

**Response of the Professional Negligence Bar Association  
to the Legal Services Board Consultation Paper on referral fees,  
referral arrangements and fee sharing**

**Introduction**

The Professional Negligence Bar Association represents approximately 1,100 barristers whose expertise includes, in particular, clinical negligence work, professional regulatory and disciplinary work and lawyers' liability claims arising out of the conduct of personal injury and clinical negligence claims. Members of the Association represent both claimants and defendants.

We note that whilst the consultation paper takes a favourable view of the Jackson recommendations, the Legal Services Board is considering measures that would fall short of implementation of his recommendation for abolition of referral fees. We note that the consultation paper considers that regulation of referral fees to ensure transparency for the consumer would be sufficient to protect the public.

Whilst we have reservations about a number of the Jackson recommendations, on the topic of referral fees we endorse the recommendation in favour of abolition. Whilst referral fees may have had the effect of producing more work for lawyers we recognize the widespread revulsion to them within the legal profession and on the bench since they were introduced. The Association's view is that a firm and determined regulator acting in the public interest would respond to the issues that have been raised in relation to referral fees, and the recommendation of the Jackson report, by taking prompt action to protect the public and the legal system from further damage and abolish referral fees.

As requested we consider the individual questions identified in the consultation paper.

**Question 1:**

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

**Response**

No. We consider that the analysis contained in the consultation paper underestimates the damaging effect on the public interest and the legal system of referral fees. We consider that the consultation paper has not taken on board the very real damage being done by referral fees as identified by the Jackson report.

The effect of referral fees, as the Jackson report recognised, is to divert a considerable fund of money from the legal system that could be more usefully spent on compensating the public.

Whilst the consultation paper suggests that referral fees could be equated with marketing costs and can therefore be viewed as being in the public interest as increasing public awareness and understanding of the market place this represents a misunderstanding of how referral fees actually work. The marketing strategy that referral fees represent is based on signing up consumers with a legal problem and selling them to whoever is willing to pay for them regardless of whether they are appropriate to deal with the client's problem. If and insofar as such a strategy can properly be described as a marketing strategy then it is not one that should be encouraged by a responsible regulator.

We note the Legal Services Board's concern about whether there is sufficient "definitive" evidence of the distorting effect of referral fees on the market. We agree that it is hard to

find definitive evidence about the effect of referral fees and that extracting definitive evidence from the powerfully expressed representations from all those concerned with referral fees is a difficult task. We consider, however, that the lack of “definitive” evidence is a natural result of the nature of the market and a regulatory response that awaits “definitive” evidence in the face of a very obvious and real level of concern about the public interest identified in the Jackson report would be a disproportionate approach by a regulator.

By the nature of the work that the PNBA undertakes our members see what is happening within the profession and what is going wrong with the conduct of the profession in terms of the public interest. By the nature of our work much of what we see has to remain confidential and we are unable to quantify what we see in a statistically valid way. We can, however, report on the distorting effect of referral fees. Although to an extent this merely adds to the anecdotal evidence already available we consider that a search for statistically valid evidence as a condition of further action would leave the public undefended against the now recognised problems simply because the problem cannot be weighed in statistical terms.

Whilst we would not pretend that referral fees are the only factor at play in producing the bad practices that we will refer to below, we consider that referral fees are by far and away the most significant factor in a deteriorating level of quality of practice. The fields of personal injury and clinical negligence in particular have enjoyed considerable improvement of quality in recent years as a result of a combination of factors such as Legal Services Commission franchising of specialist firms dealing with clinical negligence claims, Law Society accreditation to personal injury and clinical negligence panels, improvements in CPD provision through bodies such as APIL, AVMA and other more commercial providers. In our view the effect of referral fees on the market has been to reverse the trend towards improving standards. What we have seen in practice includes:

- (a) Cases sold to the highest bidder regardless of whether there is an appropriate match in terms of skill or expertise,
- (b) An increase in solicitors acting at a geographically remote distance from their clients because they were prepared to buy a claim,
- (c) Solicitors having to build costs in cases in order to recover the referral fee that they have paid out,
- (d) Delegation to unqualified staff who are then placed under pressure to meet financial targets by converting referral fees that have been prepaid into profitable costs,
- (e) An increased risk of under-settlement of serious claims but disproportionately high costs in smaller claims,
- (f) The interests of the client, and the wider interests of the integrity of the legal system, subrogated to the commercial interests driven by the investment that has been made in referral fees, and
- (g) The very considerable downward pressure on quality of work as a result of the money that referral fees take out of the system.

In our view the damaging effect of referral fees applies to both claimant and defendant sides of the divide. On the defendant side insurers are very well aware of the referral arrangements that are in operation and transparency is not an issue. Nevertheless defendant insurers and advisers become caught up in the ethos of paying to procure work regardless of quality assurance and transparency is not prevented a relentless downward pressure on quality

assurance. Whilst insurers are big enough and well enough informed to take properly informed decisions even they struggle to control the knock-on effect of how the market works for short term gain. Claimants are in no position to make any informed assessment even if increased transparency about referral arrangements was introduced. Even if they could understand the information which it is suggested they should be given it will be hard for them to make an independent decision within a system that has become dictated by referral fees when making an assessment of whether they should entrust their claim to a “solicitor”<sup>1</sup>.

## **Question 2:**

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

## **Response**

We can only contribute to the anecdotal evidence that was gathered and assessed by Lord Justice Jackson in his report. We have set out above the difficulties that we identify in the effect of referral fees on the market above.

## **Criminal Advocacy**

## **Questions 3-5 inclusive**

## **Response**

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<sup>1</sup> Often in fact an unqualified person poorly, if at all, supervised.

We are aware of and can understand the very real concerns that are raised within the legal profession about the effect of referral fees on criminal advocacy and in particular in relation to quality assurance and informed decision making by clients. As the field of criminal advocacy is not within the particular area of expertise of our Association we will not comment in detail since there will be representations made on behalf of the Bar Council dealing with this area. Those comments and representations will be more informed than any representations that we might make but we would not wish the absence of a detailed response from us to be taken in any way as diluting the importance of the submissions that will be made by those within the Bar Council in a much better position to respond.

### **Recommendations for improving transparent and disclosure.**

#### **Question 6:**

Will the proposals assist in improving disclosure to consumers?

#### **Response**

Yes the proposals will assist in improving disclosure to consumers since the proposals will require such disclosure to be made. We consider, however, that the proposals for disclosure will have but a marginal effect on the difficulties that are created by referral fees for the reasons that we have indicated above.

#### **Question 7 :**

Are there other options for disclosure that ... should consider?

## **Response**

In our view however complex the proposals for disclosure might be made they will still not achieve the purpose for which they are intended namely creating a free and fair open market in the public interest for the reasons we have identified above.

## **Question 8:**

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

## **Response**

For the reasons set out above we do not consider that disclosure of referral contracts of itself will solve the problem that the consultation paper is addressing. If regulation of referral contracts was enforced by making the recoverability of costs conditional upon compliance then there is a very significant risk that the Legal Services Board as regulators would trigger yet another damaging “costs war” which would be very detrimental to the public interest (and the credibility of the LSB as regulator). If the more traditional regulatory routes are adopted then they will be incredibly burdensome and difficult for the Legal Services Board as regulator and will undoubtedly lead to considerable increase in cost and delay in regulation. The cost will have to be funded out of funds that would be better spent on serving the public interest directly.

## **Question 9:**

How should these issues be addressed?

**Response**

By abolishing referral fees.

**Question 10:**

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

**Response**

Only by considerable time and effort on the part of regulators.

**Question 11 :**

What measures should be the subject of key performance indicators or targets?

**Response**

This question highlights the very real concern about enforceability and monitoring of the proposals contained in the consultation paper. By far and away the preferable approach would be abolition. The largest problem posed by the Jackson proposals for abolition is whether it is too late to “put the genie back into the bottle”. We recognise that implementation of the Jackson proposal for abolition would require a regulator to show that they were strong enough to act decisively in the public interest and take on the emerging vested interests in the referral market. In our view, however, such a regulator would be welcomed by those with the interests of the public and of a sensible legal system at heart. It would meet the public wish for “ambulance chasing” to be curtailed. It would unite

consumer bodies with the legal profession and the bench in support of the new regulatory system for legal services. The problem identified by Lord Justice Jackson is only going to get worse and so putting off abolition until some intermediate step or regulation has been attended without success will only make things harder. A deferral of firm action for 3 years to allow a study and a trial of regulatory intervention, as suggested by the consultation papers, will simply suck more regulatory effort money out of the system while allowing the problem to grow and will be seen as an indication of weakness on the part of the Legal Services Board.

**Question 12:**

What metrics should be used to consider consumer confidence?

**Response**

It is important that the public and consumers have confidence in those providing legal services but also in those charged with regulating them in particular the Legal Services Board. Accordingly the public perception of whether the Legal Services Board is acting robustly in taking on the vested interests that have been identified by the Jackson report as being adverse to the public interest will be important.

**Grahame Aldous QC**

20<sup>th</sup> December 2010