



Legal Services Board – decision notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

The Solicitors Regulation Authority (SRA) rule change application for approval to changes to the SRA’s regulatory arrangements relating to the payment and receipt of referral fees in claims for personal injury or death

The Legal Services Board (LSB) has granted an application from the SRA who sought approval to changes to the SRA Code of Conduct 2011 and the SRA Handbook Glossary 2012 in relation to the payment and receipt of referral fees in claims for personal injury or death.

This decision notice sets out the basis for the LSB granting the application and the decision taken, including a brief description of the changes.

Introduction

1. The LSB is required by Part 3 of Schedule 4 to the Legal Services Act 2007 (the Act) to review and grant or refuse applications by approved regulators to make alterations to their regulatory arrangements. The Law Society is an approved regulator and the SRA is the regulatory arm to which the Law Society has delegated its regulatory functions.
2. Paragraph 25 of Schedule 4 to the Act explains that the LSB may only refuse an application setting out a proposed change to the regulatory arrangements if it is satisfied that by granting the application one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below¹) will be met. For example, the LSB’s granting of the application to alter the regulatory arrangements must not be prejudicial to the regulatory objectives overall. Accordingly, if the LSB is not satisfied that one or more of the criteria for refusal are met, then it must approve the application in whole, or the parts of it that can be approved.
3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules² about how the application to alter the regulatory arrangements must be made including the contents of that application. The rules highlight the applicant’s obligations under section 28 of the Act to have regard to the Better Regulation Principles.

¹ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the regulatory objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

² [Rules for Rule Change Applications – Version 2 \(November 2010\)](#)

The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub paragraph 25(3)(f) of Schedule 4 to the Act requires that each proposed alteration has been made or is likely to be made in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration. This therefore includes the LSB's rules.

4. The chronology for the LSB's handling of this application can be found towards the end of this decision notice.

Proposed alterations

5. The proposed alterations encompass the following changes:

- New outcomes and indicative behaviours into Chapters 6 (Your clients and introductions to third parties) and 9 (Fee sharing and referrals) of the SRA Code of Conduct 2011 and new terms defined in the SRA Handbook Glossary 2012. Two new outcomes are introduced: Chapter 6, O6.4: "*you are not paid a prohibited referral fee*"; and Chapter 9 O9.8: "*you do not pay a prohibited referral fee*".

6. These outcomes are supported by three new indicative behaviours:

- IB(6.3) and (IB9.7): "*Having effective systems in place for assessing whether any arrangement complies with statutory and regulatory requirements*". (Included twice in relation to outcomes 6.4 and 9.8).
- IB(6.4) "*Retaining records and management information to enable you to demonstrate that any payments you receive are not prohibited referral fees*".
- IB(9.8) "*Ensuring that any payments you make for services, such as marketing, do not amount to the payment of prohibited referral fees*".

7. There are also consequential amendments to the SRA Handbook Glossary 2012 where new definitions of terms used in the new outcomes are inserted, specifically:

- "**LASPO** means the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*".
- "**Payment** includes any form of consideration whether any benefit is received by you or by a third party (but does not include the provision of hospitality that is reasonable in the circumstances) and pay and paid should be construed accordingly"
- "**Prohibited referral fee**" means (i) a payment prohibited by section 56 of LASPO or (ii) a payment made to or by you which appears to the SRA to be a referral fee for the purposes of section 57(7) of LASPO, unless you show that the payment was made as consideration for the provision of services or for another reason and not as a referral fee."

Decision

8. Section 56 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) comes into force in April 2013, and prohibits the payment and receipt of referral fees in claims for personal injury or death by regulated persons. It also prohibits regulated persons in the course of providing legal services from receiving a payment for arranging for a third party to provide services to the client, and the payment and receipt of referral fees in relation to other claims arising out of personal injury or death. LASPO also requires that the relevant regulators ensure they have appropriate arrangements in place for monitoring and enforcing the restrictions imposed by section 56, although there is no requirement to make specific rules for that purpose. The SRA has opted to introduce outcomes and indicative behaviours to reflect the prohibitions on referral fees contained in LASPO.
9. In making its decision the LSB considered whether it was proportionate for the SRA to introduce outcomes and indicative behaviours that made specific reference to the ban on referral fees when the ban was enshrined in legislation. On balance the LSB was persuaded that the outcomes and indicative behaviours provide clarity to the regulated community and consumers. The SRA's proposed provisions are also drafted in line with the LSB's Section 162 Guidance published in May 2011³ on Referral Fees in respect of having outcomes that take account of consumers and their interests and needs.
10. The LSB asked the SRA to say what plans it had to review the regulatory arrangements once LASPO had become embedded. The SRA's response that it intends to review compliance through, for example, recording reports about possible breaches to enable its Risk Centre to identify, assess and monitor any associated risks and provide data about compliance, is welcomed. However, the LSB has also an expectation, stated in its May 2011 referral fee guidance, that approved regulators review their own practice to ensure that the outcomes in the May 2011 guidance are being achieved. In addition, the LSB's draft Business Plan for 2013/14 expressed the LSB's intent to review the regulators' approaches to regulating referral fees, arrangements and fee sharing, reflecting inter alia the new statutory provisions in LASPO. Should that review be confirmed in the final Business Plan, we will discuss progress further with the SRA in that context.
11. The LSB noted that in the SRA's *Supervision and Enforcement Strategy for the ban of referral fees*, it envisages that some firms may look to reconfigure their business model and/or apply to become an alternative business structure (ABS). Where the SRA considers that changes to a business fail to meet the regulatory requirements (in respect of referral fees), authorisation will not be granted. The LSB considers that it is important that any changes to authorisation practice ensure proper case-by-case evaluation rather than a blanket approach, are made transparently and are dovetailed with the wider

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http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20110525_referral_fee_decision_paper_final3.pdf

improvements to the ABS authorisation process which the SRA are currently developing for early implementation.

Conclusion

12. The LSB is satisfied that, having considered the SRA's application against the criteria in paragraph 25(3) of Schedule 4 to the Act, there is no reason to refuse this application; accordingly, the LSB grants this application.
13. Annex A to this decision notice contains the relevant amendments to the SRA Code of Conduct 2011 and the SRA Handbook Glossary 2012.

Chronology

- The LSB confirmed receipt of an application from the SRA on 11 February 2013.
- The 28 day initial decision period for considering the application ends on 10 March 2013.
- This Decision Notice is being issued to the SRA on 6 March 2013 and will be published on our website on 7 March 2013.

Chris Kenny, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
6 March 2013

Annex A

SRA Amendment to Regulatory Arrangements (Referral Fees) Rules [2013]

Preamble

Rules dated [date of approval by the Legal Services Board] made by the Solicitors Regulation Authority Board under sections 31, 79 and 80 of the Solicitors Act 1974, sections 9 and 9A of the Administration of Justice Act 1985, paragraphs 2 and 3 of Schedule 14 to the Courts and Legal Services Act 1990, section 83 of, and Schedule 11 to, the Legal Services Act 2007 and section 57 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, with the approval of the Legal Services Board under paragraph 19 of Schedule 4 to the Legal Services Act 2007.

Rule 1

The SRA Code of Conduct 2011 shall be amended as follows:

- (a) in Chapter 6, at the end of O(6.3) replace “.” with “;” and insert:

“O(6.4) you are not *paid a prohibited referral fee.*”;

- (b) in Chapter 6, at the end of IB(6.2) replace “.” with “;” and insert:

“IB(6.3) having effective systems in place for assessing whether any *arrangement* complies with statutory and regulatory requirements;

IB(6.4) retaining records and management information to enable you to demonstrate that any *payments* you receive are not *prohibited referral fees.*”;

- (c) in Chapter 6, renumber IB(6.3) and IB(6.4) as IB(6.5) and IB(6.6);

- (d) in Chapter 6, under the heading “Overseas practice”, replace “The outcomes in this Chapter” with “Outcomes 6.1 to 6.3”;

- (e) in Chapter 9, at the end of O(9.7) replace “.” with “;” and insert:

“O(9.8) you do not *pay a prohibited referral fee.*”;

- (f) in Chapter 9, at the end of IB(9.6) replace “.” with “;” and insert:

“IB(9.7) having effective systems in place for assessing whether any *arrangement* complies with statutory and regulatory requirements;

IB(9.8) ensuring that any *payments* you make for services, such as marketing, do not amount to the *payment of prohibited referral fees.*”;

IB(9.9) retaining records and management information to enable you to demonstrate that any *payments* you make are not *prohibited referral fees*;

- (g) in Chapter 9, renumber IB(9.7) to IB(9.9) as IB(9.10) to IB(9.12);
- (h) in Chapter 9, under the heading "In-house practice", replace "9.7" with "9.8"; and
- (i) in Chapter 9, under the heading "Overseas practice", replace "The outcomes in this chapter" with "Outcomes 9.1 to 9.7".

Rule 2

The SRA Handbook Glossary 2012 shall be amended as follows:

- (a) after the definition of "**knowledge**" insert

"LASPO

means the Legal Aid, Sentencing and Punishment of Offenders Act 2012." ;

- (b) after the definition of "**part-time**" insert

"payment

includes any form of consideration whether any benefit is received by you or by a third party (but does not include the provision of hospitality that is reasonable in the circumstances) and "pay" and "paid" shall be construed accordingly.";

- (c) after the definition of "**professional services**" insert

"prohibited referral fee

means

- (i) a *payment* prohibited by section 56 of LASPO; or
- (ii) a *payment* made to or by you which appears to the SRA to be a referral fee for the purposes of section 57(7) of LASPO, unless you show that the *payment* was made as consideration for the provision of services or for another reason and not as a referral fee."

Rule 3

These amendment rules shall come into force on 1 April 2013 or the date of approval by the Legal Services Board, whichever is the later.