



---

## YOUNG BARRISTERS' COMMITTEE

### **RESPONSE OF THE YOUNG BARRISTERS COMMITTEE TO THE LEGAL SERVICES BOARD ON REFERRAL FEES, REFERRAL ARRANGEMENTS AND FEE SHARING, NOVEMBER 2010**

#### **Introduction**

1. The Young Barristers' Committee (YBC) is one of the Bar Council's main representative Committees and it represents barristers who are under 10 years' call. Led by a Chairman and Vice-Chairman, it comprises elected members of the Bar Council (employed and self-employed barristers) under 7 years' Call, as well as barristers who are co-opted to ensure representation from different areas of practice and from all Circuits. Its membership is therefore diverse and representative.
2. This is the response of the YBC to the Legal Services Board's paper entitled '*Referral Fees, Referral Arrangements and Fee Sharing*.' ("the LSB Paper").
3. On 2<sup>nd</sup> March 2010, Nichola Higgins (then Vice-Chair of the YBC) and Hannah Kinch met with Charles Rivers Associates to discuss referral fees and fee sharing arrangements. They set out their reasons for opposing both.
4. Additionally, in February 2010, the YBC responded to a letter dated 4 December 2009 to Mr. David Hobart, Chief Executive of the Bar Council, by Dr. Dianne Hayter, Chair of the Legal Services Consumer Panel ("the Panel") and to the Panel's paper entitled *Investigation into Referral Fees*.
5. The YBC remains opposed to the introduction of referral fees, as set out previously in our response in February 2010. We adopt the points made in that response, and do not seek to

rehearse them here. Instead, we add our comments to the issues specifically raised in the LSB Paper.

6. As before, we wholly endorse the points made in the joint response of the Bar Council and Criminal Bar Association. Rather than repeat them, we seek to address the questions raised in the LSB Paper from the perspective of the junior Bar.

**Q1) Do you agree with our analysis of the operation of referral fees and arrangements?**

7. No. It is not accepted that referral fees continue to be required to widen access to justice. The public are very aware of their right to bring claims, especially in the field of personal injury and therefore there is no longer a requirement to inform the public of their individual rights to bring proceedings. Solicitors are permitted to advertise and therefore any benefits gained by solicitors from CMCs could be adopted by solicitor firms, the availability of personal injury solicitors can be adequately advertised on the internet, through the Association of Personal Injury Lawyers' website and other standard forms of advertising. It is noted that many personal injury solicitors already advertise in such ways. It is not accepted that CMCs or similar organisations limit marketing costs which solicitors would otherwise seek to obtain back from their clients. It is not accepted that rising marketing costs for solicitors should outweigh concerns raised in relation to client care and the spiralling costs associated with civil litigation.
8. Clients should be able to freely choose from a number of solicitors, which is likely to lead to greater competition, result in greater client care and case management at a lower cost.
9. Insurers will remain able to recommend solicitors to their clients, and are likely to do so, without the need for a referral fee. The comment at 2.13 is noted, regarding insurers claiming that the liability for costs of referral fees across all legal work exceeds the income from referral fees. Therefore there is no argument that referral fees limit insurance expenses.
10. Further, it is not accepted that if referral fees do widen access to justice they do so by a proportionate means that should override consumer detriment. It is not believed that sufficient weight has been given to Lord Justice Jackson's in depth and wide ranging review on referral fees which led to his following comments:

- *"The effect of allowing referral fees is that clients now have less choice than they would if referral fees were prohibited"*

- *"I do not accept that referral fees are necessary for access to justice."*

- *"Under the present regime, solicitors are not competing to get business on price. nor are they competing on quality of service. They are usually competing to see who can pay the highest referral fee."*

**Q2) Do you have additional evidence about the operation of referral fees and arrangements that should be considered by the LSB?**

11. The YBC does not have empirical evidence that ought to be considered. It does have anecdotal evidence from its members of examples where the client has never seen the solicitor, due to the geographical difference, and where the client has not been properly informed that they have a choice of solicitor. It is acknowledged that such anecdotal evidence is of limited use.

**Q3) Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?**

12. The YBC agrees that there is currently no mechanism in place in which to be able to independently assess the quality of advocacy services provided by those who enter fee sharing arrangements. We also agree that QAA will hopefully provide a system by which minimum advocacy standards can be monitored and maintained.

13. It is stated at paragraph 6.10 that 'there is no evidence that lawyers are consistently putting financial interests ahead of their duties to their clients.' However, one clear example of where financial interests are put ahead of duties to lay clients concerns the increasing use of solicitors who appear as junior counsel in a two counsel case, even where they do not have sufficient experience of crown court advocacy to justify their instruction. This is motivated purely out of financial concerns, and cannot be said to be beneficial to the lay client. Junior counsel is supposed to be able to take over the running of a trial at any given point. Although this will not often happen, it may be required, for example, if leading counsel suddenly becomes ill, or suffers a bereavement. The trial is expected to continue in their absence. Disruption comes at

considerable cost. This plainly could not and should not happen if junior counsel is not sufficiently experienced to be able to take over the running of the case.

14. The development of this practice has had a considerable impact on the junior Bar, which is finding junior briefs increasingly few and far between. This has a considerable impact on the development of more complex crown court practices, undermining a junior barrister's ability to proceed to more complicated matters.
15. However, in the absence of QAA the 'evidence' the LSB seeks is unlikely to be provided. Those at the independent Bar are clearly not in a position to be able to give anything other than anecdotal evidence of some solicitors entering into fee sharing arrangements, by virtue of the fact that they are a referral profession; it can be very difficult to 'bite the hand that feeds.' Substitute Advocates are unlikely to confirm that their ability to prepare cases is compromised by the fact that they are instructed after the PCMH, when a case management strategy is supposed to be set out. Similarly, solicitors who engage in fee sharing are unlikely to accept that their practice compromises the quality of the service that their client receives.
16. The undesirability of fee sharing arrangements through the use of Substitute Advocates has been confirmed by the LSC in its document 'Sharing/Referral Fees - Important guidance for holders of LSC Crime Contracts December 2010'. This document confirms that the Instructed Advocate should be appointed on the basis that they conduct the trial, and not where there is no intention to see the case through to its conclusion. Of course, there will be occasions when an Instructed Advocate cannot ultimately conduct the trial, perhaps because another trial has overrun, or because it is a warned list case. However, the guidance sets out the circumstances in which the Instructed Advocate can withdraw.
17. We were disappointed to see it said at paragraph 6.11 that "that the Bar Protocol might be having effects similar to a price support mechanism." We completely disagree with this analysis. The Bar Protocol simply sets out the fees for elements of advocacy that have been set in the Statutory Instrument, and ensures fair distribution of fees for those undertaking the work. The protocol is particularly important for the junior Bar, because it ensures junior barristers are not exploited, either by more senior members of the Bar, or by solicitors willing to take advantage of their willingness to forge relations.
18. We do not agree that flourishing competitive markets best protect those who use the criminal justice system. Many of those who use the services of criminal advocates are from the most vulnerable groups in society. Their experience of the criminal justice system will almost

certainly be a stressful one. Many may struggle to understand the fact that they are entitled to be represented by an advocate of their choice, and that this should not be limited to those willing to enter into a fee sharing agreement (who may not in fact be the best advocate to do the case, but is simply prepared to work for a lower fee). Under the current system, a young barrister must build a reputation for hard work, quality advocacy and an ability to communicate well with lay clients in order to develop a practice. The introduction of referral fees will eradicate this, with the market instead favouring those who are prepared to work for less than their peers.

19. The YBC strongly maintains that the best way of protecting the consumer in the criminal justice system is to ensure that ability is the deciding factor when choosing an advocate, not price. Allowing referral fees or fee sharing arrangement plainly goes against this. We repeat our concerns raised in our submissions of February 2010, and endorse those submitted by the Bar Council and CBA.

**Q4) Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the LSB?**

20. The YBC does not have any additional evidence of this. As outlined above, the fact that the Bar remains a referral profession makes obtaining evidence (as opposed to anecdotes) of referral fees or fee sharing arrangements very difficult. Those who enter into such schemes are unlikely to openly acknowledge or publicise this. Barristers who know of such schemes may be reluctant to say anything that could be seen as potentially compromising their position with solicitors.

**Q5) In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?**

21. In the absence of the QAA scheme, there is no empirical evidence regarding the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy. The YBC believes it would be rash to allow fee sharing and referral fees, when there are clearly anecdotal concerns reported about the effects of such practices on criminal advocacy, before the scheme to assess advocacy which could test these concerns is established. In addition, we refer to our arguments set out in response to question 3 above.

**Q6) Will the proposals assist in improving disclosure to consumers?**

22. The proposals will assist in improving disclosure to consumers. However, the proposal should go further and place the legal provider under a duty to disclose to their client the key facts about the referral fee before the start of the relationship, rather than "*being free to determine the process for disclosing the key information*". Failing to include such a provision would lead to the substantial risk that consumers are not informed of their right to shop around before they have already engaged with the referral solicitor. If it is "*expected*" that the disclosure will take place as soon as feasible there can be no argument to include such a provision.

**Q7) Are there other options for disclosure that ARs should consider?**

23. None within the YBC's knowledge

**Q8) What are the issues relating to the disclosure of referral contracts by firms to approved regulators and their publication by approved regulators?**

24. This question is outside of the knowledge of the YBC.

**Q9) How should these issues be addressed?**

25. The YBC is not in a position to be able to answer this question.

**Q10) Will the proposals assist in improving compliance and enforcement of referral fee rules?**

26. We have not seen any evidence within the paper which suggests that the proposals will assist in improving compliance and enforcement of referral fee rules. It is accepted at paragraph 8.11 that the LSB is concerned about the low level of compliance with the current SRA rules which currently regulate referral arrangements. No reference has been made as to why it is that there has been such a poor level of compliance, or why

the SRA has been unable to regulate the arrangements properly. As such, the YBC is unable to answer this question more fully.

**Q11) What measures should be the subject of key performance indicators or targets?**

27. In the absence of any proposals within the paper, the YBC is unable to answer this question.

**Q12) What metrics should be used to measure consumer confidence?**

28. This question is outside of the knowledge of the YBC.

**Young Barristers' Committee of the Bar Council of England and Wales**

20<sup>th</sup> December 2010