

NATIONAL ACCIDENT HELPLINE

RESPONSE TO THE LEGAL SERVICES BOARD INVESTIGATION INTO REFERRAL FEES, REFERRAL ARRANGEMENTS AND FEE SHARING

December 2010

INTRODUCTION

National Accident Helpline (NAH) is pleased to respond to the Legal Services Board discussion document on referral fees, referral arrangements and fee sharing, having previously responded to the Legal Services Consumer Panel investigation into referral arrangements in February of this year.

NAH has made a number of positive contributions to reviews and consultations carried out by legal bodies and regulators, and the MOJ (formerly DCA) over recent years.

As one of the largest single organisations involved in the personal injury sector we are keen to contribute our knowledge and expertise on consumer issues. We welcome this opportunity to work with the Legal Services Board and to contribute to this discussion document.

As stated in our response to the Consumer Panel in February, whilst we understand that the LSB is independent of Government, we would recommend that the discussion document and the conclusions which stem from this investigation take into account the contributions to, and findings of, recent MOJ considerations, including the decisions that the MOJ reached in response to the 2007-08 consultation on the Claims Process for Personal Injury Claims.

About NAH

National Accident Helpline is the UK's leading free advisory service for people who have suffered an injury as a result of an accident. We help these people seek financial assistance to aid their recovery, through our national solicitor network. National Accident Helpline is authorised by the Ministry of Justice in respect of regulated claims management activities and is a registered company, incorporated in the UK.

NAH was formed in 1993, in advance of both the introduction of conditional fee arrangements and the Access to Justice Act. We were formed by a group of solicitors who saw the economic advantages of pooling resources and advertising through a national brand – NAH – to help people frightened of approaching solicitors directly to obtain advice and, where appropriate, pursue their rights to claim for personal injuries suffered by them.

NAH is made up of a network of 108 specialist solicitor firms, our panel members, from across the country and is highly regarded across the industry. We have panel firms in England, Scotland, Wales and Northern Ireland. Our panel members pool resources to advertise as a gateway for thousands of personal injury victims who are seeking an entry point into the legal system.

Our model

The NAH model is significantly different to arrangements that operate in other areas of the personal injury market and that involve referral fees. The NAH model is a pooled marketing model, rather than a referral model. Indeed, this distinction was recognised when NAH was established in 1993 at

a time when referral fees were not permitted in the legal system. The Law Society recognised that the NAH model did not involve referral fees and that our pooled marketing arrangements are different.

NAH has no contract with the inquiring consumer and the service to the consumer is entirely free. We do not sell on or auction claims to our panel firms or other third parties and we oppose the commoditisation of claims. We conduct marketing activities such as TV advertising on behalf of our panel firms and the cost of these activities is divided between the panel firms on the basis of the number of enquiries they receive from us. Panel firms receive enquires from post code based geographical territories and each firm makes a contribution to the pooled marketing cost in line with the number of consumers that require assistance in that territory in any given month. Firms are not charged a referral fee but simply contribute their proportionate share of the overall marketing costs which they outsource to NAH. We believe that this is quite distinct from a referral fee model.

During 2010 NAH will receive around 195,000 inquiries from consumers who are injured in accidents and who want advice and help on what to do. Our call centre staff are legally trained. They take the initial inquiries and filter out spurious or invalid calls and then pass the inquiry to one of our panel members who has a geographic or specialism link to the consumer. The centralised NAH call centre filters out around 130,000 of those inquiries (those highly unlikely to have a legitimate claim to pursue) and refers around 60,000-65,000 people with their consent to one of NAH's specialist personal injury panel member solicitors. The call centre ensures that the consumer is made fully aware of the nature of our scheme and the arrangement with the panel solicitor. NAH takes its responsibilities in complying with the MOJ claims management regulations very seriously. We undertake to comply with all the necessary regulatory requirements including rule 9 of the SRA code of conduct.

That concludes the relationship between the consumer and NAH (save that we sometimes ask for consumer feedback in accordance with our customer charter). The nature of the relationship will then be described further, and in writing by the panel firm in accordance with SRA rule 9. There is never any direct contractual relationship between NAH and the consumer.

Our response

NAH is responding specifically to those areas of the consultation which discuss referral fees and personal injury; in particular, we are responding in detail to the questions pertaining to Chapter 5.

NAH believes that it is important for the LSB to recognise the very different nature of some of the arrangements by which claimants enter the legal process, and by which their claims are then progressed and handled. We believe that understanding these significant differences is key to being able to determine those practices that add value and are of great assistance to consumers, and those which the LSB may feel are not centred around consumer needs / access to justice and so may be in need of reform. We hope that this submission will provide some valuable insights into that assessment.

QUESTIONS FOR CONSULTATION: CHAPTER 5: CONCLUSIONS – PERSONAL INJURY

In general, NAH is supportive of the LSB's conclusions on referral fees:

1.14: “We do not believe there is sufficient evidence to sustain a prohibition of referral fees in the personal injury...market. Nor do we think that other consumer-facing legal services markets should be treated differently and, as such, conclude that bans cannot be justified on the current evidence.”

NAH supports the above conclusion and again stresses the varying levels of procedure which fall under the umbrella term 'referral fee' and agree that an outright ban of everything which falls under this procedure would damage access to justice.

In fact we believe that the involvement of a referrer not only provides a good means for consumers to access legal advice but also adds significantly value to the consumer. For example NAH adds consumer value by;

- Providing free advice and assistance to consumers , particularly the 130,000 consumers whose claims are not passed to panel solicitors
- Providing advice via our website and on line chat facilities
- Providing access to advice outside office hours
- Providing a nationwide panel of solicitors
- Providing positive closure to consumers who claims do not proceed, for example by referring them to a charity or the MIB or CICA
- Monitoring consumer feedback on the service provided by both our call centre and panel solicitors
- The introduction of our customer charter
- Ensuring that none of our panel solicitors deduct any compensation from consumers damages
- Ensuring that the panel solicitor is suitably qualified and accredited to undertake the consumers claim

5.1 The LSB concludes that:

- ***There is no compelling case for a ban on referral fees in personal injury***
- ***There is evidence that disclosure arrangements do not always work effectively***
- ***We believe...that the most important themes for assessing the impact of referral fees are... quality, costs, competition, independence, choice and access to justice***

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

In responding to these conclusions, NAH has taken the key points from Chapter 5 which concern our business and addressed them individually below.

NAH agrees with the main conclusion that there is no compelling case for a ban on referral fees in personal injury. We also strongly endorse the LSB's conclusions that access to justice has been improved by some referral fee models, specifically the NAH model, which enables those who have suffered a personal injury and who have a justifiable case to be directed to a local or specialist solicitor, free of charge. We believe that access to justice must be at the forefront of any decision made by government and regulators with regard to referral fees.

Costs

5.10: "Another ground for challenging the impact of referral fees is that they have driven up costs for consumers...in the PI market, concern around price is likely to be mitigated by the impact of CFAs and other funding models. Indeed, the majority of PI cases do not involve any self funding."

We fully endorse the LSB's findings which indicate that referral fees have had no upward impact on the cost of bringing claims for consumers. In fact the NAH model has had completely the opposite effect. Solicitors are perfectly entitled to deduct any unrecovered legal costs from a consumer at the end of a case, even when acting on a CFA. A provision of NAH panel membership is that our panel solicitors will deduct nothing from a consumer's compensation. We also observe that legal fees are fixed in between 75 % and 80% of personal injury claims.

The CFA or 'no win no fee' model ensures access to justice that otherwise would not be available to hundreds of thousands of claimants. NAH believes that the insurance industry's own activities are both pushing up costs, and promoting an unreasonable and false impression of a 'compensation culture'. The costs of legal cases are only being paid out to claimant lawyers in cases where the insurance companies' client was at fault. The claims have been brought because of that fault. The fault has caused injury.

Costs only mount up to "excessive" levels where cases have dragged on – in other words, where the insurers have not been pro-active enough in admitting fault in good time , and making realistic offers to settle. We know that in some cases defendants and their insurers are using delay and obfuscation as a tactic to encourage some claimants to give up on a legitimate claim. There is clear evidence in the minority of cases with disproportionate costs that defendant insurer practice is significantly failing to meet these mutually expected standards, and so is the main cause of delays and cost increases in cases.

The insurance industry states that premiums have increased due to a rising compensation culture. However, as the LSB Consumer Panel concluded, there is no real evidence to show that there has been an increase in a 'compensation culture', or indeed that any such culture exists at all.

NAH is making more detailed submissions to the parliamentary transport committee and within our submission on the Jackson green paper.

5.12: "Lord Justice Jackson proposes that success fees and ATE premiums should no longer be recoverable from defendants. Lawyers would still be able to agree CFAs with their clients but any

success fee would be payable by the client. In practice this is likely to mean that the success fee would come out of damages awarded to the client... This issue will be subject to consultation by the Government in the autumn.

NAH welcomes the Government consultation on Lord Justice Jackson's report on this issue, due before the end of this year, and will respond to this consultation as appropriate. However, for completeness we have outlined below our main thoughts on Jackson's key propositions, as discussed by the LSB.

ATE

After the Event Insurance is an insurance policy purchased after the cause of a legal dispute has happened, which provides cover for the costs incurred in the pursuit or defence of litigation. NAH exists to ensure that members of the public who have suffered an injury through somebody else's fault have access to the legal system, and to filter out anybody with a spurious claim before they enter the system. As part of this process, our panel solicitors advise genuine claimants about the option of insuring against the costs of their case as they are required to do under their professional conduct rules. The recoverability of ATE premiums is a fundamental component of ensuring good access to justice for consumers.

Success fees

The NAH system is very different to insurer systems involving referral fees. In the NAH model, member firms contribute to the overall marketing and advertising costs. Claims worthy of investigation are passed on to an appropriate member solicitor. Claims are not "sold", and no referral fee is paid to NAH by the solicitor who receives the claim.

Similarly, we have previously stated that NAH supports the recoverability of success fees as they reflect the fact that claimant solicitors provide a free service to those injury victims that they feel genuinely deserve help, even though they may not in the end succeed. We do not believe claimants should have to pay a 'levy' on their compensation. We believe that the implementation of Lord Justice Jackson's primary proposals would result in significant consumer detriment.

The main advantage with solicitor panels like NAH is that we insist that our panel firms take no cut from the client's damages even if all the costs are not recovered from the defendant. If the claim is lost the solicitor waives their costs and the other side's costs are typically met by an insurance policy that the solicitor arranges, at no cost to the client, to provide full protection against the risk of losing. Win or lose, the client pays nothing and has no risk. All the risk is taken by the solicitor and the company insuring the case.

The main aim of no win no fee is to ensure that claimants do not have to pay a fee if they lose their claim which lessens the risk involved when making a claim. However, at the National Accident Helpline we ensure that consumers will always take home 100% of their compensation, because if they win, their solicitors fees will usually be recovered from the other side on top of any compensation awarded. If there is any shortfall in costs recovered we do not permit our panel solicitors to deduct anything from the consumer's compensation.

Competition

5.16 "We have heard concerns that referral fees mean that work now only goes to large firms – distorting competitive pressures in the market to the detriment of smaller firms. The Consumer

Panel expressed concern in their recommendations that the gravitation of...personal injury work to large panels raised competition-related concerns which should be examined by the OFT. Specifically it is argued that there is little change in panel membership and the entry requirements limit access for smaller firms..."

NAH is a pooled resource of over 100 solicitor firms, drawn from right across the country. Claimants are referred to solicitors based on either their geography or specialism for more complex cases. We believe this gives consumers the help that they need in locating a suitable solicitor which, as our research shows, is a daunting task for those unused to the legal system.

We do not believe that there is any distortion in the market, which is a vibrant one with a huge range of companies offering their services to the public. In a fast moving regulatory environment, it is natural that those firms that are best equipped to move quickly, invest wisely and offer the best service to the consumer, will do well. Indeed, we would argue that it is the constant miasma of regulatory threats hanging over the industry which act as the greatest barrier to entry or success in the sector.

Choice

5.26 "The consumer Panel found evidence that insurance companies strongly steer or put pressure on consumers to use panel solicitors."

5.28 "The evidence does not support a finding that consumer choice is undermined by referral fees and arrangements. However, there should be no barriers (real or perceived) in the way of consumers who wish to use their own lawyer: consumers should of course not be deterred from shopping around."

NAH agrees that consumers should be free to 'shop around' for legal advice. We believe that we offer an option for those who are daunted by the legal process and who want free advice as to how to go about making a claim and finding a suitable solicitor.

We agree with the evidence that insurance companies put pressure on consumers to use their solicitors. We believe that this restricts competition amongst the market and access to justice for unsure consumers. We also have some concerns about the restrictive nature of many before the event insurance policies where access to a solicitor of the consumer's choice is prevented until after the issue of formal Court proceedings.

We are also concerned about the growth of third party capture and the consumer's right to access independent legal advice following an accident. We are concerned that it is contrary to an insurer's interest to ensure that an opposing party is made aware of their entitlement to seek independent advice.

Access to justice

5.30: “Analysis of the English and Welsh Civil Justice Survey ...demonstrates that fewer consumers resolve personal injury problems than other types of problem.”

NAH recently commissioned a report which confirms both the analysis done by the English and Welsh Civil Justice Survey and by the LSB itself showing that consumers are not aware of their rights in the personal injury area. Based on a poll of 1600 people by Opinion Matters, the NAH report, *The Scale of Injustice: How the British public is paying the price for the compensation culture myth*, explores the British public’s true attitude towards personal injury claims and solicitors, and their awareness of legal rights. The report finds that in reality only a small fraction of people are aware of their rights to seek redress for injuries caused by someone else’s negligence, and that major barriers are dissuading people from accessing the legal system when they have every right to do so.

Key research findings from the poll show:

- Confusion about personal injury claims is almost universal: only 6 per cent of people say they are confident they know their legal rights
- Eight out of ten perceive significant obstacles to seeking redress for a personal injury
- In employment liability cases, six in ten (59%) feel the power balance favours the employer rather than the individual and an almost identical proportion of people (60%) would feel guilty about bringing a case against their employer
- There is a major social stigma associated with personal injury compensation: More than half of people (57%) consider that those who have sought compensation for their injuries are ‘working’ the system
- Peer perception matters: Four in ten (39%) are concerned by how they would be perceived by others if they were to seek legal help following a personal injury which was someone else’s fault

NAH would be delighted to share our full findings with the Legal Service Board on request.

5.33: “We cannot conclude from this evidence that access to justice is harmed by referral fees. It is indeed arguable that access to justice has been improved.”

5.35: “We have found that referral fees offer some benefits to consumers, particularly in connecting consumers to lawyers in fields like personal injury and thereby widening access to justice. The objective, therefore, should be to allow referral fees and arrangements – preserving their beneficial elements and addressing the challenges they cause to consumers.”

Through our experience of working with consumers from around the country, NAH has learned that many people find the legal system intimidating and the possibility of pursuing a claim against either a large organisation or an employer daunting. Sometimes the relationship between employer and employee is one based on an unequal division of power, meaning when something goes wrong at

work resulting in an accident or injury to an employee, often the worker feels overwhelmed by authority and fears that seeking redress may cost them their job.

We believe that our business model provides the information and assurance that consumers need and that this model improves access to justice for all.

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

NAH's business model is based on member firms contributing to the overall marketing and advertising costs; we provide a pooled marketing resource. We do not auction off claims to the highest bidder. Therefore, we stress again the difference within the market between those who sell claims and those who provide access to justice by providing free legal advice. This distinction was noted by Lord Sugar during a contribution he made to the House of Lords debate on the Lord Young report on 25/11/10.

Lord Sugar observed;

"To add insult to injury, some of them are simply brokers who sell their inquiries on to solicitors; they are not solicitors themselves. I point out here that National Accident Helpline is not one of those organisations"

(A) CHAPTER 7: RECOMMENDATIONS FOR IMPROVING TRANSPARENCY AND DISCLOSURE

The LSB recommendation state:

1.18 "The legal provider should disclose to their clients the key facts about referral fees:

- *whom the referral fee is paid to and for what services*
- *The value of the referral fee in pounds*
- *The consumer's right to shop around for an alternative legal services provider*

"Approved regulators should collect and publish all agreements between introducers and lawyers. All agreements for referral fees should be in writing."

"Approved regulators should set out their compliance strategy for referral fees and arrangements when setting out their regulatory arrangements."

6. Will the proposals assist in improving disclosure to consumers?

The arrangements set out in the SRA Code of Conduct (specifically rule 9.02) provide a very comprehensive set of disclosure requirements for both law firms and introducers. NAH provides an

undertaking to its panel firms to comply with these rules and an extract of the relevant section of our license agreement is set out below.

- 4.2.1 *promptly inform the Licensee of any complaint it receives concerning dissatisfaction with the service provided by the Licensee;*
- 4.2.2 *undertake to comply with the requirements of Rule 9 of the Solicitors' Code of Conduct 2007 as if the Licensor were an Introducer within the meaning of that Code;*
- 4.2.3 *before making a referral give the client all relevant information concerning the referral;*
- 4.2.4 *not act in any way that puts the Licensee in breach of the Solicitors Code of Conduct 2007 and in particular shall not acquire clients as a consequence of marketing publicity or other activities which if done by a person regulated by the Solicitors Regulation Authority would be in breach of any of the Rules of the code.*
- 4.2.5 *perform its duties in a lawful manner and adhere to the Data Protection Act and the British Code of Advertising, Sales Promotion and Direct Marketing (The CAP Code);*
- 4.2.6 *maintain its authorisation under the Compensation Act 2006 for the delivery of regulated claims management services;*
- 4.2.7 *comply with the requirements of the Compensation Act 2006 and the Rules, Codes and Regulations made under it so far as they relate to the Licensor and its business.*

NAH refers approximately 60,000 consumers to law firms per year and we cannot trace any consumer complaints relating to referral arrangements between ourselves and our firms within the last 3 years. Our panel firms all ensure that the consumer is properly advised. Our experiences are in direct accordance with the evidence provided by a major insurer, CMC and solicitors firms at 4.7.3 of the Charles Rivers Associates report.

As set out in our response we do not operate a referral fee model, rather a pooled marketing resource for law firms. In many cases it is not feasible to provide the consumer with the exact monetary value of the referral as our model does not work on that basis. The panel solicitor does not (except in certain limited categories of claim e.g. foreign accidents or CICA claims) pay a fee per referral but a share of the global advertising costs, the costs of which are not calculable at the point of referral. In cases where a direct cost is attributed to a particular category of claim, then the exact referral fee is explained to the consumer by both NAH and details are provided in writing by the panel solicitor.

Whilst NAH is conscious of the need to be as transparent as possible we must highlight the difficulties that can arise when a consumer is bombarded with information. The majority of our panel firms' client care letters, for various compliance reasons run into several pages and whilst they tick the boxes from a compliance perspective they are generally incomprehensible to the majority of consumers, particularly those in lower socio-economic groups.

Whilst, we acknowledge the possible consumer detriment that referral arrangements can theoretically create we endorse the LSB's general findings in this area. For example, the majority of our panel firms take work from ourselves, other introducers and direct from consumers. If the LSB was to undertake an analysis of how law firms deal with consumers referred by different sources we doubt very much that there would be any identifiable difference save that some introducers insist on consumer protection over and above that required by the SRA (for example we insist that consumers are updated about their claim on a monthly basis and consumer queries are dealt with within 24 hours).

We are concerned that injured people receive a barrage of information when taking advice following an injury. In research recently undertaken by NAH we identified from a survey of 1619 consumers that 35% of consumers were worried about the costs of claiming and that this concern was a significant barrier to accessing justice. This result was surprising bearing in mind the vast majority of claims management companies and law firms offer a free service to consumers injured in accidents and advertise to that effect. Due to the various regulations surrounding CFA's and the existence of the indemnity principal the advice that solicitors are required to provide to consumers is over-burdensome and over-complicated. The rules that are designed to protect consumers generally have the opposite effect as they are incomprehensible to many consumers however good the solicitor is at explaining funding in personal injury.

NAH's overriding view is that the information that introducers and lawyers must provide to consumers must be proportionate to any likely consumer detriment and must be considered within the context of the multitude of other information they will receive. We refer specifically to information relating to funding and the myriad of other information that solicitors are required to provide clients. In many cases more time is spent at the outset advising on technical funding and other compliance points which the consumer has no real interest in than in progressing the consumer's actual instructions which are usually to obtain the compensation that the consumer deserves.

Whilst NAH is generally supportive of transparency, "information overload" is also potentially damaging to consumers and good access to justice in personal injury.

The consumer's right to shop around for an alternative legal services provider

Consumers will only approach NAH as a result of a "shopping around" process and will have contacted us entirely through their own free choice. They will typically approach our contact centre in response to TV or other advertising, or via the internet. It would seem nonsensical in these circumstances for NAH to advise consumers that they may also contact one of our main competitors. This would be rather like a consumer entering Asda being advised that there is a Tesco next door.

We see a situation where a consumer is "captured" by, for example, a motor or legal expenses insurer, as being quite different. They will typically be referred to a panel firm and often the consumer is given no information relating to the freedom of choice they may exercise under the terms of their legal expenses policy. NAH are aware that consumers captured by insurers following

road traffic accidents are funnelled quickly to a panel firm without being made aware of the freedom of choice they have available to them in choosing their own legal representative.

We are conscious of that many UK insurers apply a deliberately restrictive interpretation of the Legal Expenses Insurance Directive (87/344) which, in theory, gives insured persons the right to choose their own lawyer. We believe there is frequently a policy of misinformation whereby, far from the consumer being advised that they are free to choose their own lawyer, steps are taken to actively discourage the consumer from doing so. Such misinformation includes placing a significant emphasis that “others may charge” or other similar techniques designed to inhibit consumer choice. NAH believe that regulation may be required particularly in respect of the transparency of legal expenses policies and referrals made to law firms by insurance companies.

“Approved regulators should collect and publish all agreements between introducers and lawyers. All agreements for referral fees should be in writing.”

SRA Rule 9 is already clear that regulators should have access to all agreements between introducers and lawyers. This is a sensible rule which NAH and its panel have always complied with. Our referral arrangements have been scrutinised by the SRA on many occasions during SRA visits to firms and NAH endorses full transparency between, introducer, law firms and regulators.

We firmly believe that whichever rules the LSB recommends these should be applied uniformly by all regulators.

We believe that the publication of all referral arrangements (for example on the internet), does very little to serve the consumers’ best interest and is a disproportionate solution to a problem that doesn’t exist to any large degree. Whilst we fully endorse regulators having full access to referral arrangements we are against wider publication because:

- the main use of the publication of referral arrangements will be for introducers, law firms, ABS and insurers to “check out” what their competitors are doing
- consumers will find almost no benefit is derived from reviewing these agreements and the percentage of consumers that wish to review the arrangements will be miniscule
- consumer protection is much better served by rules that prescribe the provision of certain specified information. This is already dealt with adequately by the SRA code of conduct.
- many arrangements will contain commercially sensitive data which is not relevant to the consumer, for example the terms of service level agreement between introducers and law firms, provisions for the use of intellectual property, duration and termination clauses etc
- many introducers may wish to enter different arrangements with different law firms which are subjective to significant commercial sensitivity
- The publication of referral arrangement is not necessarily compatible with the SRA’s move towards a policy of outcome focussed regulation.

CONCLUSION

National Accident Helpline hopes that this submission clearly sets out the distinction between pooled marketing models and those involving referral fees, and we would welcome recognition of this difference by the Legal Services Board.

As stated to the Consumer Panel, we do not believe that it is our place to comment on other models but we are aware that separate from our model, different types of referral fee arrangements do operate in other areas of legal services – as indeed they do across areas of other markets and industries.

NAH's aim is that the LSB understands the role of our model within the legal services market, and recognises that whether those different referral fee models are useful will depend on whether they add value and expertise through the passage of a claim and so help claimants who deserve access to justice.

We hope the LSB will acknowledge the valuable contribution that NAH provides to large numbers of consumers, particularly those who receive advice and support from NAH and do not proceed to bring claims.

For further information please contact:

Jonathan White, Head of Legal, National Accident Helpline

jonathan.white@nahl.co.uk

01536 527500