

Keoghs LLP response to the Legal Services Board consultation:

Referral fees, referral arrangements and fee sharing.

Introduction:

Keoghs is the only “top 100 law firm” to focus exclusively on the insurance sector and offers an “end to end” claims service for the handling and defence of both mainstream and specialist insurance claims. This includes pre-litigation, litigation and costs negotiation activities.

We represent insurers, who between them provide around 70% of the motor insurance purchased in the UK,

With more than 800 dedicated staff, Keoghs are recognised leaders in the field. In the last twelve months Keoghs has been instructed to handle in excess of 31,000 claims.

Given the firm’s clear focus, our response is in relation to the conclusions in Chapter 5 and relate to personal injury claims, not conveyancing or criminal advocacy.

Keoghs does not agree with the conclusions drawn by the LSB.

Keoghs supports the banning of referral fees in all personal injury cases, and does not consider that this will in any way impact access to justice. It will, however, remove unnecessary waste from a process which has been rendered dysfunctional by disproportionate cost which adds no value for the injured victim.

Whilst Keoghs has held this opinion for some time, it is interesting to see the recently published views of other bodies with considerable experience in this arena. We have to say that the overwhelming weight of evidence leaves the LSB conclusion somewhat out of balance.

We would refer particularly to the in depth work of Lord Justice Rupert Jackson QC. Jackson and his assessors considered referral fees in some detail over the course of a year. His conclusions within his final report, published in December 2009, were as follows:

4.3 The normal effects of competition are distorted in the context of personal injuries litigation, because the clients generally do not pay the costs.....Under the present regime, solicitors are not competing on quality or service. They are usually competing to see who can pay the highest referral fee. Such competition is not beneficial to claimants or indeed to anybody else, apart from referrers. Where cases fall under the fixed recoverable costs scheme in CPR Part 45, the amount of costs available is a fixed sum. The more of that sum is paid to the referrer, the less are the resources available to devote to the handling of the case. In the context of fixed costs the effect of referral fees is either to drive up the level of fixed costs or to drive down the quality of service or both.

4.7 On the basis of all the evidence that I have read and heard during the Costs Review, I consider that BTE insurers and claims management companies charge referral fees without adding any commensurate value to the litigation process. On the contrary, referral fees have now escalated to such a level that some solicitors cut corners in order to (a) cover the referral fee and (b) make a profit on the case. In straightforward road traffic accident (RTA) cases, often more than half

the fees paid to the solicitors are paid out in referral fees. This is to the detriment of the client, the solicitors and the public interest.

5.1 I recommend that the payment of referral fees for personal injury claims be banned.

We would particularly support Lord Justice Jackson's sentiments in 4.7 above.

When the Department of Constitutional Affairs set the level of RTA Predictable Costs in 2003, they factored in an allowance to cover the cost of a referral fee. This was against the wishes of insurers and other compensators. A typical fee under the predictable costs regime would be circa £1400 with the claimant lawyer having purchased that claim for up to £800. This undoubtedly drove up the level of costs in RTA cases and reduced the lawyer's margin to a point where service to the client has been curtailed.

The question which needs to be asked is whether a marketing spend, which is essentially what a referral fee is, of more than 57% of income would be sustainable if the Claimant themselves were paying part or some of the costs.

Lord Justice Jackson also provides commentary on responses from other external bodies whom he interviewed during the course of his years work. We would refer the LSB to the following sections:

3.8 [The Personal Injuries Bar Association:](#)

"So far as the Bar is concerned, they are not allowed by the Code of Conduct. We can see no benefit in permitting referral fees for solicitors either. In many cases the referral fee is the substantial proportion of the costs required to conduct a case and has led to cost cutting by solicitors and cases being insufficiently prepared to the detriment of Claimants. Referral fees mean that the solicitor who conducts the case is the highest payer but not necessarily the best solicitor for the claimant. The market is driven by who pays the most, not who provides the best or most efficient or cheapest service. There is no doubt that referral fees have fuelled the costs war..."

3.9. [The Bar Council](#) argues for abolition of referral fees adopting similar arguments to those of PIBA – see above.

3.12 [Accident Compensation Solicitors Group.](#)

"Since the introduction of referral fees, the whole scope of the claims process in road traffic accident claims has shifted from independent and impartial advice from qualified and experienced staff, to low quality advice from inexperienced staff; leading to what the ACSG believe, regular and significant under settling of claims".

[The Law Society:](#)

The Law Society passed a resolution in November 2009 which concluded that the way in which referral fees operate within the legal services market is detrimental to the public interest. The Council also resolved that the payment of referral fees tended either to increase the cost of legal services or to put pressure on the quality of the services delivered. The Law Society also raised the issue of independence and noted that the UK was out of kilter on referral fees with most other jurisdictions.

We would also refer the LSB to the very recent report prepared at the request of the Prime Minister by Lord Young of Graffham – "Common Sense, Common Safety". This report has already received the full backing of the Government.

Response to LSB consultation: referral fees

In his report, Lord Young comments on referral fees as follows:

“Last year both the Law Society and the Bar Council recommended that referral fees be stopped on the grounds that they have the potential to limit access to justice and reduce the quality of legal services on offer. Others, such as the LSB argue that there is little evidence of this. I am in no doubt that the payment of referral fees and the accompanying culture that sees claimants rewarded before the legal process has even begun creates a climate in which businesses, the public sector and even voluntary and charity organisations fear litigation for the smallest of accidents and then manage risk in accordance with this fear”.

With the exception of those who derive an immediate financial benefit from referral fees, Keoghs has struggled to actually find anyone who does support their continuance.

We would challenge the Empirical evidence on which the LSB conclusions are based:

We have considered the reports of both Vanilla and Charles River Associates. Whilst comprehensive, we believe that certain conclusions within those reports are flawed. We also note that there is interdependence between the reports as they draw on one another for conclusions. We submit that both reports are vulnerable to challenge.

There is a strong assertion that referral fees have not driven up the level of costs in personal injury claims. We refute this based upon our own extensive experience and management information derived from the handling many tens of thousands of personal injury claims.

We would refer the LSB to the views of the Advisory Committee on Civil Costs (ACCC) who confirmed that in their view referral fees and marketing costs in general accounted for the whole of the difference between defendant and claimant costs. They stated:

“A significant proportion of PI cases taken on by claimants’ solicitors are generated by advertising or by paying referral fees to Claims Management Companies (CMCs). The general consensus is that the excess marketing/costs referral fees paid by claimants’ versus defendants’ solicitors are between 20% and 40% of total income generated (see, for example, ABI, 2009, Table 2), which accounts for the entire gap.

So in the PI sector, the gap between claimants’ and defendants’ solicitors rates can be entirely accounted for by extra marketing costs/referral fees, which are additional costs which claimants’ solicitors appear to find it necessary to incur. One may conclude from this that if defendants’ solicitors are not making excess profits from the system, then neither are claimants’ solicitors. This does not, however, exclude the possibility that referral fees are sustained above the “market rate” because the GHRs are too high in PI cases and this enables claimants’ solicitors to overpay”.

We would again refer to the predictable costs regime in motor claims. A typical motor claim referral fee is circa £800. A typical legal costs bill for a modest whiplash claim would be circa £1400. The referral fee therefore, represents more than 50% of the total cost of the legal fees. We fail to see how this does not drive up legal costs.

Referral fees should be banned and both fixed cost regimes and hourly rate structures reduced appropriately. The reduction in costs would benefit all those who currently pay for the system and would not affect the quality of service received by claimants or impinge upon access to justice

We do not believe that access to Justice would be impacted by a ban on referral fees.

The LSB paper also purports that referral fees have broadened access to justice. This is in conflict with several respondees to Jackson whose evidence was quite the opposite.

In order to test the issue we have ourselves also reviewed the number of personal injury claims submitted in recent years based upon data from the Compensation Recovery Unit (CRU).

In 2000 / 2001 there were 219,183 Employers' Liability claims submitted. By 2009 / 2010 that number had fallen to 78,744. In respect of public liability claims, in 2000 / 2001 the number of claims presented was 95,583. By 2009 / 2010 that number had reduced to 91,025 – a 5% reduction.

Whilst we accept that workplaces and public areas have generally become safer over the last 10 years, the statistics would indicate that employees and the public have not been pursuing additional claims as a result of referral fees. The same can be said for clinical negligence claims which have also reduced.

Given this, and despite the increase in motor claims (which can be attributed to a wide range of other competing factors), we would question whether there is any real evidence that referral fees have enhanced access to justice.

We would submit that the only true impact of referral fees in both EL and PL claims has been to drive up the level of legal costs.

The consequence of pushing up legal costs is then of course reflected in the level of insurance premiums. These premiums are paid by private motorists, UK Plc and Local Authorities who collect that money from Community Charge payers. All sectors of society are affected by higher premiums and ultimately pay for referral fees in the compensation process.

The concern around motor insurance premiums has become so strong that the Government recently asked a Department of Transport Select Committee to take evidence on this issue and submit views / recommendations. The Committee heard that quoted premium has risen by anything up to 40% in the last year and that the main driver for that has been the cost of personal injury claims. We await the Committee's views and are hopeful that they will concur that Lord Justice Jackson's comprehensive recommendations will go a considerable way to mitigating the rise in premiums.

There would be no impact of banning referral fees on Alternative Business Structures (ABS):

Alternative Business Structures will come into being in 2011. There have been strong assertions made that this will change the legal landscape dramatically. It is too early to predict what different behaviours may be driven by ABS. There is a school of thought that Claims Management Companies will buy or create their own law firm and so the need to pay referral fees will be circumvented.

We do not believe that a ban on referral fees would hinder the operation of ABS. We can do no better than quote from Lord Justice Jackson's final report at 4.15 where he said:

"ABS will incur such marketing costs as they see fit in relation to personal injury claims. There will be no benefit to consumers in allowing ABS to trade in personal injury claims either between themselves or with third parties. Both before and after 2011 the effect of referral fees can only be to drive up legal costs (since the referee must recoup its outlay) and / or to depress quality of service. In my view, essentially the same arguments will make it appropriate to ban, alternatively cap, referral fees after 2011 as apply now".

Given the above, we do not see the forthcoming ABS regime as a reason not to act now and ban referral fees.

Conclusion:

To conclude our submission we would summarise with the following points:

- Keoghs supports the “interlocking package” proposed by Lord Justice Jackson which incorporates a ban on referral fees in personal injury claims. This consultation must be considered in context and not in isolation. The work of Jackson, Young and the recent MoJ consultation on costs and funding must all be brought together to influence the final outcome.
- This view is supported by practitioners and those engaged in the arena of personal injury compensation. The only bodies that appear to be in favour of referral fees are those who derive an immediate financial benefit from them.
- That there is no evidence that supports the premise that referral fees have enhanced access to justice. On the contrary, CRU data confirms that with the exception of motor claims, personal injury claims frequency has reduced since 2004.
- We agree that the interest of the consumer should be at the heart of the system, but referral fees serve only to drive up the transactional costs of delivering personal injury compensation. That cost is then passed on to society at large through higher premiums and benefits no one other than the recipients of referral fees.
- The quality of legal advice must be adversely affected by referral fees. When in the predictable costs regime, more than 50% of the fee charged goes to the referrer, this must be to the detriment of the consumer. There is no justification for the marketing spend of Claimant law firms to be any higher than the average in any other consumer based sector.
- The current personal injury claims process is both dysfunctional and unsustainable in terms of transactional cost. Change is inevitable and for all the reasons contained in this paper, we urge the Government to ban referral fees in personal injury claims.

Keoghs LLP
November 2010