

# Referral fees, referral arrangements and fee sharing

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*Decision Document*

May 2011

## Introduction

In **Chapter 1** we explain the Board's approach to referral fees. The Board has concluded that it should set out the outcomes that it wishes to secure for consumers.

This relies on regulators having in place arrangements that:

- a. reduce the likelihood of detriment to consumers as a result of allowing referral fees, referral arrangements and fee sharing, and
- b. can justify any ban or restriction of referral fees, referral arrangements and fee sharing with reference to evidence, the Regulatory Objectives and the Better Regulation Principles.

Importantly, consumers should know when referral fees and/or referral arrangements are, or may be, in place in order to inform their choices.

The Board continues to hold the view that there the *purely regulatory* case for a general ban in the legal services market has not been made out. This is because sufficient evidence of consumer detriment, which would have been needed to merit a ban, has not been found.

To help ensure that these outcomes for consumers are achieved in practice, the Board is also:

- a. setting a clear expectation that approved regulators should review their own practice to ensure that the outcomes are achieved
- b. setting out clear and comprehensive Guidance on how that task might be achieved
- c. ensuring that the Guidance has statutory force under s.162 of the Legal Services Act 2007 (the 2007 Act), enabling us to assess the extent to which it has been taken into account
- d. planning further work to assess implementation in 2013-14.

**Paragraphs 17-30** replicate the Guidance the Board is issuing to approved regulators under s.162 the 2007 Act. The Guidance emanates from the policy set out in Chapter 1.

Beginning at **paragraph 31** the Board provides a summary of the responses it received to its discussion document *Referral fees, referral arrangements and*

*fee sharing* published in September 2010. Alongside the summary of responses, the Board provides its own response in some detail, allowing the reader to link the Board's decision back to the evidence, its own consultation, and the views of stakeholders.

**Annex A** is a list of respondents to the discussion document.

**Annex B** gives the reader a list of the key documents and where they may be read online.

## Chapter 1: The Board's approach to referral fees

1. This document sets out the Legal Services Board's (LSB) conclusions following the recent consultation exercise on referral fees, referral arrangements and fee sharing. It details the action that we now expect approved regulators to take to ensure that there is in place a consistent regulatory approach to the issue.
2. The Board began its review in November 2009 before we had taken on our full enforcement powers. This was in response to the approach by The Law Society setting out the views of its Council that there should be a ban on all forms of referral fees across all the regulated legal professions. The Bar Council (The Bar) also lobbied for action, but in the narrower context of concerns about solicitors being able to compete against barristers for advocacy work.
3. Our starting point for the review was two-fold:
  - a. first, our prime focus was to establish whether referral fees and broader referral arrangements were harming consumers or diminishing access to justice
  - b. second, in an area marked by strong views but relatively little data, we should be guided by hard evidence and should seek to generate new evidence where we found data to be lacking.
4. We therefore commissioned two substantial pieces of analysis:
  - a. first, we asked Charles River Associates to explore the impact of referral fees in relation to the conveyancing, personal injury and criminal advocacy markets. Their full findings are set out in their report to us, entitled *Cost benefit analysis of policy options related to referral fees in legal services*. In brief, they concluded that there was no evidence of harm in the first two markets they examined (conveyancing and personal injury), whether in the form of higher prices than would otherwise be the case or through the advance of cases without merit and to the detriment of other cases. In relation to criminal advocacy, they noted that the presence of referral fees could have undesirable incentive effects, but that these could be mitigated through an effective regulatory mechanism to underpin quality assurance of advocacy.

- b. second, we asked the Legal Services Consumer Panel for their advice, specifically from a consumer perspective. The Consumer Panel, in turn, commissioned Vanilla Research to explore, with potential and recent users of legal services that commonly involve referrals, what the advantages and disadvantages were for consumers, to assess the impact of the marketing activities of claims management companies on those seeking access to justice and whether this affected some groups of consumers more than others. The Vanilla Research report, along with its advice to us, is available on the Consumer Panel's website. There is a link to both reports in Annex D. The Consumer Panel's report and advice, were published in May 2010. The Consumer Panel concluded that referral fees could be retained, provided that they were revealed and properly regulated.
5. In the light of this evidence, the Board produced its own proposals for consultation in September 2010. At that stage, we considered that the proper tests needed for the approved regulators (whose responsibility this would be) to impose a general ban across the full range of legal markets had not been met, and that more proportionate forms of regulation were available to provide transparency and prevent abuse. We set out a number of options for how approved regulators could achieve this in practice. We also made clear that we remained open to new data being produced from other sources to enable us to expand or amend these provisional conclusions.
6. The Board has now considered the responses to the consultation. We believe that there are some potential dangers in the unregulated operation of referral fees, not least that they are seen to undermine consumer confidence in legal services. We therefore will now ask the approved regulators to take further action. There is clear evidence that current disclosure and compliance arrangements do not do enough to ensure consumer and public confidence. However, equally there is relatively little evidence of actual or potential harm to consumers or the public interest. The Board has therefore determined that action is needed to protect the Regulatory Objectives, but we are not asking the approved regulators to consider a blanket ban.

7. We start from the approach of securing clear outcomes to be achieved for consumers.
8. These outcomes should be that:
  - a. regulators have in place arrangements that:
    - i. reduce the likelihood of detriment to consumers as a result of allowing referral fees, referral arrangements and fee sharing
    - ii. can justify any restriction on referral fees, referral arrangements and fee sharing with reference to evidence, Regulatory Objectives and Better Regulation Principles.
  - b. consumers know when referral fees and/or referral arrangements are in place in order to inform their choices.
9. The Board believes that specifying these outcomes, but leaving approved regulators free to find the best ways of working towards them in their own parts of the legal services market, represents the right balance between the need for consistency of approach and the need to tailor the response to the different conditions and risks across the sector.
10. To help ensure that the outcomes are achieved in practice, the Board is also:
  - a. setting a clear expectation that approved regulators should review their own practice to ensure that the outcomes are achieved
  - b. setting out clear and comprehensive Guidance on how that task might be achieved
  - c. ensuring that the Guidance has statutory force under s.162 of the 2007 Act, enabling us to assess the extent to which it has been taken into account
  - d. planning further work to assess implementation in 2013-14.
11. We expect scrutiny by approved regulators to cover not just the “regulatory rules”, but also how the framework operates in practice and,

crucially, the arrangements they have in place to ensure that the impact on consumers is consistently monitored.

12. Section 162(5) of the 2007 Act says “when exercising its functions, the Board may have regard to the extent to which an approved regulator has complied with any Guidance issued under this section which is applicable to the approved regulator”. Thus the Board will be able to hold approved regulators to account, both in reviewing progress generally and specifically when considering their applications to change regulatory arrangements.
13. Further reinforcement for the Board’s decision that there is insufficient evidence to sustain or introduce a blanket prohibition of referral fees, referral arrangements and fee sharing for purely regulatory reasons is that the legal services market is on the threshold of substantial structural change. One possible effect is that firms’ dependence on referral fees may lessen and the importance of claims management companies in the market decrease as firms become more effective at “client acquisition” as a result of more professional management. Law firms may move more deeply into claims management and claims management companies may seek to gain a licence to become an Alternative Business Structures (ABS). Moreover, larger brands with better connection to clients may simply have greater marketing capability, so removing the need for claims management activity at all.
14. A third factor is that a ban could create perverse incentives which lead to more harmful behaviour, such as the payment of “under the counter” inducement fees.
15. The Board intends to undertake a review of approved regulators’ approaches to regulation of referral fees, arrangements and fee sharing. This would be focused on consumer benefit in terms of accessibility and value for money in particular. This review will take place after they have put in place their own arrangements to respond to the attached Guidance (including monitoring its impact on the market) in 2013-14.
16. It will be the action of approved regulators in improving their regulatory frameworks and operations, and, even more importantly, the ability of all parts of the profession and its partners to show that they can operate ethically and transparently within those frameworks, which will determine what, if any, further action is necessary at that stage.

## **GUIDANCE ON REFERRAL FEES, REFERRAL ARRANGEMENTS AND FEE SHARING TO APPROVED REGULATORS**

### **INTRODUCTION**

#### **The provision of Guidance**

17. Section 162 of the 2007 Act allows the Board to give Guidance:
  - a. about the operation of the 2007 Act and any order made under it
  - b. about the operation of any rules made by the Board under the 2007 Act
  - c. about any matter relating to the Board's functions
  - d. for the purpose of meeting the Regulatory Objectives
  - e. about the content of licensing rules
  - f. about any other matters about which it appears to the Board to be desirable to give Guidance.
18. Guidance under s.162 may consist of such information and advice as the Board considers is appropriate. The Board will have regard to the extent to which an approved regulator has complied with this Guidance when exercising its functions.

### **BACKGROUND**

19. The LSB published a consultation document entitled Referral Fees, Referral Arrangements and Fee-sharing in September 2010. In May 2011 it published its decision document. This Guidance forms part of that decision document.

#### **Application of the Guidance**

20. The Board considers that the information provided here gives sufficient clarity as to the outcomes to be delivered, whilst allowing an appropriate degree of discretion for approved regulators to decide how best they can be secured.



21. Section 162(5) of the 2007 Act says “when exercising its functions, the Board may have regard to the extent to which an approved regulator has complied with any Guidance issued under this section which is applicable to the approved regulator”.
22. The LSB will examine the extent to which an approved regulator has demonstrated that its regulatory arrangements deliver the outcomes set out in this Guidance. It will do this through the rule approval process for any individual rules relating to referral fees, referral arrangements and fee sharing; the scrutiny of more general codes or handbooks where they are submitted for approval and in its oversight of any other relevant regulatory functions.
23. The Guidance sets out the issues that approved regulators may wish to take into account in assessing how they are proposing to deliver the outcomes. There are a number of alternative ways in which these outcomes could be delivered and the Board would expect the approved regulator to have available evidence to support their choice of approach. This evidence would need to be compelling, reasonable and present the regulatory rationale.

## **GUIDANCE ON REFERRAL FEES, REFERRAL ARRANGEMENTS AND FEE SHARING**

### **OUTCOMES**

24. This document provides Guidance for the delivery of the outcomes which have been identified by the LSB for approved regulators. The outcomes to be delivered are set out below:
  - a. regulators have in place arrangements that:
    - i. reduce the likelihood of detriment to consumers as a result of allowing referral fees, referral arrangements and fee sharing
    - ii. can justify any ban or restriction on referral fees, referral arrangements and fee sharing with reference to evidence, regulatory objectives and Better Regulation Principles.
  - b. consumers know when referral fees and/or referral arrangements are or may be in place in order to inform their choices.

### **JUSTIFYING REGULATORY ARRANGEMENTS**

25. Each approved regulator that has imposed, or wants to impose, a ban on referral fees, referral arrangements or fee sharing must be able to justify their approach. To justify an existing ban on referral fees (or the proposal for a ban), the Board would expect an approved regulator to establish evidentially the extent to which a ban or restriction is compatible with the Regulatory Objectives and is in accordance with the Better Regulation Principles and regulatory best practice. This assessment is likely to include, but need not be limited to, consideration of:
  - a. Why a ban is relevant to the particular market in question, demonstrating the approach taken to market segmentation by legal service provider e.g. large/small firms and type of consumer such as experienced or first-time user
  - b. What the risks associated with referral fees, referral arrangements and fee sharing are in particular market segments – as well as any evidence of those risks materialising in practice

- c. The costs and benefits of other less prescriptive measures to manage the risks identified
  - d. How referral fees impact or would impact on different groups of consumers in the specific markets
  - e. The extent to which this evidence supporting the decision has been published and made subject to external scrutiny
  - f. How the impact of the ban will be monitored and how an assessment will be made on its continued appropriateness.
26. The Board considers that such justification needs to be segmented by reference to the various activities, markets and consumers in which authorised persons, overseen by an individual approved regulator, operate. It considers that blanket bans imposed without this segmented analysis call for a particularly high standard of analytical justification.

## **DELIVERING INFORMATION TO CONSUMERS**

27. Approved regulators must be able to demonstrate that regulatory arrangements are in place to tell consumers about referral fees and arrangements. This is because the Board considers that such a requirement may help to inform consumer choice, which can in turn promote confidence in markets where referral fees and arrangements are in use. This demonstration is likely to include, but need not be limited to:
- a. How requirements to tell consumers about referral fees and arrangements are appropriate to:
    - i. different market segments – for example, conveyancing, probate
    - ii. different services – for example, general legal advice, litigation
    - iii. different types of consumers – for example, experienced, informed or repeat consumers, first time users of legal services
  - b. What information authorised persons are required to provide to consumers to tell them about the existence and extent of a referral fee. Typically this could include information such as price, the identity of recipient of the referral fee or arrangement and a reminder of the consumer's right to shop around

- c. Whether the timing of giving information to consumers should vary for different market segments, services and/or consumers
- d. Whether the types of information given to consumers should vary for different market segments, services and/or types of consumers
- e. At what point in the process of getting legal advice the approved regulator requires information to be disclosed so as to ensure that it assists consumers to make informed decisions about their choice of legal service provider
- f. Whether the timing of information disclosure should vary for different market segments/services/consumers
- g. Whether disclosure should highlight all exchanges as part of referral arrangements or just monetary exchanges and whether this varies for each of the segments
- h. Whether the form and medium of disclosure will be prescribed or whether legal services providers will be given guidelines about the type and form of information disclosed. Consideration should be given to whether this should vary for each of the segments outlined above. Evidence should be available to support the choices made by approved regulators.

## **DELIVERING INFORMATION TO THE MARKET**

28. Approved regulators must be able to demonstrate that their regulatory arrangements provide information to the market about referral fees and arrangements. This is because the wider market and other stakeholders should have confidence in the operation of referral fees and arrangements. The provision and publication of information will help to deliver this, not least by enabling disinterested research and improving competition. Approved regulators will need to have considered the case for providing information to the market, with particular regard to the Better Regulation Principles. The demonstration of this by approved regulators is likely to include but not be limited to:

- a. Consideration of who would be expected to use the information in a particular market and in what ways this would contribute towards meeting the Regulatory Objectives
- b. The extent to which referral contracts are in writing
- c. The extent to which publishing agreements might aid competition such as by addressing information asymmetry between referring agents/agencies and legal service provider/s
- d. The extent to which the level of concentration in a particular market segment may increase the risk of collusion
- e. The collection of information, including consideration of:
  - i. How referral contracts will be collected. Consideration should be given to the impact alternative methods of collection are likely to have on the accuracy of information provided
  - ii. The cost collection methods will impose on authorised persons and the regulator
  - iii. The frequency with which the information should be collected - for example, annually or when contracts are signed or updated
  - iv. When information should be collected - for example, with practising fee certificate information or at some other time
  - v. The form in which referral agreements or information about referral agreements should be published - for example, approved regulators may choose to publish full agreements, key facts, summaries, aggregations or reports about agreements
  - vi. Where information should be published - for example, on an approved regulator's website, the firm's website or by some other means. An approved regulator would also need to assess whether any option for publication would be likely to facilitate anti-competitive behaviour
  - vii. The ability of stakeholders to use the information

- f. What other risks are associated with the publication of information and how they might be tackled by the approved regulator – for example, closer monitor of market behaviour and pricing.

## **COMPLIANCE AND ENFORCEMENT**

29. Approved regulators must be able to demonstrate that their approach to compliance and enforcement of regulatory arrangements relating to referral fees and referral arrangements promote good regulatory practice. This demonstration is likely to include but not be limited to:
  - a. The type of information and data they collect about referral fees and arrangements, including consideration of the need to collect details of:
    - i. the amount that individuals and entities pay for referral of work (including an assessment of the value of work undertaken in place of a referral fee)
    - ii. the percentage of turnover made up from referral fees and arrangements
    - iii. the number of referral contracts that firms and individuals have
  - b. How they assess whether their regulatory arrangements are being delivered by authorised individuals and entities – for example, through collection of data, visits, surveys
  - c. the frequency with which they request information about referral fees and arrangements from those they regulate – for example, annually or more frequently
  - d. how they have established that the information they collect is sufficient to support their compliance and enforcement activities
  - e. how they address poor compliance with regulatory arrangements – for example, financial penalties, enhanced compliance activities, provision of additional monitoring information

- f. how they assess the way in which their regulated community works with other bodies and/or individuals who also have contact with consumers and are involved in provision or receipt of fees or referral arrangements – for example, the provision of information to consumers

## **CO-OPERATION**

- 30. Referral fees and arrangements are a feature of several markets. The overriding consideration for approved regulators must be their ability to demonstrate that this is not a barrier to consumer understanding of referral fees and arrangements and the role they play in the wider legal services market. Their demonstration of how they have achieved this is likely to include but not be limited to:
  - a. Whether working with other approved regulators, regulators from other markets, trade bodies and professional bodies could enhance their ability to ensure the regulation of referral fees and arrangements meet the shared Regulatory Objectives. For example, this may include consideration of common disclosure standards or information sharing.

## RESPONSES TO THE CONSULTATION AND THE BOARD'S RESPONSE

### General comments

31. The consultation received 62 responses. The table below sets out the groups who responded. Responses were received from four approved regulators, from the Office for Fair Trading, from law firms and from barristers – the latter mostly including those active in criminal advocacy. Responses from representative bodies came from those representing solicitors, barristers and conveyancers, as well as from bodies representing agencies contiguous with the legal services market (including the insurance industry and claims management companies). There were several other responses from a variety of organisations – these included Cardiff University Law School, the South Eastern Circuit and a number of estate agents. Seven respondents asked the LSB to keep their responses confidential.

<b>GROUP</b>	<b>Percentage</b>
Approved regulators	7%
Law firms and solicitors	20%
Barristers and chambers	13%
Representative bodies	31%
Trade unions	5%
Insurance firms	11%
Others	11%
Other regulators	2%

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

32. While most approved regulators that responded agreed with the Board's analysis, there were points of disagreement and criticism. In general, comments related to areas where the approved regulator suggested that



the Board had not made the case or dealt sufficiently with a particular issue. For example, the Solicitors Regulation Authority (SRA) did not feel that the Board had dealt sufficiently with the risks posed to independence. However, the SRA also added that the risks posed by a lack of independent advice “are not attributable solely to referral fees”. ILEX Professional Standards Limited (IPS) commented that the Board had not provided a “compelling argument” about the unequal power relationship between lawyers and introducers, suggesting that the recommendations were disproportionate. The Bar Standards Board (BSB) was wholly in disagreement with the analysis, saying that the existence of no evidence did not mean there was no detriment. This was a comment reflected by other respondents including The Bar and the Criminal Bar Association (who submitted a joint response), as well as Professor Richard Moorhead of Cardiff University.

33. There were responses from 12 law firms. These included responses from law firms which are active in personal injury cases, representing both claimants and defendants (including insurance firms and the NHS, for example). There were also responses from firms which majored on conveyancing. In all cases, their views on referral fees reflected their commercial positions – where firms paid referral fees, they were largely in favour of the Board’s analysis (though not necessarily with all the recommendations). Where firms represented defendants, they largely disagreed with the analysis. Their reasons for support or disagreement with the analysis were also consistent. Those supporting the analysis and the retention of referral fees were likely to say that they had not increased costs, whilst improving access to justice and quality. Those who disagreed with the analysis were found to say the opposite.
34. Several insurance firms responded. They were consistent in their disagreement with the Board’s analysis - commenting that referral fees, at their worst, actively harmed the interests of consumers and should be banned as had been recommended by Lord Justice Jackson in his report on civil litigation costs. Some said that, if referral fees were to continue, they should be capped at a moderate level. These views reflect those of Lord Justice Jackson. One respondent referred to an increase in instances of law firms moving personal injury cases out of the predictive fee scheme as a means of increasing the revenue they could earn - which had the effect of increasing costs. This was because of the increase in the

cost of referral fees and the need to earn sufficient revenue. Several respondents were also critical of the evidence used in the discussion document, commenting that it was either too limited or too simplistic.

35. Responses were received from three trade unions, all of which currently have in place referral arrangements. Each of them commented that they did not receive any payment for the referrals that they made to various law firms of their members' cases. In general, they agreed with the Board's analysis but two of these bodies expressed concern about the growth of commercial referral fees and were keen to draw a distinction with their own arrangements. Whereas referral arrangements made a positive contribution, referral fees were felt to be a more suspect proposition.
36. Over 30% of responses came from representative bodies. These fell into three broad categories – those representing solicitors and conveyancers, those representing barristers and those representing agencies contiguous with the legal services market. Not surprisingly, there was a split in support for the analysis dependent upon membership of the representative body. For example, those representing claims management companies agreed with the analysis and those representing defendants in personal injury cases disagreed with it. Those who disagreed with the analysis tended to be critical of the evidence that had been used. One respondent agreed with the approach adopted by the Board but said that if the objective was to protect consumers then referral fees should be banned.
37. The Law Society wholly disagreed with the analysis presented by the Board. They were critical of the evidence that had been used to support the analysis and commented that referral fees damaged access to justice, limited consumer choice, discouraged an independent strong, diverse and effective legal profession and created adverse incentives contrary to the professional principles. Several regional Law Societies also responded, though not all shared these views, with one being actively in supportive of the Board's analysis.
38. All respondents representing the interests of barristers disagreed with the Board analysis. The general view was that lawyer-to-lawyer referrals and fee sharing damaged the public interest and the interests of clients. The Young Barristers Committee commented that referral fees did not increase access to justice. The Bar and Criminal Bar Association

expressed concern about the objectivity of the Board's analysis and said that it had been based on insufficient evidence. They also claimed that the Board had not taken into account other substantial evidence such as the report by Lord Justice Jackson. Further, that there had been too much reliance on the absence of complaints by consumers without acknowledging why it may be the case that consumers did not complain.

39. There were several responses from organisations that represent lawyers working in particular areas of law, such as personal injury, motor accidents or insurance. While the Motor Accident Solicitors Society (MASS) accepted the Board's analysis, the body described referral fees as a "necessary evil" requiring better regulation. They also believed that the Board's analysis represented "almost a complete misunderstanding of the real adverse impact of referral fees". The Federation of Insurance Lawyers (FOIL) disagreed with the Board's analysis, instead being critical of the evidence presented and commenting that too simple an approach had been taken. In particular, it commented that the analysis had ignored the access to justice issues of insurance firms. While the Association of Personal Injury Lawyers (APIL) was in favour of referral fees, it expressed some concern about the analysis. In particular, that body was concerned whether or not there had been sufficient clarity in the definition of referral fees and arrangements.

#### **Board response to QUESTION 1**

40. The Board remains confident in the evidence it presented on referral fees and arrangements in personal injury and conveyancing and fee sharing in criminal advocacy. It continues to be the most substantial economic and consumer analysis of the issue that is currently available.
41. There was no additional substantial evidence presented as part of the consultation that has led the Board to reassess its conclusions and the substantive nature of its proposals. In particular, it considers that there remains no purely regulatory case for a general ban in the legal services market. Referral fees, referral arrangements and fee sharing arrangements are legitimate aspects of the legal services market but their regulation should be outcomes-focused and consistent with the Regulatory Objectives and Better Regulation Principles.

42. The Board has reassessed the means by which its proposals should be achieved. It is recognised and accepted that the approach taken in the consultation document would be potentially too prescriptive. The Board has therefore concluded that it should set outcomes but leave regulators with freedom to achieve those outcomes in the most appropriate manner. The outcomes are accompanied by Guidance to approved regulators under s.162 of the Legal Services Act 2007 which is set out in this document.
43. Some respondents commented that the Board had not been clear about the application of the proposals in the discussion document to referral fees and/or referral arrangements. The Guidance will support approved regulators in considering all forms of referral fees, referral arrangements and fee sharing when considering how to achieve the outcomes described above.

**QUESTION 2 - Do you have additional evidence about the operation of referral fees and arrangements that should be considered by the Board?**

44. The National Accident Helpline, which is a claims management company regulated by the Claims Management Regulator (CMR), drew attention to research it had undertaken which explored the public's attitude towards personal injury claims, solicitors and their awareness of their legal rights. This was a poll of 1600 people by Opinion Matters. Key findings presented in their response to the Board were that:
  - a. 6% of people said they were confident they knew their legal rights
  - b. 80% of respondents perceive significant obstacles to seeking redress for a personal injury
  - c. In employment liability cases almost 60% felt that the power balance favours the employer rather than the individual and almost the same amount would feel guilty about bringing a case against an employer.
45. Several respondents highlighted guidance published in December 2010 by the Legal Services Commission (LSC) "Fee Sharing/Referral Fees – Important guidance for holders of LSC Crime Contracts". In response to

concerns raised by The Bar, the LSC agreed to publish guidance on fee sharing/other payments between providers and advocates under LSC crime contracts. Those who identified this guidance in their responses suggested that it prevented fee sharing arrangements where the instructed advocate did not intend to prosecute the case.

46. The SRA commented that the Board had not taken sufficient account of tribunal and court cases. It also said that these cases showed consumer detriment arising from the lack of independent advice.
47. Several bodies commented that the Board should have done more to take into account evidence provided by Lord Justice Jackson in his report on civil litigation costs. Those making this suggestion were likely to have disagreed with the Board analysis on referral fees. One insurance firm said “RSA consider that the issues raised in the Board’s consultation should not be dealt with in isolation to the recommendations made by Lord Justice Jackson in his well-balanced and comprehensive review of civil litigation costs.”
48. Several insurance firms pointed to the recent report by the Transport Select Committee into The Cost of Motor Insurance published in March 2011. This enquiry focused on the reasons and consequences of recent increases in the cost of motor insurance and whether there are public policy implications from the rise, as well as asking whether there are any steps which should be taken by government. It considered, amongst many other issues, the impact of referral fees and made the following recommendation which it said should be in place by the end of the year:
  - “27. The Legal Services Board's study of referral fees thoroughly examined the case for and against the payment of such fees by solicitors, including the impact on costs and the independence of legal advice. It accepted the view of its Consumer Panel that there was not sufficient detriment to consumers to merit a ban on such fees but there were concerns about transparency. The panel concluded that transparency ‘alerts consumers to the possibility of conflict, counters pressure selling, encourages consumers to compare prices to find the best deal and helps regulators to monitor the market’.
  28. In our view, consumers are largely unaware of how much money moves around the insurance industry when they make a claim,

particularly if they were not at fault for the accident. We suspect consumers are often confused about why their insurer insists that they use a specific vehicle repairer or solicitor and about whether they are entitled to make their own choice. The LSB has made recommendations about the transparency of referral fee arrangements in the legal sector which we consider should form the basis for a transparency regime throughout the motor insurance market. **Insurers should publish on their websites a list of the firms with which they have referral arrangements, an indication of the level of the fees paid, and a clear explanation of how referral arrangements work and their purpose. Policy holders should be sent this information with their insurance documents. When claims are made, insurers should make it clear to claimants that they need not use the solicitor, vehicle repairer or credit hire firm which is recommended by the insurer. We look to the insurance industry to implement a more transparent regime for referral fees by the end of next year and to the government to step in, with legislation if necessary, if the industry is unwilling or unable to agree on this.**<sup>1</sup>

49. Professor Moorhead pointed to research on fixed fees in Scotland which suggested that a diminution in quality associated with restricted costs can be real. He said this implied that quality was both a general problem but also a problem likely to be accentuated by referral fees. This suggested that if referral fees were to be regulated then efforts should focus on incentivising quality rather than disclosure to clients. Moorhead also expressed some concern at the disparity of his own analysis of Compensation Recovery Unit (CRU) data and that used by CRA from Datamonitor in its report.

## **Board response to QUESTION 2**

50. While several respondents provided examples of matters they believed the Board should have considered in its analysis, there was no additional

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<sup>1</sup>Transport select committee paragraph 28

<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtran/591/59105.htm#a4>

substantive evidence presented in response to the consultation document that has led the Board to alter the substance of the proposals that have been made. However it is accepted that more detailed analysis of any particular market segment may be beneficial when the approved regulator considers its own regulatory arrangements.

51. Approved regulators will need to demonstrate that their proposals for their regulatory arrangements are supported by evidence and analysis in terms of referral fees, referral arrangements and fee sharing directly and in their wider context such as in relation to quality. The Board acknowledges that there is currently limited evidence on the quality of legal services and is separately considering how best this can be addressed. The Board has pressed approved regulators to put in place a quality assurance scheme for ensuring minimum quality standards for criminal advocates and expects this to commence before the end of 2011. This is further explored in our response to question five below.

**QUESTION 3 - Do you agree with our analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy?**

52. Around 25% of respondents addressed this question. Almost all were either barristers involved in criminal advocacy, barristers' representatives or their regulator. The South Eastern Circuit also responded to this question, as did Professor Moorhead.
53. The Bar and the Criminal Bar Association did not agree with the Board's analysis of the operation of referral fees or fee sharing in criminal advocacy and said that there was evidence that lawyers were putting financial interests ahead of their duties to clients. They reiterated statements made in their submission to the Consumer Panel that referral fees were "inimical to the interests of justice" and fee sharing in publicly funded work was both "unjust" and, in their opinion, "unlawful." Further, that their existence undermined the Regulatory Objectives within the Legal Services Act 2007. The response also suggested that the recent guidance from the LSC demonstrated that fee-sharing was prohibited.
54. The South Eastern Circuit was strongly opposed to fee sharing and commented that "if the public [are] aware that their life-long liberty was

being traded for a share of the advocate's fee to the lowest bidder then we venture to suggest that any right-minded member of the public would wonder at the competence of those who permitted such an arrangement to be contemplated.”

55. The Young Barristers' Committee (YBC) agreed that there was no mechanism in place with which to assess the quality of advocacy services provided by those who enter fee-sharing arrangements.
56. There was general agreement that, at best, it was inappropriate for competition and price to be a feature in criminal advocacy and that the “best way of protecting the consumer in the criminal justice system” according to the YBC was “to ensure that ability is the deciding factor when choosing an advocate, not price. Allowing referral fees or fee sharing arrangements plainly goes against this.” This was a view shared by several others, including the South Eastern Circuit. YBC also commented that fee sharing jeopardised the ability of young barristers to gain experience.
57. Several suggested that the Board's analysis had underestimated the size of the problem. There had been an increase in the number of cases where the litigator claimed to be the Instructed Advocate when the chances that they would conduct the case were small or nil.
58. The BSB commented that the professional principles required that lawyers act in the best interests of their clients. This meant that it was not enough for a solicitor to refer their client to an in-house Higher Court Advocate (HCA) who may be competent in the delivery of advocacy services; they had to actively seek out what was best for their client and consequently it would be difficult, if not impossible, for them to act independently in this situation without giving the consumer the choice of a self-employed barrister.
59. Professor Moorhead agreed with the Board's conclusions. He said that the Board faced a difficult decision: “should a profession's failure to introduce adequate measurement and assurance of quality be a sufficient reason to inhibit potential competition in the future?” His overall view was that arguments and evidence of detriment were stronger in criminal advocacy than for referral fees generally but that a ban would “inhibit future benefits under different funding arrangements (for example,



competition rather than graduated fees) which might accrue if referral fees were permitted, though the nature and extent of such benefits are uncertain.” He emphasised the importance of the Quality Assurance Scheme for Advocate (QASA) in this process and the need for it to be able to “ameliorate any risks of serious harm.”

### **Board response to QUESTION 3**

60. As has been mentioned above, the Board has reassessed the means by which its proposals for referral fees, referral arrangements and fee sharing should be achieved. This will be through the requirement to deliver outcomes which will be accompanied by Guidance that is included in this document.
61. The Board’s commitment to quality assurance has been restated. The absence of any measure for reassuring consumers and the wider public about the quality of criminal advocates in the face of repeated concerns from the Judiciary and other stakeholders is of serious concern.

### **QUESTION 4 - Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the Board?**

62. Most respondents in the advocacy field said that it was difficult to provide anything other than anecdotal evidence about the operation of referral fees or fee sharing arrangements. YBC commented: “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.”
63. Several respondents highlighted the LSC guidance published in December on fee sharing/other payments between providers and advocates under their crime contracts. Respondents also pointed to the practice of an advocate becoming the instructed advocate with no intention of prosecuting the case. They commented that the LSC guidance

prohibits this.<sup>2</sup> The LSC provides that it is inappropriate for an advocate to become the Instructing Advocate where there is no intention to prosecute the case. It also provides that "...negotiation over the split of case fees is a required element of the AGFS and, is not, of itself, a breach of the litigator's duties to either the LSC, his professional standards or the client"

64. The Bar and CBA drew attention to a case in Scotland - *Alexander Woodside v HM Advocate*. Lord Gill had said that it was "difficult to see how a solicitor who has rights of audience or whose partner or employee has such rights can give his client disinterested advice on the question of representation."
65. The Professional Negligence Bar Association (PNBA) agreed that it was hard to find definitive evidence about the effect of referral fees but also said as follows: "We consider 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."

#### **Board response to QUESTION 4**

66. There was no additional substantive evidence presented in respect of referral to, and amongst, criminal advocates that has led the Board to alter the substance of the proposals that have been made in relation to criminal advocacy.
67. Any review of the operation of referral fees and fee sharing within criminal advocacy is likely to need to take account of the operation of prosecution and defence markets, funding arrangements and the implementation of the intended quality assurance scheme.
68. The Board acknowledges that it cannot be best regulatory practice to act or intervene only where detriment has already happened: regulation must endeavour to operate to prevent or ameliorate certain risks and impacts. In such circumstances, it ought to be possible to draw from the experiences of similar markets, other regulated communities and

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<sup>2</sup> Legal Services Commission *Fee sharing/referral fees* (December 2010) para. iv

economic analysis in order to better understand how removal or modification of a ban might impact on the Regulatory Objectives. In shifting its focus to outcomes and supporting Guidance, the Board intends to create the environment within which such analysis becomes appropriate.

**QUESTION 5 - In particular, do you have evidence about the impact of referral fees or fee sharing arrangements on the quality of criminal advocacy?**

69. Respondents commented that evidence, by its nature, concerning quality tended to be anecdotal and therefore difficult to gather. Some respondents repeated concerns about the quality of some criminal advocacy directly or indirectly.
70. One barrister commented that the inability of junior members of The Bar to gain experience because of the actions of Higher Court Advocates would diminish the quality of advocacy over time. Others also provided anecdotal evidence about the impact of fee sharing in criminal advocacy. They suggested experience of Higher Court Advocates being of lower quality and a lack of consumer awareness of this fact.
71. While QASA was recognised as a means of measuring quality in criminal advocacy, as well as in determining whether there were any systemic problems with different types of advocate, not all respondents to this question felt that it was the definitive answer. The South Eastern Circuit, for example, commented that it “will merely provide a form of ‘minimum requirement threshold’ but will say little or nothing about the real ability of criminal advocates. Most importantly it will say nothing about their independence.” This view was shared by some respondents.

## **Board response to QUESTION 5**

72. The Board's commitment to a quality assurance scheme for criminal advocates is set out above. There was no additional substantive evidence presented in response to the consultation document that has led the Board to alter the substance of the proposals that have been made. However the restatement of anecdotal evidence in relation to quality problems reinforced the Board's concerns.
73. The Board remains of the view that there is limited systematic evidence that fee sharing is reducing quality in criminal advocacy. But there is a significant amount of work to do to be able to confidently assess and measure quality in the legal services market.
74. That the profession and its regulators have not yet put in place any effective means of ensuring minimum quality standards that will allow the assessment of the quality of criminal advocacy should not be seen as a reason to restrict the use of referral fees. The interests of consumers are best protected where competitive markets are able to flourish.

## **QUESTION 6 - Will the proposals assist in improving disclosure to consumers?**

75. Most respondents were in agreement that transparency was important for consumer confidence. However, there was variation in the detail of views relating to the proposals. Around a quarter of respondents agreed with all or part of the recommendations that had been made. Over 15% thought that the proposals were already in place in approved regulators' rules. A similar proportion believed that the proposals would improve disclosure but bring little benefit. Nearly a quarter made no comment in response to this question. Fewer than 10% disagreed with the proposals. There was also a distinct split between those in favour of recommendation one in relation to increased disclosure to consumers and recommendation two in relation to the publication of referral fee contracts. Most comments in this section relate to recommendation one.
76. Several respondents asked for clarity about whether the transparency proposals that had been made would apply to those paying referral fees or to all those with referral arrangements. The SRA said that it would be

difficult to provide a monetary value where there were referral arrangements and suggested that a broader provision was needed, which it believed would be more in line with its move to outcome-focused regulation. The ability to give a monetary value for referral arrangement was a concern shared by others including Trade Unions.

77. Respondents also emphasised the need to provide consumers with information at the point at which it could best assist them in their decision-making and suggested that it was important for there to be co-ordination between legal services regulators and the CMR to ensure a consistency of approach. The SRA suggested that if the disclosure proposals were adopted across the legal services market it could assist in improving disclosure. They welcomed the Board's plans to engage with markets outside the legal profession with a view to achieving a consistent set of principles for the use of referral fees. The importance of cross-market action was highlighted by several others both within and outside of the legal services market. This was a role that respondents expected the Board to fill.
78. Some expressed concern about the amount of information consumers generally receive when dealing with legal matters. National Accident Helpline said while it was "generally supportive" of transparency, "information overload" was also potentially damaging to consumers and good access to justice in personal injury matters.
79. FOIL said that the more important question was not whether the proposals would improve disclosure, but whether it would lead to more benefits for consumers – suggesting that they care little about the level of referral fees because they had no financial stake in their case.
80. Some bodies suggested that transparency arrangements, which had been proposed for non-criminal matters, should also apply to criminal advocacy. The South Eastern Circuit said that "while we make plain our total opposition to the permission of referral fees in criminal advocacy, we see no reason in principle why such conclusions should not apply if the contemplated arrangements are permitted".
81. Professor Moorhead pointed to "a reasonably substantial" evidence-base that "consumer-facing disclosure requirements have a minimal impact either on consumer understanding or on consumer behaviour" because of

issues of non-compliance by advisers and complexity for consumers. Consequentially, there should be limited emphasis on disclosure provisions". He suggested instead that it was more important to incentivise quality through referral arrangements.

82. The Law Society commented that the disclosure proposals did not address the "limited regulation of those who receive referral fees". The Society added that transparency did not "guarantee better outcomes" and suggested that the proposals would "live or die" by how well they were enforced, which it commented was a more important matter when it comes to the issue of referral fees.

### **Board response to QUESTION 6**

83. Transparency for consumers remains a difficult issue. It is the Board's view that disclosure and transparency can help to underpin honesty and, importantly, can help build consumer confidence in markets where referral fees and arrangements are prevalent
84. Many, if not most, consumers have limited understanding about the way in which the legal services market works. This is particularly the case for individual consumers. The Consumer Panel's research showed that consumers do have some concerns about the existence of referral fees but are reassured by and value their active regulation. It is therefore important that the outcomes focus on this aspect.
85. It is also the case that there is limited evidence that transparency and disclosure alters consumer behaviour, so it is particularly important to consider the associated cost. The Board maintains the view that the cost of disclosure in relation to referral fees and arrangements is relatively low where it is done when the contract is signed by the lawyer.
86. However, the Board expects approved regulators to consider whether there are other means of achieving transparency and disclosure at the point of consumer choice by working with other approved regulators or regulators involved in the wider legal services market. It may also be the case that approved regulators, in demonstrating their delivery of the outcomes will look at whether taking a consistent approach to transparency and disclosure is in the interests of particular groups of

consumers. Approved regulators are likely to want to work with the CMR, other trade and professional bodies related to the legal sector, as well as others.

87. Some respondents raised concerns about consumers facing information overload. Others felt that detailed information was required in order for consumers to understand the true nature of the referral arrangement. The Board accepts that careful balancing is required to deliver improved consumer choice and confidence without restricting the efficient operation of the market. The attached Guidance sets out the detail that the Board considers approved regulators will need to consider in reaching an appropriate balance in each market segment.

**QUESTION 7 - Are there other options for disclosure that approved regulators should consider?**

88. Around a third responded to this question and the nature of responses tended to follow (but not entirely) their attitude to referral fees. Those who were not in favour of referral fees tended to suggest that there should be some form of positive assent by consumers to the payment of a referral fee. Others added that failure to comply with disclosure should require the repayment of the fee. Those in favour of referral fees tended to suggest that if information on referral fees were to be collected, it should be done so at the time that information was gathered for practising fee certificates as a means of reducing the burden of compliance. Glaisyers said this would “ensure that regulators can easily check that individual clients are being advised of the agreements.” Several emphasised the importance of collecting information. Professor Moorhead said that it would be important to collect information on quality issues.
89. MASS suggested that disclosure requirements might be better achieved by requiring practices to “confirm to the regulator the steps they are taking to comply with rule 9.” The Bar and CBA suggested that a requirement could be imposed that approved persons would only be permitted to enter into arrangements with referrers who agree to make full disclosure of referral arrangements at the time of the referral.

90. Bryan Jones, a non-lawyer partner with Lewis, Hymanson and Small Solicitors recommended that the regulation of referral fees be consistent across the range of regulators which would be responsible for ensuring compliance - and not lawyers. Further, that the SRA and CMR should introduce a standard referral agreement and the SRA and Ministry of Justice should approve referral schemes. The notion of standardisation and agreement approval was supported by other respondents.
91. Respondents provided a variety of alternative means of delivering transparency. For example, a few respondents suggested that a referral fee should only become payable once the consumer had signed that they understood that a referral had been paid for their case. Others suggested alternative forms of regulating referral fees, for example suggesting that approved regulators should develop standard referral agreements.

#### **Board response to QUESTION 7**

92. The Guidance we have provided requires approved regulators to understand - and be able to demonstrate - that the arrangements they have in place for referral fees and referral arrangements are appropriate to different markets, services and consumers. They will also need to be able to demonstrate that they have assessed and understood the risks and mitigations of the approaches they have adopted. In doing this, they may wish to consider the relevance of the proposals that have been offered as part of this consultation exercise.

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

93. Almost all respondents thought that the purpose of this proposal was for consumers to use directly the information contained within contracts as a means of improving their understanding or choice of agency using (or not using) referral fees.
94. A significant majority were not in favour of the publication of referral contracts by approved regulators. Most recognised that the requirement to



provide contracts to approved regulators was already an obligation for solicitors and others. Less than 10% of respondents were in favour of the publication, suggesting it should provide no issues for firms if they were in compliance with their regulatory requirements. Several bodies that were in favour or accepting of publication were also those against referral fees. For example, Weightmans, a law firm that represents defendants commented that “we can foresee no reasonable objection if it informs consumer choice so that only referrers and solicitors who deliver what they promise through viable and efficient structures and service contracts continue to thrive in a Darwinist claims environment that the LSA may usher in.”

95. Several respondents which were happy to provide information to regulators were also in support of referral fees. Professor Moorhead said that “market-facing disclosure is a more interesting and potentially useful approach...The regulators would have more information, as might some journalists and researchers and other interested stakeholders. Insurance companies would take an interest. Legal service competitors would take an interest. Consumer bodies might also. Enforcement of poor practice might be easier...The debate about the ethics and public interest in relation to these agreements is likely to become more informed and regulators views of the risks better.”
96. Concern was expressed about competition implications. OFT suggested that there would be limited beneficial effect on competition of price transparency because those paying referral fees were already well-informed. Further, that the OFT would “hazard that there is a low but non-negligible risk of price transparency facilitating collusion in some ...markets.” Others said that the publication of referral contracts would release important business development information and would allow others to free-ride. One respondent said that there would be no expectation of the publication of similar agreements for major supermarkets. These views were expressed by those against and in favour of referral fees.
97. Respondents also suggested the proposal was disproportionate to the level of consumer detriment that had been identified by the Board. For example, the SRA suggested its own research had shown that consumers “were not overly concerned about referral arrangements provided that

they are informed of the existence of the arrangements.” Further, that the current transparency provisions were sufficient for consumers’ needs. Carter Law and the National Accident Helpline, among several others, also commented that they felt the proposal was disproportionate.

### **Board response to QUESTION 8**

98. There was significant misunderstanding about the proposals to publish the contractual agreements for referral fees and agreements. The publication of referral contracts was designed to give confidence to the market about the way in which referral fees and referral arrangements work. It would be inappropriate to view them as a form of disclosure targeted at individual clients (although, of course, a few may choose to review them).
99. The Board expects that consumer bodies and others may want to use the information from the publication of referral contracts in order to better help consumers choose their lawyer. It is also the case that the Board considers transparent agreements will facilitate better research, analysis and understanding about the operation of referral fees and arrangements.
100. It also remains the Board’s view that the publication of referral contracts could aid competition, subject to the test of concentration in any given market that it may give rise to oligopoly concerns.
101. The Board does however accept that the benefits of full disclosure of agreements may also be obtained by other means. Alternatives might include the collection of key facts about agreements, summaries of information and publication of aggregate information. Publication might be best delivered by firms themselves, the approved regulator or by some other route.
102. The Board notes the views of the Transport Committee and its recent report *The Cost of Motor Insurance* published in March 2011.

### **QUESTION 9 - How should these issues be addressed?**

103. There were few specific comments from respondents directly relevant to the steps that might be taken to address the challenges of requiring the publication of referral arrangements.
104. One law firm suggested that referral agreements could be published without the inclusion of price information. Others, including IPS, also suggested this. Some suggested the development of standard terms and conditions and the publication only of those terms which deviate from these standards. The SRA suggested that a more proportionate approach would be to ensure proper information-gathering and publication by each approved regulator. The need for good information-gathering was endorsed by other respondents. Richard Moorhead commented that there would be benefit in “collecting, collating and publishing key data on referrals such as price...” The Association of British Insurers (ABI) suggested that the information contained within referral agreements may be sought on a case by case basis.

### **Board response to QUESTION 9**

105. It is accepted that market confidence, as has been mentioned above, may also be achieved via other means than the publication of referral contracts. For example, it may be achieved through the collection and publication of other information (for example about relevant parties to contracts, key features of agreements and prices) which the approved regulator has also risk-assessed. The responses to this question and others also provide alternatives which approved regulators may wish to consider and determine that they will assist in delivering the outcomes.

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

106. Just over half of respondents addressed this question. Two main themes were presented. First, respondents believed that there should be increased emphasis on compliance and enforcement and suggested this is the main issue to be addressed within the legal services market and is

more important than the disclosure proposals. The Law Society suggested that the Board proposals would live or die by how well they are enforced. Further, effective enforcement would only take place if all key interests in the referral chain were regulated. The Law Society also said that there is currently “limited regulation of those who receive referral fees”. Other respondents drew attention to the need for consistency in approach across different regulators.

107. Second, there was a group which believed that the proposals for compliance and enforcement would make little difference to the regulation of referral fees and arrangements. This view tended to be shared by those who believed that referral fees should be banned.
108. The SRA expressed some concern that an approach was being adopted which would require the publication of bespoke compliance strategies for every area of potential regulatory risk. The SRA is concerned that this would impact on other areas of work and will not allow for a risk-based approach to regulation. This concern was shared by other approved regulators.
109. Some respondents identified the fact that ABS is to be introduced in less than a year and suggested that it may be appropriate to consider delaying changes to the regime as a consequence. IPS suggested that this raises the question “whether changes to disclosure requirements and rules should take place after ABS has been introduced - when the profession is better informed of the impact of ABS. Referral fees may become redundant in the near future, so it may be wise that substantial resources are not currently invested in the area.”

### **Board Response to QUESTION 10**

110. The Board welcomes the wide recognition of the importance of compliance and enforcement. It is a core part of the Guidance that the Board is issuing and approved regulators will, of course, find it difficult to be confident that they are delivering the outcomes if they focus only on their handbook or rules and not whether their requirements are being achieved.

111. The Board recognises that the legal services market continues to evolve at pace. The removal of barriers to external ownership and control in 2011 will no doubt impact on the way that clients navigate some parts of the legal services market to find an appropriate adviser or representative. The fact of a changing market was significant in the Board's decision to have outcomes rather than detailed provisions. The approved regulators will be able to respond with flexibility to market developments and regulate particular sectors in a targeted and proportionate manner.

**QUESTION 11 - What measures should be the subject of key performance indicators or targets?**

112. Over 50% of respondents provided no input to this question, however others provided comments about targets.

113. The SRA and IPS said that it should be for each approved regulator to draw up appropriate performance indicators, rather than taking a "one size fits all" approach. Others, however, pointed to the benefits to be gained for consumers from a consistent approach to disclosure and therefore compliance and enforcement. MASS suggested that there is a need for a unified advertising code "which applied equally to all legal and non-legal bodies that are engaged in the claims management process, including claims management companies."

114. Several respondents (particularly those which are not in favour of referral fees) suggested that compliance was the most important form of performance information. Others suggested that it is important only to have targets where compliance performance was low.

115. Several felt that performance indicators were not necessary.

**Board Response to QUESTION 11**

116. In having outcomes that must be achieved the Board is providing a clear focus for any assessment of the regulation of referral fees and fee sharing. The Guidance will support the delivery of the outcomes and allow the approved regulators to decide how best the outcomes can be secured.

This, in turn, will ensure that the approved regulators are themselves able to describe the key risks and impacts and regulate to avoid or mitigate them.

117. The Board wants to be clear about the actual securing of the outcomes in the legal services market. In overseeing the approved regulators, the Board focuses on ensuring that regulation meets the Regulatory Objectives and is consistent with the Better Regulation Principles and wider best practice. The Board will seek to deliver that approach with regard to referral fees through a thematic review that considers the success of approved regulators in delivering the outcomes.
118. Ahead of a thematic review, the Board may undertake a call for evidence to approved regulators, or more widely, and may conduct further research. In deciding whether - and if so precisely when - such a review should take place, the Board will consider evidence of changing practice amongst regulators, the extent of any consultation undertaken by approved regulators, the information that it has gained through its own approval process to amend approved regulators' regulatory arrangements and the Board's assessment of risk in the light of any other priorities.

#### **QUESTION 12 - What metrics should be used to measure consumer confidence?**

119. There was limited response to this question, with less than 25% providing suggestions as to the metrics to be used to measure consumer confidence. However, from those that responded there was general agreement that the most effective measures of consumer confidence were complaint levels and customer satisfaction surveys. Allianz Insurance suggested that consumer confidence would be improved with information demonstrating rigorous observation with the rules and harsh sanctions.

#### **Board response to QUESTION 12**

120. The Board may undertake its own research as part of a thematic review or any other research or policy work. The outcomes include a clear focus on allowing consumers to exercise choice where they so wish and it would

therefore be unlikely that the effectiveness of regulation could be assessed without good quality consumer understanding.

121. However, it is for each approved regulator to assess the evidence that it needs in order to deliver the outcomes after carefully considering the Board's Guidance. Thus a regulator might wish to consider first tier complaints and Ombudsman data, disciplinary and other enforcement information as well as direct consumer research.

## **ANNEX A**

### **LIST OF RESPONDENTS TO THE DISCUSSION DOCUMENT**

12 College Place

Allianz Insurance

Amlin Insurance

The Association of British Insurers

The Association of Personal Injury Lawyers

The Association of Regulated Claims Management Companies

AVIVA

AXA Insurance

Bar Council & Criminal Bar Association

Bar Standards Board

Beachcroft

Cardiff Law School

Carter Law

Christopher Kinch QC (personal response)

City of London Law Society

Claims Standards Council

Council for Licensed Conveyancers

Conveyancing Association

Countrywide Conveyancing Services

Forum of Insurance Lawyers

Glaiysers Solicitors LLP

Hampshire Incorporated Law Society

ILEX Professional Standards

Irwin Mitchell

Keoghs LLP



The Law Society  
Legal Expenses Insurance Group  
Lewis Hymanson Small Solicitors  
Liverpool Law Society  
Lloyds Market Association  
Motor Accident Solicitors Society  
National Accident Helpline  
Nicholas Gurney-Champion  
Oldham Law Association  
Premier Property Lawyers Limited  
Professional Negligence Bar Association  
Renatta Steggles  
Royal Institute of Chartered Surveyors  
Royal & Sun Alliance Insurance  
South Eastern Circuit  
Solicitors Regulation Authority  
The Credit Hire Organisation  
The Live Organisation  
Thompsons Solicitors  
Thomson Reuters  
Three Raymond Buildings  
Tunbridge Wells, Tonbridge & District Law Society Regulatory Committee  
UNISON  
Unite the Union  
Usdaw  
Weightmans LLP  
Young Barristers Committee

Zurich Insurance

The Council of the Inns Court

## Annex B

### KEY DOCUMENTS

1. LSB discussion document published September 2010

[http://www.legalservicesboard.org.uk/what\\_we\\_do/pdf/20100929\\_referral\\_fees.pdf](http://www.legalservicesboard.org.uk/what_we_do/pdf/20100929_referral_fees.pdf)

2. Responses to LSB discussion document

[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/submissions\\_received.htm](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_received.htm)

3. CRA cost benefit analysis of referral fee options

[http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/Publications/economic\\_research\\_on\\_referral\\_arrangements.htm](http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/economic_research_on_referral_arrangements.htm)

4. Legal Services Consumer Panel advice to LSB

[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/ConsumerPanel\\_ReferralArrangementsReport\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/ConsumerPanel_ReferralArrangementsReport_Final.pdf)

5. Consumer research published by the Consumer Panel

[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/VanillaResearch\\_ConsumerResearch\\_ReferralArrangements.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/VanillaResearch_ConsumerResearch_ReferralArrangements.pdf)