

## **Legal Services Board (LSB)**

### **Referral Fees, Referral Arrangements & Fee Sharing**

#### **Discussion Document on the Regulatory Treatment of Referral Fees, Referral Arrangements and Fee Sharing**

#### **The Motor Accidents Solicitors Society Response to questions posed by the LSB**

The Motor Accidents Solicitors Society (MASS) is a Society of Solicitors acting for the victims of motor accidents, including those involving personal injury. MASS has approximately 180 Solicitor Firm Office Members. We estimate that Member Firms conduct upwards of 500,000 PI motor accident claims on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom. The Government's Compensation Recovery Unit's statistics record that there were 675,000 motor accident personal injury claims in 2009/2010. It can be seen therefore that the vast majority of these claims were conducted by MASS member firms. The objective of the Society is to promote the best interest of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident Claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

MASS, when responding to Lord Justice Jackson's Consultation to assist him with the preparation of his report into costs in the Civil Justice System, expressed the following view with regard to referral fees, which is a view we maintain:

MASS Members regard Referral fees as a necessary evil rather than a desirable practice. MASS believes that referral fees that are charged without adding any 'value' to the process or claimant should if possible be removed – i.e. the selling of claims by insurers / brokers / motoring organisations etc to solicitors purely for revenue. There are challenges as to how this distinction can be drawn. Whilst MASS dislikes the concept of Referral fees, if they were banned, there must be effective regulation and enforcement to ensure that they are not forced 'underground'; returning to the previous system of inconsistency and discrepancy of what does and does not constitute marketing fees. However, solicitors should be free to engage in direct and indirect marketing, to include solicitor consortia or via properly regulated claims management companies. There should be a unified advertising code, which applies equally to all legal and non-legal bodies that are engaged in the claims process, including claims management companies.

All paragraph references are in accordance with the numbering appearing in the LSB's Discussion document.

#### **5. Conclusions: personal injury and conveyancing**

##### **QUESTION**

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

##### **Summary**

##### **5.1**

Whilst MASS accepts that a compelling case for a ban on referral fees in personal injury is not made out on the evidence gathered by, or on behalf of, the LSB, the

Society recommends that more detailed consideration should be given with regard to the compelling evidence of all those most closely involved with the administration of justice in personal injury cases, all of whom, almost without exception, have supported a ban on referral fees, or at least some change in the rules governing their use, operation and/or policing. Those expressing these views include, in addition to MASS, The Law Society, The Bar Association, The Judiciary, including Lord Justice Jackson (following the most thorough investigation of civil litigation costs this Century), as well as other groups which the LSB itself has identified and noted in its reports and documentation. By focusing on broad based evidence, which may well have different and/or alternative causes, the LSB has failed to appreciate the fundamental problems with referral fees that those most closely associated with their influence can clearly see. These problems include:

- Fostering a culture of pestering the victim to secure the case
- Pushing the boundaries of acceptable and unacceptable advertising
- Fraud
- Third party capture
- Cutting costs potentially leading to a poorer service
- Inadvertently encouraging increased litigation

## 5.2

We agree that disclosure/arrangements do not always work effectively. We also agree that disclosure is a crucial part of ensuring that Consumers know the details of the deal they are getting. Whilst crucial, MASS does not accept that disclosure holds all the answers to problems connected with referral fees. It is of note that the provisions of Rule 9 of the Solicitors Code of Conduct already impose upon the profession, clear disclosure requirements with regard to referral fees. Rules have been in place since 2004. There is evidence that compliance with the disclosure requirement is patchy at best. We certainly believe therefore that policing of adherence to these rules needs to be much more effective. Since the Solicitors Regulation Authority (SRA) is moving to outcome focused regulation (OFR), this affords an opportunity which should not be missed to improve compliance. Under this new regime, new self reporting obligations could, for instance, be placed upon the profession, requiring Firms to proactively assert compliance. MASS also has reservations as to how OFR will work in terms of an area like Rule 9 which has always been prescriptively rules based. Great care will need to be taken in order to ensure improved rather than reduced compliance. The Society also recommends looking at penalties associated with non compliance, perhaps related to the referral fee amount undisclosed. For example, a breach or failure to disclose a referral fee payment of £500 could, for instance, lead to a £500 fine. The Society recommends carefully scrutinising the policing environment whilst translating the requirements of Rule 9 into an OFR based structure without losing its present clarity.

## 5.3

We strongly agree that this specific focus on quality, costs, competition, independence, choice and access to justice are the correct focus and do represent the most important themes for assessing the impact of referral fees within the Legal Services market. However, we do criticise the broad based micro analysis of the LSB, which represents almost a complete misunderstanding of the real adverse impact of referral fees.

## Quality

## 5.4

We take the view that there is a huge risk of reduced effort on individual cases and poorer outcomes for clients. We refer, in particular, to low value motor accident PI claims, which have, since 2004, been subject to wide ranging fixed costs regimes. An admitted liability case between £1,000-£10,000 of damages which settles at Stage 2 in the new RTA Protocol will lead to an award for costs of £1,200. In its own

evidence, the LSB has pointed to the fact that average referral fees might be as high as £800 per case. In 2004, again, the LSB's evidence was that the average referral fee might be £250. Even, if one assumed that legal costs have stayed at the same level, namely £1,200, which they have not in that they have reduced at least slightly over this period, this would now lead to a hugely reduced net amount available to a legal practice to conduct such claims. There must be reached a point at which the inflation of referral fees directly impacts the service to the Consumer. On this analysis, back in 2004, £950 was available to conduct each case; whereas now only £400 is available. Since account has not been taken of the higher fees probably charged back in 2004, and no account has been taken of inflation, it is believed that the direct comparison of these figures is about accurate. The concern of MASS is that with uncontrolled and spiralling inflation in referral fees at some point there will be significant Consumer detriment. It is to the credit of MASS Members and others that notwithstanding these considerable and real reductions in money available to conduct cases that service has been maintained and moreover improved. The LSB's conclusion that referral fees have plateaued at around £800 is not, in MASS's view, the case, and there is some anecdotal evidence of further increases in some cases as high as £950 to £1,000. This is likely to be exacerbated with the introduction of ABS's in October 2011. A cap on referral fees should be carefully considered only as a method of ensuring that there are sufficient fees to cover the cost of conducting cases professionally. However, the potential damage of a cap is encouraging an unseen culture of extending the cap through other means.

## 5.5

We would agree that it would be expected that evidence would be available that providers are acting in the interests of third parties, if independence has been compromised. In order to see this evidence, however, it is necessary to analysis the detail of individual referral fee arrangements, and associated contracts and agreements to establish whether those agreements represent a position which is detrimental to the Consumer of legal services. For instance, if referral fees are paid, and there is a tied agreement to use certain medical providers, credit hire providers and so on, is this commercially driven or in the Consumers best interests, or indeed as a matter of public policy, in the public interest.

Some of these arrangements are purely commercially driven rather than having any regard for the Consumers' best interests. It is accepted that in overall terms some commercial arrangements do indirectly assist clients; for example offering the availability of credit terms.

When analysing Consumer outcomes, it is important to also consider supplementing this with a close look at how specific introducer agreements work, as there are occasions where such agreements could be and are detrimental to the Consumer. In a letter to the Chairman of the LSB dated 23<sup>rd</sup> June 2010, an offer was made by MASS, which has not been taken up, to assist with this further analysis. Once this process has been studied, the most effective measures to prevent adverse impact can be recommended. MASS is disappointed that the LSB has not seen fit to consult with an organisation like MASS which is best equipped in this respect to judge the impacts on the Consumer of legal services arising from motor PI accidents.

## 5.6 to 5.9

The problem with expecting to see some evidence of Consumer detriment once referral fees are in place, is in broad terms isolating a causal link. Much has happened, as is observed by the LSB, over the same period following the introduction of referral fees in 2004. Also, the rules prior to 2004 were generally regarded by the profession as unclear. Indeed, referral fees in all but name and under other labels, were widely utilised in the PI market before 2004, which makes less relevant the 2004 as a watershed date. The Society suspects that these factors rather than just any positive influence of referral fees that has contributed to maintaining or even improving the level of complaints, success rates and damages. It would also be

accepted that panel arrangements, often associated with referral fees, have sometimes improved service levels by imposing service level agreements which would not otherwise be in place. The concern of the Society is the rights and best interests of the Accident Victim. If they are forced to use a particular provider of service, not according to their own need, but according to the commercial terms that are paid by the Third Party, this cannot be said to be in the Accident Victim's best interests. We are also concerned at fuelling unnecessary claims through the provision of some services, which can be recovered on behalf of the accident victim but adds little, if any, value to the accident victim him or herself. It is only by analysing individual arrangements across the Industry that the interests of the Consumer of legal services can be properly assessed. Technology has marched on at a huge and rapid rate since 2004. Fees payable have significantly reduced by more than half, whether because of, or despite referral fees over this period, which has focused the Solicitors profession on more efficient and effective service. The focus on training within the profession and compulsory development points, as well as memberships requiring bespoke and specific training will all have improved provision of service to the Consumer. Also, general activities of MASS and other victim support organisations have helped with training and awareness both for the Consumer and those practising in the field. It is quite wrong therefore to conclude that since the key benchmarks have not shown adverse variation that therefore referral fees are good for the Consumer of legal services.. MASS would recommend that a representative sample of such arrangements should be looked at in detail to ascertain the true Consumer impact. Analysis of some case studies which should be capable of being produced by the SRA would also inform the LSB's conclusions in respect of detriment to Consumer service. There are also wider Public Policy issues beyond those of the interests of accident victim which should also be considered.

One idea in order to protect clients from adverse third party arrangements is to submit third party arrangements to independent scrutiny, but this is unlikely to be practical and would probably become over bureaucratic.

## **Costs**

### **5.9**

CFAs, or no win no fee agreements, are not relevant to price. They are simply a way of paying for the risk that in some cases no recovery of fees will be made. It needs to be understood that CFAs do not represent price inflation, they are simply increased and reduced prices according to risk. At one extreme, no fees will be recoverable and at the other extreme, 100% uplift of costs will be recoverable, and indeed all points between. We agree that there are few Consumers who will self fund their own accident or injury legal action. Indeed, in the present environment, there is rarely a need for a Consumer to be self funded.

### **5.10**

We refer to our comments under paragraph 5.4 with regard to the adverse impact on service of referral fees being uncapped in an environment where fixed costs by definition are capped. Since 2004 there has been a reduction by more than one half in real terms of the fees available to devote and pay for legal service through the inflation in referral fees. It is questionable that this is in the Consumer's best interest.

### **5.11**

There are other issues around sharing the fee with the client, which is one example of providing an incentive to the legal services Consumer to bring a claim. It is thought by the present Government that this and similar incentive schemes represent "incitement to litigate". MASS does not believe that this would be so in the vast majority of cases, but does accept that this perception may make it appropriate to disallow such direct incentives to litigate, as an appropriate Public Policy position.

## 5.12

MASS is significantly concerned with regard to Lord Justice Jackson's proposals to abolish the recoverability of success fees. Evidence gathered by Stewarts Law (see Attachment 1) looked at a sample of all cases over £250,000 of damages, over a period of a year. On average, those accident victims were almost £50,000 per case worse off under the Jackson proposal, after taking into account the proposed 10% increase in general damages which purports to provide a counter balance to abolition. The Law Commission in 1998 made recommendations for increases in general damages, which for cases over £5,000 would lead to more than an increase in damages of between one and a half and two times, without taking into account price increases (which the Law Commission recommends it should). This puts into proper perspective the impact of an increase in damages for pain, suffering and loss of amenity of just 10%.

The success fee cap of 25% is also extremely concerning when considering the Accident Victims best interest. The same sample referred to above analysed by Stewarts Law, found that probably half of cases which had been pursued in the sample would not have been brought with such a cap in place, since the litigation would cease to become commercially viable. Whilst MASS is sure that there will be the odd case which a practice can bring on a non commercial but compassionate and pro bono basis, it is unrealistic to presume that a practice can conduct 50% of its cases on this basis. Additionally, the threshold for bringing claims in terms of probability of success would rise from its present level of above 50% prospects to above 75% or better prospects before that case would become commercially viable. MASS concludes that this is a wholly attractive Public Policy position for a Conservative Liberal Coalition Government.

## 5.15

We agree that if LJ Jackson's proposal to remove the recoverability of an ATE premium is introduced, this will make legal costs a direct issue for the PI Accident Victim. Also, the Stewarts Law evidence pointed to that fact that on average there were circa £50,000 of disbursement costs in the category of cases which they analysed. Removing the recoverability of these premiums would therefore have a further impact, which when assessed in conjunction with the abolition of the recoverability of success fees, would reduce damages for those most seriously injured by £100,000. There is significant evidence that many accident victims utilise this money to make basic interim and other care provision for themselves, rather than being simply an item of compensation for their pain, suffering and loss of amenity. This again is pointed to in the Stewart's analysis and survey. This, MASS submits, is an unacceptable Public Policy outcome.

## Competition

### 5.16

There is a case for considering the competition implications of increasingly large solicitor practices conducting PI work. This should also extend to look at those Firms links with Insurers, both in the provision of Claimant introduced work, and in respect of instructions to defend cases on behalf of the same liability insurer. This investigation becomes increasingly urgent with the spectre of ABS's on the horizon from October 2011, which will allow the Insurers concerned to move from introducer of Claimant instructions to owner of Claimant practice conducting Claimant work, whilst still defending claims as a liability Insurer!

### 5.17

The analysis of the payment of referral fees accounting for up to 20% of the income of just under 70% of law practices that pay referral fees, and the fact that larger firms (43%) are more likely than sole practitioners, and firms with 2-4 Partners (16%) to pay referral fees, misses the point. Analysis is required specifically of the PI sector, and each segment of that sector, and, in particular, motor PI work for all the reasons

referred to under 5.16. MASS is happy to provide assistance to the LSB and/or the OFT in carrying its investigation. MASS's sole concern is to ensure that the accident victims' best interests are preserved.

**5.18**

MASS agrees with the objective of encouraging a strong, diverse and effective legal profession. We also concur with the view that it is for the market to determine structure, rather than it being the job of regulators. However, the complicated issues surrounding conflict, compound growth, the engagement of Insurers in all aspects of the Claimant and Defendant process, and the introduction of ABS's gives rise to a profound need to regulate with enormous care to ensure that the Consumer of legal services is properly protected. For instance, there are difficult questions to ask about whether Insurers should in fact be excluded from the opportunity to own an ABS, when the ABS is a Solicitor's practice which will be conducting Claimant personal injury work on the same Insurer's behalf. The potential for abuse of this powerful position is a very proper concern for the LSB as overarching regulator.

MASS fully recognises that the growth and enlargement of Solicitor's panels has produced some good influences, as well as giving rise to the potential referred to above for abuse. More service concerns generally, better processes, connecting accident victims with service providers have all enhanced the Consumer experience in the best examples. However, there is also the risk and experience of adverse Consumer experience, in the worst examples.

**5.19**

The prohibition of firms from entering into bidding auctions or similar processes for referred work recommended by the Consumer panel should not, MASS believes, be rejected so lightly. By analysing such bidding processes, evidence of Consumer detriment will be discovered. This is particularly so around tied arrangements which are driven by commercial concerns rather than concerns for the Accident Victim. Rules should be considered to preserve the best interests of the Accident Victim rather than presume that the commercial ethic will always determine the right result for the Accident Victim.

**5.20**

There are two primary concerns that MASS member firms have with regard to ABS's. We have already referred to the first, which is the potential for conflict, particularly regarding the activities of Insurers with regard to ABS. The other is that traditional Solicitors' Practices should not be prejudiced in terms of their ability to compete with the newly introduced ABS from October 2011. MASS is reassured by announcements made by the Solicitors Regulation Authority (SRA) that there should be a single regulatory structure governing ABS and non ABS Solicitor Practices. This certainly must be the case if unfair competition is to be avoided. The impact of the introduction of ABS in respect of Insurers requires very close scrutiny by both the LSB and the OFT. Also, it would be a mistake for ABS licensing to be divorced from what decisions are made in respect of referral fees. For instance, if referral fees were to be banned as is recommended by the majority of the Legal Profession and all its Governing Bodies, as well as the Judiciary and, in particular, Lord Justice Jackson, then the introduction of ABS's needs to be looked at very closely. A simple route round a referral fee ban would be for an Insurer to own a Claimant Solicitor's Practice to avoid paying a referral fee. As mentioned earlier in this response, this gives rise to serious conflict concerns which would adversely impact the provision of service to the Consumer. It is simplistic to simply look at the ability of law firms to compete with Introducers, and introducer companies to compete with law firms by owning them. The issue is very much more delicate and complicated than this.

**5.21**

The development of pre-existing models along the lines of "Injury Lawyers 4 U" may well be possible under the ABS licensing regime. Also whilst the business case for the existence of referral fees may become redundant in a post ABS environment

where ownership of a Claimant Solicitor's Practice by an Insurer becomes the norm. Such an environment should not be taken for granted as being right and in the best interests of the Consumer of legal services. Proper and detailed investigation is essential.

## **Independence**

### **5.22**

MASS would be surprised if the SRA did not have some case study data which demonstrated that some lawyers do not act in the Consumers best interests under some panel solicitor arrangements.

### **5.23**

Introducers are in a very significantly strong negotiating position as is acknowledged by the LSB. Again, the analysis should not be of the market overall in which under 70% of legal practices pay referral fees, and they account for below 20% of income, and where only 14% of practices that pay referral fees do "paid for" cases make up more than 50% of income. The correct analysis is to look at the PI market, and segments of it like motor PI work and analysis in detail what is happening in those market sectors. The broad analysis of Solicitors' practices generally does not identify the problems occurring in specific markets.

### **5.24**

Again, we would encourage specific analysis of large panel agreements in some detail to establish whether there is evidence that Solicitors act largely in the best interests of clients. MASS believes that there are arrangements which clearly do not require the Solicitor to act in the best interests of clients. Again, MASS would seek to assist the LSB and indeed the OFT with regard to its investigation of this area. MASS stresses again that it is disappointed not to have been asked to assist with its detailed knowledge which would have better informed the LSB's deliberations on the issue of referral fees.

### **5.25**

MASS agrees that the risk of lawyers acting against their core duties is greatest when three conditions are met, namely unequal power relationship between lawyers and introducers, Consumers freedom of choice being constrained and the interests of introducers and Consumers not being aligned. The conclusion that the LSB reaches, namely that since they have found no evidence of misalignment of interests between Introducers and Consumers caused by the undoubted, unequal or power relationship (which the LSB accepts) and the constraint of freedom of choice (which again the LSB accepts) is too superficial for all the reasons stated in this paper.

The LSB needs to take account of the full implications of the Eschig case, which are for reaching with regard to the Consumer's right to choose. It is MASS's view that if strictly interpreted this decision has the prospect of paralysing the Legal Expense market, which MASS accepts has to operate in the context of Solicitors Panel arrangements to some extent (see Attachment 2).

## **Choice**

### **5.26**

We agree Insurance Companies strongly steer or put pressure on Consumers to use Panel Solicitors. We ask a simple question as to whether this is always done with the best interest of the Consumer of legal services at heart? The answer is that the overwhelming motive is commercial and financial which gives rise to the obvious danger that the Consumer of legal services' best interests are made second to exclusively commercial concerns. MASS encourages the LSB to analyse the comparative impact of service delivered by commercially constrained Solicitor Panel arrangements as compared to Client selected Solicitors. MASS can assist in arranging for this comparison to be carried out.

**5.27**

We do not agree that if there were problems with lawyers acting against the best interests of their clients, that this would manifest itself through increased complaints, increased prices, or reductions in quality, such as success rates and damages levels. It is in the nature of a profession that the relationship between Solicitors and Client will be one of great trust. Whether or not the Clients best interests have been preserved is a matter for scrutiny case by case, rather than only the broad based analysis adopted by the LSB.

**5.28**

MASS agrees that Consumers should be able to use their own lawyer should they wish. We very much support giving Consumers absolute notice of their right to choose at a point in the transaction when it is still possible for that choice to be exercised. Again, close scrutiny of arrangements would reveal that sometimes this choice is illusory. In reality, once a client has been engaged to some extent, it is well known in the Profession that those clients will stick with the same Solicitor. Accordingly, the caveat that freedom only applies at the point of contemplating litigation historically applied in PI cases has effectively given rise to the taking away of choice from the Consumer of legal services at the most vital point. MASS would however recognise that freedom of choice cannot be unlimited, given proper commercial and other concerns that must exercise some constraint on choice in order to make legal expense insurance and other funding provision at all viable.

**Access to Justice**

**5.29**

The only claims which have increased over the last decade are motor PI cases. This is for a combination of reasons, including direct intervention or third party capture by insurers and the vast inflation in referral fees which in the experience of MASS members has been led by Insurers. Other factors include the increase in Consumer rights awareness through the activities of claims management companies and others, and the provision of services to Accident Victims, like credit hire, which in turn are often used to promote PI claims. It is very difficult to dissect which of these has had what percentage impact. However, it is certainly the case that one of the key features of the increase in motor accident claims is Insurer activity.

**5.30**

We agree with the conclusion of the LSB that there continues to be a legal need in the area of PI. The regulator must play a key role in ensuring that this need is met rather than open to abuse.

**5.31**

We refer to the reasons outlined in our answer to 5.29 with regard to the cause for the rise in the number of motor accident claims involving PI. We do agree that recoverability of success fees and ATE premiums and Court decisions will also have had an impact on cases, in addition to those factors referred to above. However, MASS takes the view on balance that Insurer activity is probably much more profound than those cited here in 5.31.

**5.32**

We agree that claims management companies at their best have assisted in good marketing and improved client care or "hand holding" which is essential for a lot of accident victims who are often tentative and under confident with regard to their rights. We also agree that organisations like our own have contributed to making accident victims aware of their rights. We are proud not ashamed of this.



### 5.33

There is not a simple answer as to whether access to justice has been harmed or not by referral fees. A lot of the improvements do not have to be associated with the continued allowance of referral fees. For example, better processes, better 'hand holding' or client care, better marketing of Solicitors' Practices can all happen with or without referral fees.

## Conclusion

### 5.34

We agree with transparency, accountability, proportionality and consistent and targeted actions are appropriate. The target should be policing, however in MASS's view, if referral fees are to be retained, it must be remembered that in 2004 it was thought to be an extreme liberalisation that referral fees should be allowed in some quarters. Accordingly, the word 'extreme' should not be used with regard to the abolition of referral fees. The central question is whether or not this is in the best interests of the Consumer of legal services, as well as considering relevant other Public Policy issues, rather than whether the action can be labelled extreme or not. MASS's membership has a wide cross section of views. However, the Society is united in seeing referral fees as perhaps a 'necessary' evil rather than a desirable practice.

### 5.35

MASS maintains the view expressed at the outset of this response, which in turn was expressed in response to the Lord Justice Jackson enquiry. However, should this submission not be accepted, the focus should be on policing and ensuring compliance rather than with further steps to redefine the disclosure process. Specific consideration needs to be given with regard to the transition of OFR.

### 5.37

The highest risk area with regard to referral fees is the activity of Insurers. This is not because they are Insurers but because of their position of conflict in the process. They are defending liability claims on the one hand and introducing claims with the other, and with the advent of licences being granted with regard to ABS's in October 2011, they may also own the Solicitors' Practice which conduct claimant litigation on behalf of Accident Victims. This is the highest risk to Consumer best interest.

## QUESTION

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

We refer to our detailed analysis in answer to question 1. In short, the LSB investigation needs to be supplemented by some micro analysis to be assessed in conjunction with the macro data already looked at by the LSB. The macro data also needs to be segmented to scrutinise to analyse specific market segments, like PI and motor PI.

## RECOMMENDATION 7

### **Recommendations for improving transparency and disclosure**

#### **Recommendation one**

- **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**

#### **Recommendation two**

##### **Improved 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**

### **QUESTIONS**

#### **6. Will the proposals assist in improving disclosure to Consumers?**

MASS believes that the recommendation is already covered by the provisions of Rule 9 of the Solicitors Code of Conduct. Fresh analysis should be done with regard to the compliance and Rule 9 with a move to OFR with regard to a proactive declaration by Solicitor Practices that they are complying with Rule 9 rather than a system that simply 'catches' Solicitors if they are not complying.

The notification of the existence and amount of the referral fee, confirmed in writing, to the client is ensuring that open disclosure is happening where the rule is complied with. MASS have found that clients by and large do not express concerns when advised with regard to referral fees being paid. Clients simply want reassurance that they are not going to have to pay a referral fee themselves.

The major focus should be on policing. It may be that financial penalties could be considered with any fines paid being contributed to causes supporting the best interests of the accident victim.

With regard to Recommendation 2, the publication of details of contracts is not practical. Whilst MASS believes the impact of referral fees is important, it has to be accepted that clients are not interested in whether or not a referral fee has been paid. However, they would be interested in any detrimental impact visited upon them as a result of a referral fee system being in operation. Some referral contracts, which include service level agreements, may be many pages long. The Consumer would just not understand the complexity of why such an agreement is necessary.

There are also concerns about legitimately commercially sensitive information being kept in a public register.

There would also be a huge risk of leaving loop holes with regard to disclosure providing further difficulties in reaching the LSB's objective.

MASS takes the view that the focus should be on policing rather than changing the disclosure arrangements.

One mechanism which might assist the Consumer is the calculation of the actual hourly rate which can be applied to work on their case; e.g. by deducting referral fees from the fixed costs and applying an aggregate of hours spent on each case.

#### **7. Are there options for disclosure that ARs should consider?**

MASS recommends that options be looked at with the SRA in light of the move to outcome focused regulation (OFR). For instance, it may be more effective to require practices to confirm to the regulator the steps they are taking to comply with Rule 9 as earlier stated.

**8. What are the issues relating to disclosure of referral contracts by firms to approved regulators and their publication by approved regulators?**

The issues are those of releasing commercially sensitive information, and creating an over bureaucratic system. MASS takes the view that both of these will result from Recommendation 2.

**9. How should these issues be addressed?**

There should be a focus on policing and proactive evidence of compliance rather than waiting to spot a breach and then reprimanding the Solicitors' Practice concerned.

**RECOMMENDATION 8**

**Recommendations for delivering active regulation**

**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**

**QUESTIONS**

**10. Will the proposals assist in improving compliance and enforcement of referral fee rules?**

MASS takes the view that it is important that there should be published information as to how regulating bodies will carry out their regulatory function.

However, Consumers are concerned about what they understand affects them directly. Whilst we believe the impact of referral fees is material to the client's best interest, the adverse impacts are not going to be seen through public disclosure. This requires investigation, understanding, and appropriate rule setting, which the Regulator should carry out, and the Consumer needs to have absolute confidence it has been carried out.

MASS is not convinced with regard to targets, although this could be re-evaluated once the proper detailed investigation MASS has recommended has been carried out.

**11. What measures should be subject to key performance indicators or targets?**

We refer to our answer to question 10.

**12. What metrics should be used to measure Consumer confidence?**

We refer again to the need for more detailed investigation before any metrics can be identified. A valid metric in any event will be disclosure of compliant and non compliant case numbers, when compared to the total case numbers.