14 December 2012

Solicitors Regulation Authority
The Cube
199 Wharfside Street
Birmingham
B1 1RN

By email: consultation@sra.org.uk

Dear Sirs

Consultation on the ban on referral fees in personal injury cases

The Association of Personal Injury Lawyers (APIL) welcomes the opportunity to respond to a further consultation regarding the ban on referral fees. Our comments follow on from our response to the June discussion document, dated 26 July 2012.

The further clarity provided by the SRA is welcomed and the latest proposed guidance has gone further than we anticipated. It is essential that any guidance issued by the SRA allows solicitors to navigate the ban successfully. There are some areas where we believe that the SRA could improve on their proposed guidance. There is a professional need for clarity and consistency, and at the moment there are several grey areas which could cause confusion or lead to abuse of the regulations.

Concerns about the proposed guidance

It is essential that there is a tighter definition and guidance of what constitutes a legitimate service, as this is an area where there is the potential for abuse by some practitioners seeking to flout the ban. Providing for “legitimate” services - as the LASPO Act describes could, without clear rules and guidance, lead the way for firms and companies to dress up arrangements as services to circumvent the ban. The SRA needs to be very wary of this potential for abuse when regulating. If a solicitors’ firm is engaging with a separate organisation who introduce new clients to the firm under the umbrella of providing a service, this should be caught by the ban.

A further concern surrounds charities. There is a real danger that implementation of the ban as suggested would have unintended consequences for charities, for example where a firm

sponsors a charity event and then the firm gains a certain number of clients because those people attended the event and became aware of the firm. This is not a direct referral, but could fall within the ban if care is not taken with implementation of the provisions. Law firms also support charities in other ways , for example by advertising in publications and raising money themselves through events. As a result of these ventures, the firms may receive enquiries. We do not, of course, advocate firms using charity as a vehicle to get referrals, yet there is a danger that the ban will deter firms from sponsoring events because they are concerned about being caught by the ban. Money received through sponsorship is vital to charities, and the ban should not have an adverse effect such as this. There is a need for clarity to make sure that those who are genuinely supporting charities are not caught, and therefore we feel that pre-approval is necessary here. Alternatively, we suggest that there should be specific exclusion of the sponsorship of charities, providing it can be proved that there is no nexus in the arrangement for sponsorship with the referral of work.

We feel that there should be more information as to who is a “regulated person” in part 3, paragraph 8 of the consultation. It is stated that a “regulated person” includes insurers, but only “subject to the Treasury making regulations to enable the Financial Services Authority to monitor and enforce the ban”. We would be grateful for more information on this point. Is the Treasury making these regulations, and when will they be in force? Before the regulations are in force, are insurers still classed as regulated persons? It would be vastly unfair to make solicitors firms comply with the regulations, whilst letting insurers carry on paying referral fees. Compliance of all regulated persons must be imposed simultaneously.

Clarity and consistency are key; the guidance proposed by the SRA could go further to assist with this. Whilst we accept that providing an endless list of examples of the types of situations that are legitimate and those that are not would be impossible, we suggest that, at least to begin with, pre-authorisation and pre-approval of structures and arrangements is necessary. A help line should also be set up so that people can seek advice as to what is a legitimate business model, and what is not. This is especially important given the short amount of time that firms have to digest the guidance and adjust their practices to ensure compliance.

The proposed enforcement strategy, detailed in part 4 of the consultation paper, is not robust enough. The risk is that the majority of those affected will observe the ban, but there will be some who will not, which will leave an uneven playing field and lead to unfairness. The SRA should approach enforcement in a different manner. The usual approach is to take a harsh line against those who are in violation of the rule, to deter others. We feel that a more

constructive approach would be to reiterate guidance and explain why a certain situation is in breach of the ban. Especially in the first few years, it is likely that breaches will be genuine errors of misinterpretation. We propose that the best way to ensure that this does not keep happening is to help those who have fallen foul understand why they have done so, and publish more guidance highlighting the "problem" areas to help the profession as a whole.

General comments

APIL is anxious about the speed at which the proposals are being implemented. We feel that there is not enough time for firms to adapt their practices in order to avoid being caught by the ban. The guidance suggests that the enforcement relies heavily on self-compliance and self-monitoring, but this will fall apart if people do not have enough time to familiarise themselves with the rules and change their practices and business models accordingly. Publication of the guidance is planned for March, with the ban coming into force in April. This is simply unfair on businesses, given the added pressure that continual reform is bringing in the area of personal injury litigation. The Ministry of Justice, for example, released a consultation on 19th November regarding fixed recoverable costs for cases in the new extended portal. This is a further blow to firms, as the document mentions that referral fees will be banned, and uses this as a justification for why the fixed costs will be low- solicitors will no longer need to spend money on referral fees. This is illogical, as the level of current fixed costs was set after careful negotiations which insurers and claimant lawyers participated in. Referral fees were not taken into account when the current fixed costs were agreed- therefore they are a completely separate consideration and should not have a bearing on the level that fixed costs are set at. Further, this justification does not take into account that those firms which currently acquire cases through the payment of referral fees will now have to fund alternative marketing strategies. With fixed fees being reduced, firms will need to focus even more on finding ways to cut costs throughout the firm. This will take time and much planning- which is not possible if the ban comes into force on the proposed date.

In addition, we have concerns about possible disparities in the guidance given by the different regulatory bodies, which could lead to an un-level playing field between solicitors, insurers and claims management companies. There is no indication of what guidance the Ministry of Justice (MoJ) will give out regarding claims management companies or what the Financial Services Authority (FSA) will give to insurers- will they take the same approach to the implementation of the ban as the SRA? The Legal Services Board should ensure that there is a single consistent framework implementing the ban across all regulated persons, rather than leave room for different regulatory approaches.

We hope that our comments prove helpful to you. If you wish to discuss matters further, please do not hesitate to get in contact.

Yours faithfully

Alice Warren
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