a solicitor spends half his budget with an advertising agency and the other half with a CMC, are both referral fees or only the latter? Is there a difference between an entrepreneurial individual with a mobile phone trying to track down a few PI introductions and large marketing companies who have specific skill-sets? The term "referral fee" seems to be used by certain people to imply an evil and unusual

method of obtaining business specific only to the world of personal injury claims, unfairly singling out CMCs.

In his report on civil justice funding, Lord Justice Jackson made a number of criticisms of the referral fee system.

He believes that referral fees do not provide access to justice and that anyone with a claim will somehow find their way to a solicitor. This ignores the fact that many potential claimants (2/3rds of the total with good cases) do not. It also fails to recognise the millions that companies like AAH, NAH, and IL4U have all invested on promoting access to justice, in the absence of any Government funded awareness campaign.

Jackson LJ's unevidenced opinion is that referral fees are both substantially higher than "normal" marketing and drive up marketing costs. If that were the case, then solicitors would market themselves and not use referral fees to obtain work: that is commercial sense. It is also commercial and basic economic sense to recognise that bulk buying of advertising by CMCs creates economies of scale that allow solicitors to benefit from the results of cheaper advertising, in turn allowing investment in other overheads areas, such as IT and service architecture.

Moreover, referral fees give legal firms the certainty of a given volume of work and what it will cost them to obtain, allowing them to manage their business strategy more easily; as well as creating the space for new entrants into the market, which provides a more competitive environment.

Jackson LJ asserts that clients get a bad deal because he erroneously believes they simply get matched to the highest paying firm. In fact, clients are referred on the basis of geography and/or specialism. If he were right (which he is not). then the inference can only be that it is his view that the best way to provide legal services is to offer the cheapest deal to the client- but that cannot correlate to the quality of advice and representation: it is counter-intuitive.

It is also to ignore the volume of non-profitable work that comes from the present arrangements, which is to the benefit of clients. Jackson's definition of a referral fee as "any form of payment or other consideration to a party for introducing clients to a solicitor" would imply for example that every client who has a ULR policy will not be

able to get that loss recovered. This is because typically the solicitors who facilitate this work do so on the ratio that for every two or three non-paying cases like these they take on, they will get one paying case- so Jackson LJ's proposed solution will cause consumer detriment.

Whilst Jackson LJ wishes to promote BTE, without the contribution of referral fees underpinning the costs of BTE, the price of premiums (or the BTE element of other premiums) would have to rise significantly from around £30 per policy to in excess of £250. This in turn would mean take up would substantially be reduced, the opposite of what he proposes.

Jackson LJ has also ignored the need to maintain competition in the marketplace. The OFT has stated that prohibiting the payment of referral fees would be both anti-competitive and to the detriment of consumers as a whole.

Any other business within any other field that had goods or services on offer to the public can and would advertise their offers (both directly and indirectly) to attract the consumer of those services: there is no reason to treat legal services, including advice and representation for personal injury, any differently.

The forthcoming radical changes to the legal world that will flow from ABS have also not been considered by Jackson LJ. The referring party could well end up owning the law firm and channelling all their referrals into that firm.

In summary, the consequences of the Jackson report create a view of the future which is out of line with the modern commercial world and is an attempt to legislate against market forces. The effect of the recommendations would be to outlaw outsourcing, a very common and generic business practice, for just one comparatively small component of one specialist part of just one profession's business arrangements. This would presage a return to the "under the counter" deals that would resurrect former malpractices, technical challenges and instability within the marketplace. In practice referral fees, in a disguised form, would continue to be paid – as they were before they were formally permitted.

As could be expected, the liability insurance industry also argues for abolition of referral fees.

They erroneously claim that the payment of referral fees comes at a disproportionately high cost to the insurance industry, that referral fees can be removed without affecting access to justice, and that referral fees contribute to excessive legal costs without adding value to the services provided to the consumer.

These arguments are responded to in detail below, but before doing so, it is appropriate to remind the insurance industry of the absurdity of their own position, as many of their own marketing arrangements are very similar to referral fees and solicitors' advertising. If referral fees impact on legal costs (which they do not for the reasons set out below) then insurers' own marketing practices by the very same token are passed on to the consumer and impact equally disproportionately on the cost of their insurance premiums, so should therefore face the same controls, regulation or abolition.

Insurers pay fees to price comparison sites in a way that is virtually identical to referral fees, to attract a consumer's business in buying their motor insurance policies, for example. Such price comparison websites advertise in the same media, in the same way, as CMCs. If CMC referral fees are not a simple marketing cost to solicitors in the insurance industry's eyes, then neither can be fees paid to price comparison websites, who are performing a very similar function. If this argument were right, then such fees cannot be a simple marketing cost as they impact on the rising cost of an individual driver's motor premium.

Virtually since the insurance industry started, insurance companies have paid (non-transparent) fees to insurance brokers, who bring them clients. Such fees are directly linked to the policy in question. That is a more direct form of referral fee than any CMC arrangement, yet they do not call for them to be banned.

And what is the most perverse argument of all, is the way liability insurers use their BTE cover policies. For an additional fee, the motorist can have added to his or her policy BTE legal expenses insurance. If the insured then claims on that policy for legal assistance, the liability insurer will refer the insured to one of its panel firms- who pay a referral fee to the liability insurer for the privilege of taking the case. On the one hand, as they see it, the liability insurers object to paying claimant solicitors' referral fees (though for reasons shortly to be advanced that is not in fact the case), yet on the other, they are quite prepared to cash in on the income from

referral fees themselves. Their argument has no principle behind it, either: it is solely based on their claim that the income they receive from referral fees through BTE policies is less than the amount paid in referral fees by solicitors to CMCs. No doubt if the reverse were the case, their position would be the opposite. They should not be allowed to have it both ways.

And of course, one only has to look at the huge sums insurers spend on their advertising and sponsorship to attract business, and their marketing generally. These sums dwarf what the claimant personal injury world invests in marketing in all its forms, including referral fees. If this is a general business cost to the insurers, then so must be the advertising costs in all their different forms incurred by the claimant personal injury side. If one is really looking for an impact on the contribution to the cost of insurance premiums, the insurance industry's advertising costs are the lion's share, compared to claimant marketing costs. Of course, in truth these costs are an overhead to the claimant personal injury industry in just the same way as the liability insurers claim their marketing is a general overhead of their trade.

We now turn to the very strong positive case for referral fees.

Referral fees promote access to justice. This is done by CMCs and others who increase public awareness of the right of those who have suffered accidents to claim compensation and by facilitating the claims process. They provide the marketing and case management skills that are essential in any consumer facing service industry where the product is opaque and most people use the service only once. There is considerable evidence to suggest that making a claim can be seen as carrying a social stigma. CMCs play an important role in dispelling that stigma attached to making a claim away from the client.

Referral fees help control the quality of the advice and assistance provided by the firm to which the case is referred, and thus protect the public. A CMC as a quantity referrer of business must assess the firm for quality and audit its performance. It also knows the competent firms. A claimant is better off going to an experienced personal injury specialist firm than a High Street general practitioner who may only do the one or two PI claims that walk through his door each year. The client will get a better and more cost effectively managed service. The individual consumer has great difficulty in choosing a solicitor unaided with no basis on which to assess

competence – inevitably all solicitors will say they can handle a PI claim, irrespective of whether or not they can do so competently.

Referral fees help provide a speedier form of complaint handling and redress. An individual client instructing a solicitor has little or no power over that firm. If the client is treated badly or the case is handled incompetently, he/she only has formal redress through the official channels which are difficult, slow, intimidating and cumbersome. However, a CMC has to protect its sources of business and cannot afford any level of complaints. It will investigate any issues quickly and require the solicitor to provide the correct, competent level of service, or face removal from its panel.

Referral fees help promote competition. The promotion of legal services which they fund provides the public with a wider choice of providers. Without them, there would be far less competition in the market place with only the larger firms surviving and thereby limiting consumer choice. It would be extremely hard if not impossible for new firms to break into the market, in the absence of a guaranteed source and quantity of work for which their referral fees pay.

As a consequence of CMCs' and solicitors' collectives' investment in advertising funded through referral fees, the public are now not only more aware of their rights to redress but they are also aware of the wider choices available to them of where to go for legal advice - whether through a CMC, going directly to a firm of solicitors, or doing their own research on the web. In practice, the referral fee system has performed a public service by empowering the public.

Referral fees also maintain the BTE insurance market. They allow BTE premiums to remain at a modest level, because BTE insurers charge referral fees to the solicitors to whom they pass the cases they are underwriting. It would not be equitable to restrict one form of referral fee and not another. Premiums would undoubtedly increase dramatically without the contribution that referral fees make to the BTE insurers.

Paying referral fees is not compulsory- it is purely a marketing option. Solicitors are not forced to pay referral fees but choose to do so. Solicitors can only obtain a sufficient quantity of personal injury claims for a viable specialist service if their services are effectively marketed, either directly through their own (expensive)

advertising, by marketing agencies acting on their behalf, or by a CMC. Referral fees are a marketing cost in just the same way as direct advertising or the costs of employing business development managers. People respond to advertising and other forms of marketing – which is why it is done. Abolishing referral fees would have no effect on marketing costs: it would merely change their composition.

Referral fees are a cost effective marketing expense. Referral fees are mainly used to pay for advertising and preliminary screening and processing, saving the solicitor expensive professional staff costs as a result. Whatever a firm spends on acquiring business through referral fees, if they were not permitted it would need to spend the same, or probably more, but less efficiently, in trying to compete for business through other forms of advertising, but with less incoming work to show for that investment.

In practice, referral fees do not constitute a cost to the client any more than any other kind of overhead which forms part of the overall business costs of the firm concerned. Indeed, without referral fees, firms would either have to spend more on advertising as they lose the economy of scale to attract the same volume of work; or make do with less work, resulting in a less cost effective business with overheads taking a greater proportion of the firm's income. To the extent that overheads are passed on, the client would then suffer higher costs.

Also bearing in mind that costs are already set at a fixed sum in 75% of cases (RTAs in the fast track, to be extended generally to all PI fast track cases in 2012, increasing the proportion even further), where the overwhelming bulk of referral fee cases are to be found, it can be seen that those referral fees effectively come from the solicitors' income not the clients' pocket, as the fixed fees are the same, whether or not a referral fee has been paid for the case concerned.

It is also important to recognise various not for profit membership organisations rely on arrangements that could be classed as referral fees as part of their broader legal support schemes, enabling them to provide a comprehensive service through cross-support: PI referral fees can be used to support free employment advice and representation or free wills for example. Such schemes are offered by many trades unions, and may well not be viable without referral fees to support them. That is a general public good which should be supported.

## CHAPTER 7

## RECOMMENDATIONS FOR IMPROVING TRANSPARENCY AND DISCLOSURE

6. Will the proposals assist in improving disclosure to consumers?
7. Are there other options for disclosure that ARs should consider?
8. What are the issues relating to the disclosure of referral contracts by firms to approved regulators and their publication by approved regulators?
9. How should these issues be addressed?

### Response

No-one can argue that referral fees have to be fair, reasonable, transparent to the client and proportionate, though there is a strong argument, set out below when responding to recommendation two, concerning the extent and detail of the transparency that is actually needed to protect the consumer.

It would be helpful firstly to summarise the development and requirements of the existing regulatory regime.

The Access to Justice Act1999 permitted recovery of CFA success fees and ATE premiums but referral fees were not allowed, leading to convoluted business models which were in effect back-door referral fees resulting in technical challenges, satellite litigation, malpractice and high profile failures like Claims Direct and The Accident Group.

Changes to the Solicitors' Code of Conduct in 2004 led to simplification of business models through transparency with light touch regulation of solicitors. This created stability for the personal injury profession and increased access to justice for the man in the street.

The Legal Services Act 2007 created the Solicitors Regulation Authority and in turn the updated Solicitors' Code of Conduct, 2007, including in particular rule 9 which regulates referral fees (Rule 9 was updated on 13th November 2009).

Rule 9 applies when solicitors receive referrals of business from, or make referrals to, third parties. Its purpose is to protect solicitors' independence and to regulate solicitors' financial arrangements with introducers, i.e. referral fees.

Solicitors must draw the attention of potential introducers to the rule and to the relevant provisions, including advertising restrictions. Solicitors must be satisfied that referred clients were not acquired as a result of marketing or publicity in breach of the rules, which also forbid personal injury referrals based on contingency fee arrangements.

When a solicitor enters into a financial arrangement with an introducer, the agreement must be in writing and be available for inspection by the Solicitors Regulation Authority; and the introducer must undertake, as part of the agreement, to comply with the provisions of rule 9. The agreement must not include any provision which would compromise, infringe or impair any of the duties set out in the rules; or allow the introducer to influence or constrain the solicitor's professional judgement.

If the solicitor believes the introducer is in breach of the agreement (including rule 9), he must take all reasonable steps to ensure that the breach is remedied. If the introducer continues to breach it, the agreement must be terminated.

As for transparency, the agreement must provide that before a referral the introducer must give the client all relevant information and in particular the fact of the financial arrangement with the solicitor. This includes the amount of any payment to the introducer referring to the referral; or where the introducer is paying the solicitor to provide services to the introducer's customers, the amount the introducer is paying for those services; and the amount the client is required to pay the introducer.

Moreover, before accepting instructions for a referred client the solicitor must give the client in writing all relevant information concerning the referral, normally writing to the client as soon as the solicitor is asked to act rather than waiting until the first interview with the client. This includes the fact of the financial arrangement; the amount of any payment to the introducer; or where the introducer is paying the solicitor to provide services, the amount the introducer is paying and the amount the client is required to pay the introducer.

The solicitor must confirm that any advice will be independent and that the client is free to raise questions on all aspects of the transaction; and confirm that information disclosed to the client will not be disclosed to the introducer unless the client consents. Where the solicitor is acting for the introducer in the same matter and a conflict of interests arises, the client must be told that he might have to cease acting.

So it can be seen that whilst rule 9 permits payment for referrals, this is subject to strict conditions, also amplified in considerable detail in the Guidance Notes to the Rule. The conditions apply to the payment of administrative or marketing fees, payments described as "disbursements" which are not proper disbursements, and panel membership fees. Paying a fee to a third party to recommend a firm constitutes a financial arrangement with an introducer.

In turn, CMCs are also regulated by the Claims Management Regulator through the Conduct of Authorised Persons Rules (CAPR). Rule 8 states that when business is introduced to a solicitor, the CMC should not put the solicitor in breach of the solicitor's rules (i.e. Rule 9). CAPR 11 requires a CMC to provide a client, in advance, information about any referral fee or other financial arrangement in respect of introducing the claim. The CMC must also inform the client about any relationship with a particular solicitor or panel of solicitors.

It follows from this strict regime that in fact the requirements proposed by recommendation one are in practice already met by solicitors' Rule 9 and its guidance, and CAPR 8 and 11:

Recommendation one: Improving transparency and disclosure for consumers

The legal provider should disclose to their client the key facts about referral fees

- Whom the referral fee is paid to and for what services
- The value of the referral fee in pounds
- The consumer's right to shop around for an alternative legal services provider

Solicitors' Rule 9 and the CMCs' CAPR Rules 8 and 11 already provide for all these protections.

We now turn to recommendation two, and in doing so also analyse the correct commercial relationships involved in referral fee transactions.

Recommendation two: Improving transparency and disclosure in the market

- Approved regulators should collect and publish all agreements between introducers and lawyers
- All agreements for referral arrangements should be in writing

When looking at the commercial implications, it is important to consider what the realities of the market are: who is competing for what, and with whom; what the contractual relationships are; and where the consumer interest actually lies.

In fact, there are three separate relationships, and the premise on which the argument for transparency as far as the claimant is concerned is in large part misplaced.

Firstly the introducer, say a CMC, is competing with other CMCs to attract the claimant to use their services: secondly, the CMC is competing with other CMCs for solicitors to whom to refer business; and thirdly, solicitors are competing with each other for claimants for whom to act.

The contractual relationships to which each party is privy are firstly, the CMC and solicitor ( including referral fee arrangements); secondly, the CMC and the client (including any fees the CMC may charge the client direct for their services, which does not include the referral fee); and thirdly, the solicitor/client relationship, (including the retainer contract but not the referral fee, this relationship being governed by the solicitors' client care professional rules, as well as rule 9). In fact, the client has no privity of contract as far as the referral fee is concerned.

Of course, if a client is asked a leading question as to whether he or she would like to know the details of any referral fee arrangement applying to his or her case, they will inevitably say they would, but what is the client's real interest and what are the safeguards the client actually needs? Surly the answer is a guarantee of the

independence of his or her legal team; and the bottom line of what his or her case is going to cost (if anything) out of the client's own pocket.

As far as the client /CMC relationship is concerned, this means certainty over the fees the client may be charged, including the bottom line maximum.

As far as the client /solicitor relationship is concerned, this means firstly, that the solicitor is acting independently, genuinely in only the client's own interests, and uninfluenced by any other contractual relationship the solicitor may have (this is required by rule 9); and again secondly, the bottom line as what the client may be liable for, in relation to the costs of the claim and any litigation.

In fact, the client has no direct interest either legally or materially in the referral fee that may be payable between the solicitor and the CMC.

The independence of the solicitor / client relationship is the only part of the referral fee arrangement that indirectly is of relevance to the client. His or her commercial relationship with the solicitor is governed by the retainer, in this context probably including a CFA backed by a separate ATE insurance contract, which together should set out the client's maximum costs exposure.

The client has no more financial interest in what amounts to the solicitors' advertising budget (whether in terms of traditional advertising or through agencies to whom he pays referral fees) in general terms any more than he has an interest in how much rent and rates the solicitor pays for his office or his staff's salaries: all are business overheads. The key issue for the client is not the cost to the solicitor of running his practice, but how much the client may have to pay at the end of the case: he wants as much certainty as possible in this, of all things.

This then begs the question of whether what is proposed in recommendation two, and which amounts to little more than a glorified price comparison website, is of any real practical benefit to a prospective client, and if so to what degree; whether that benefit, if there is one, is offset by the negative impact on the commercial sensitivities of the wider contractual negotiations and agreements between CMCs and solicitors; and if this is also the case, whether in all the circumstances, this can then be justified.

The consultation rightly rules out trying to standardise referral fee arrangements and their details. The fact is that there are as many different variants between claims introducers as there are introduction businesses. Each works to a different business model. It should also be borne in mind that referral agreements are not static: they are regularly and frequently amended as market conditions, the business competitive environment, and supply and demand for legal services change. This factor alone would create a considerable and expensive administrative burden on any regulator in keeping any register of agreements, whether on the web or otherwise, constantly up to date.

Even now, it is often difficult with existing price comparison websites, for example for motor insurance, to work out the price of one policy when compared with another, given the different cover arrangements, policy uninsured excesses, no claims bonus arrangements, no claims bonus insurance, and other "add on" features, like BTE, or combined policies for more than one vehicle: and that is with a relatively standardised product, on websites specifically designed to attract and channel business through referral arrangements to voluntarily participating insurers.

How much more confusing it would be compulsorily to publish for comparison purposes (as there can be no other reason for transparency here, as individual transparency for the client is provided by rule 9) not the price of individual referral fees (which may not be set out on the face of an agreement anyway) but the full agreements themselves. The consumer is then left to try to work out where his case would fit within each published agreement, to try to establish the material differences behind each business model as it applies in his case, and to do so by construing the legal language of the commercial contracts which constitute the agreements, having been written by lawyers for lawyers.

The consumer is not a lawyer and would find it extremely difficult if not impossible to compare the differing amount of work each CMC provides for different cases under different models.

And even if the prospective client was motivated to do so (having first found out about the existence of the regulator's website or other publication arrangements and how to access it), and was able to follow the details of the agreements, where would that get him or her?

It would not tell him or her what the CMC would charge the client for the CMC's services to the client, as that is not part of the agreement; nor the basis of the solicitor's retainer and what the solicitor's charges would be likely to be, as that is not in the agreement either. One referral fee (if it could be worked out from the agreement) may be higher than another, either for a particular class of case, (also assuming the client correctly identifies the nature of the case) or as between one CMC and another. But the level of that referral fee is no indication of whether the CMC under consideration would charge the client more or less than the comparator CMC for its services; nor the solicitor more or less for running the case: it is no guide whatsoever as to what the final bill to the client may be, which is the matter of greatest interest to the client. If anything, it would only serve to confuse the client and possibly even deter him or her from seeking advice at all.

Publication would faced the consumer with an overwhelming tsunami of data from many thousands of constantly changing legal contracts, as it should be remembered that the LSB in its consultation under reply has found that it is generally accepted that the CMC market is competitive, with some 7,500 CMCs in the market. It should also be borne in mind that each CMC may have many different firms of solicitors on its panel, each with its own separately negotiated agreement.

The fact remains, the publication of the text of every agreement would be of no use to the consumer whatsoever, in establishing the facts that he or she really needs to know: what the client's personal financial exposure will be. Moreover, the LSB has already established that there is no evidence that for personal injury work, the quality of that work has diminished or the price has risen as the consequence of referral fees.

Balanced against the dubious benefit to the consumer of publication, if it can be seen as such, there are the practical consequences for what is the real market in these contracts: the relations between introducers and solicitors. Publication would be a major interference in commercial confidentiality and would distort the market.

The consequences of the proposals could well be to undermine the competitiveness of the existing market, a market where research has shown that CMCs are normal businesses which do not make abnormally high profits.

If one CMC quotes a given price to one firm and a different price to another (for whatever reason) undoubtedly the higher quoted firm would find out and demand a renegotiation, effectively creating a standardised, non competitive market for that CMC's business. On the other hand, if one CMC were able to see the commercial deal a rival CMC had struck with any given named firm, what is to stop it going to that firm and offering to undercut the first CMC's contract? Or indeed just to find out that a particular firm is in the referral marketplace at all is commercially sensitive as between both CMCs and competing legal practices. For example, it would be of commercial interest to one firm to know how many cases a rival firm was handling or receiving in a month.

It is bizarre that it is being suggested that commercial arrangements between two consenting businesses should be openly published so their competitors, their business customers and their suppliers know the full details of those arrangements. Where else in the world of commercial transactions are businesses to be obliged to publish their contracts for services? Are insurance companies to be expected to publish their contracts with their broker firms? Or their arrangements with price comparison websites? By the same token, are cleaning contractors to be obliged to publish how much they charge property management companies for their services? Are Tesco's and Sainsbury's to be obliged to publish how much they pay their suppliers for cases of baked beans? In fact, the consumer probably has a greater financial interest in the latter, as it directly impinges on the price he or she pays for supermarket goods, than he or she has in the details of arrangements for referrals between a claims introducer and solicitor.

There is no reason to treat commercial contracts for services such as claims introduction any differently from the normal business confidentiality that is expected to apply in any other commercial contract for services. The terms are for the businesses concerned to know. Anyone entering any other market is free to negotiate terms with anyone else; and this market should not be seen differently. The regulators should not be put in the position of aiding and abetting what is little less than licensed industrial espionage.

**CHAPTER 8**

## RECOMMENDATIONS FOR DELIVERING ACTIVE REGULATION

10. Will the proposals assist in improving compliance and enforcement of referral fee rules?
11. What measures should be the subject of key performance indicators or targets?
12. What metrics should be used to measure consumer confidence?

Recommendation one: Delivering active regulation

- Approved regulators should set out their compliance strategy for referral fees and arrangements when setting out their regulatory arrangements:
    - Approved regulators should publish information about the operation of referral fees amongst their regulated community
    - Where compliance with referral fee rules is low, approved regulators should have targets for improved compliance
    - Approved regulators should have rules which are, where appropriate, consistent across areas of law with other approved regulators

**response**

We agree with the Department of Business' five principles of good regulation, which we take as our starting point for this chapter of the consultation.

These principles state that any regulation should be:

- transparent
- accountable
- proportionate
- consistent
- targeted – only at cases where action is needed

We have considered at length above, the issues relating to transparency and accountability, and here concentrate on the remaining principles, in the context of the consultation questions.

We firstly question whether it is proportionate to suggest a tougher compliance regime for personal injury generally, in light of the evidence of consumer satisfaction levels of over 90% as reported in the consultation document, supported by the findings of a competitive market.

Inevitably, a more robust regime will have cost implications, which either will have to be borne as a general business expense, or passed more directly on to the consumer, who as has just been indicated, is generally satisfied with the product.

In assessing that cost, there are also very real and onerous practical considerations of what would need to be done to record, publish, monitor, and oversee the tens of thousands of different and regularly changing agreements of 7,500 CMCs with their dozens of panel firms,(and indeed some with numbers of firms well into three figures), each with its own contract.

We agree with the proposal for the need for consistency between regulators and as far as personal injury referrals are concerned, at present we do not see any inconsistencies in the current regimes. We would be concerned if any new or revised regime were to introduce such inconsistencies, by accident as an unintended consequence or by design, either between or within regulatory regimes.

An example of such an unintended consequence would be the proposal for publication of agreements, dealt with in detail above. On the one hand the existing system preserves commercial sensitivity. The suggested publication system not only removes that, but it is also proposed that the regulator should prohibit bidding auctions, which would otherwise be one of the natural market consequences of removing commercial confidentiality, even though such a ban would be extremely difficult to enforce. It would be far better not to create the market distortions that bring the need for such a ban in the first place.

Turning to the issue of targeting regulation, again we suggest that personal injury referrals merit only a light touch, in the absence of any evidence of widespread consumer dissatisfaction whatsoever.

We see no harm in regulators publishing guidance as to how to avoid dependency on referrals creating a risk of conflict of interest for a particular firm, but equally see no need for this, in the absence of any evidence of a serious problem of such conflicts arising in practice under the existing arrangements.

As far as regulatory targets are concerned, in the absence of evidence of general dissatisfaction, we strongly believe that any system of inspection or otherwise should be consumer complaints led. When investigating complaints, the SRA already state that they consider the substance of any referral relationship rather than the mere form which is clearly the correct approach.

Additionally, if there are to be other targets based on surveying consumer satisfaction, which we do not see as necessary or proportionate, such surveying should be done on a whole case basis model, assessing overall satisfaction with the outcome of the case and the level and quality of service delivery throughout the whole process, from the client's engagement of the CMC, through the referral, to the solicitor's services and the result of the claim, to include any costs passed to the client throughout the process and the client's assessment of the value for money of the whole process. That can be the only real test of whether or not the referral concerned delivered what the consumer wanted and expected at what he or she considers a reasonable price.

There is one further recommendation of the Consumer Panel that is not reflected in the LSB consultation, which we would endorse. We agree that business acquisition costs should be openly factored into the calculation of fixed fee regimes (developed by the Ministry of Justice) and Guideline Hourly Rates (set by the Master of the Rolls), assuming this increases fixed fees to reflect this business cost. This would both add to transparency and mitigate some of the concerns that have been raised over the alleged impact of referral fees on the consumer.

Darren Werth
Chairman
Claims Standards Council
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