



**The Solicitors Regulation Authority consultation paper,  
'Improving Regulation: proportionate and targeted measures'**

**Response of the Criminal Bar Association**

Any questions in relation to this response should be referred to either:

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**Executive Summary**

The Criminal Bar Association rejects any proposal that sanctions the use of referral fees by solicitors.

They are contrary to the public interest, they distort the market for legal services by denying clients a free choice of representative, and they are open to abuse by solicitors who put their own financial interests above the interests of their clients.

The CBA is responding only to Consultation question 19: Do you consider that Outcome 9.6 should be retained or removed?

The CBA is strongly in favour of retaining the ban on referral fees currently set out in Outcome 9.6.

## **The Criminal Bar Association**

1. This is the response of the Criminal Bar Association (the “CBA”) to the Solicitors Regulation Authority consultation paper, ‘Improving Regulation: proportionate and targeted measures’, issued as part of the SRA’s Regulatory Reform Programme.<sup>1</sup>
2. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
3. The CBA’s role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
4. The CBA is the largest specialist Bar association, with around 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

## **Overview**

5. This response addresses the field of criminal law only, although we suspect our objections apply to all areas of publicly funded work. It is essential that a client’s choice of his or her lawyer is not improperly influenced by the financial interests of the lawyer or a third party who is seeking to make money out of a person who faces criminal investigation and / or charge.
6. The payment of referral fees is unethical, against the public interest, and ought to be wholly outlawed. Such payments have no place in publicly funded work and are an improper use of public funds: they do not represent value for money, and are not payments for legal services. They exist solely to benefit solicitors, who use them to trade cases without giving proper consideration to the interests of their clients. The CBA is concerned that the SRA thinks it is appropriate even to consult on this issue, since (in our view) the principled case against referral fees cannot sensibly be disputed. The use of referral fees risks giving approval to the practices of some its least ethical and least professional members. We invite the SRA to give serious consideration to banning all payments and receipts of referral fees of all types, irrespective of the category of payer or recipient, in all publicly funded work.
7. The consultation paper itself notes at paragraph 79 of the consultation paper that “*many lawyers*” consider referral fees are unethical and contrary to the principles of the legal profession as a whole. Those lawyers are right.
8. Further, at paragraph 83 the consultation paper notes that Outcome 9.6 was introduced to prevent referral fees being paid because there are strong ethical and public policy

reasons for prohibiting the payment of referral fees in certain areas. Those reasons have lost none of their force, and there is no imperative to override them.

9. The payment of referral fees is **against** the interests of vulnerable clients, the rule of law, the administration of justice and the public interest. [This applies to all the situations covered by Outcome 9.6.] It is particularly so in the field of criminal law. The payment of a referral fee is no more than a system of buying and selling cases - and ultimately of treating clients as a tradeable commodity. It is a bribe. There is no “*economic imperative*” (consultation paper, paragraph 84) that in any way justifies such conduct in our criminal justice system.

#### **Outcome 9.6 should be retained**

10. Outcome 9.6 currently prohibits payments to introducers of criminal defence work and legally-aided work. The consultation paper provides no basis for removing the prohibition. Indeed, the only area in which it makes any suggestion of a reason is in relation to police station attendance; and no evidence whatsoever has been put forward in favour of any change.
11. Banning all referral fees would promote key regulatory objectives, namely that authorised professionals act with independence and integrity, maintain proper standards of work and act in the best interests of their clients.

#### **Characteristics of those within Outcome 9.6**

13. The defining characteristics of those clients covered by Outcome 9.6 include the following:
  - a. They are very often vulnerable in several respects; financially, socially, educationally, and in other ways relating to their personal circumstances.
  - b. They are unable to afford to pay for legal representation for themselves, to such an extent that public funding is available to them: something which is now available only to those with relatively low disposable incomes.
  - c. They need legal advice and assistance in situations of great stress: advice at a police station after arrest being a typical example. In more colloquial terms, they are ‘distressed buyers’ of legal services, and many will be the most ‘distressed’ of buyers.
  - d. The only permitted source of payment for the legal services provided by their solicitors is public funds, except to the extent that they are required and are able to contribute to those costs themselves.

#### **The Context and Effect of Referral Fees on the Market for Criminal Work**

14. Recent work commissioned by the MoJ and the Law Society has revealed how marginal most solicitors practices have become, achieving on average a 5% net profit margin<sup>2</sup>. This was prior to a substantial cut in the Litigators’ Fee that was made in March 2014. Another comparable cut is contemplated by Government this summer. There is simply no scope (or economic case) within the fixed fees that are paid for referral fees to be

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<sup>2</sup> “Otterburn Legal Consulting: *Transforming Legal Aid: Next Steps*, A Report for The Law Society of England and Wales and the Ministry of Justice, February 2014” <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/results/otterburn-legal-consulting-a-report-for-the-law-society-and-moj.pdf>

paid. The exception of course are for the isolated and occasional “better paid” cases which are more likely to become the subject of corrupt behaviour if this proposed change takes place. Given the tight margins, the inevitable consequence of permitting referral fees to be paid would be a reduction in the quality of the service provided. While this might suit the commercial interests of the parties to the referral fee, such an arrangement cannot be in the interests of the public of the user of the service (client).

15. The Legal Aid scheme makes taxpayers’ money available to pay for a service provided by a lawyer to their client, within strict rules and limitations. There can be no justification be for using part of that money to create a secondary market in which they only players are the lawyers themselves. There is no legitimate use for public money to be spent in this way.
16. If the prohibition is removed, it will lead to increased demands for the payment of referral fees at other stages in the provision of legal services – for example, solicitors demanding their payment by advocates – contrary to the regulatory objectives. The CBA is aware, anecdotally (because no one has as yet blown the whistle), that instructing solicitors have demanded payments from counsel to secure instructions in better paid legal aid cases.
17. We observe that much of this ground has recently been covered in Lord Justice Jackson’s report into personal injury cases. The Government concluded that referral fees in personal injury cases should be banned: *“the activity of paying intermediaries ... to buy access to claims is in principle not in the public interest.”* If it is not appropriate in personal injury cases it is certainly not appropriate in criminal cases.
18. Lord Justice Jackson also concluded Chapter 20 with this statement:

*“If either of the above recommendations [banning or capping referral fees for personal injury claims] is accepted, serious consideration will have to be given to the question whether referral fees should be banned or capped in other areas of litigation.”*
19. The Jackson recommendations were accepted. Exactly the same reasoning applies in criminal cases. In the light of that, the CBA expresses its surprise and concern that the SRA is now consulting on the possibility of removing the ban contained in Outcome 9.6.

#### **The suggested rationales for removal of the prohibition in Outcome 9.6**

20. The consultation paper includes a number of suggestions as to why the ban might be removed. None provide any proper justification. Taking each in turn.

##### *Rationale 1 - restriction on client choice.*

21. Paragraph 76 of the consultation paper suggests that Outcome 9.6 is an example of a barrier to consumer choice. There is no explanation of why this might be so. Lord Justice Jackson firmly rejected this notion, saying that the removal actually restricted client choice and we agree.

##### *Rationale 2 - changes in the criminal legal aid market*

22. The rationale here appears to be simply that changes that have been made have led to smaller case volumes and a blurring of the traditional roles of solicitor and barrister.

The CBA disagrees. The fact that many solicitors now provide advocacy services is no reason to relax the ban. There remains a vital distinction between the role of litigator and advocate. Lifting the ban would poison all publicly funded criminal work whatever services are provided by any solicitor or barrister. All advocates, whether from the Bar or the solicitors' professional, should maintain the same and the highest ethical standards, without risk of being exposed to improper financial pressures from those who instruct them.

23. Paying for cases in any format acts to stifle competition, distort the market and is corrupt.

*Rationale 3 - improving access to justice*

24. The CBA rejects the premise in the consultation paper (paragraph 83) that the removal of Outcome 9.6 "*appears on the face of it to be a straightforward measure to improve access to justice*". Two reasons are suggested in the consultation paper, but neither stands up to scrutiny.

- a. The first reason given is that the referral of clients to lawyers might increase the take up of advice in police stations. This ignores the realities. The police tell the suspect that they are entitled to a solicitor and they will either avail themselves of the opportunity or not. A substantial proportion of that advice is easily accessed by telephone, with no requirement for third party intervention. A third party with his own financial interests to serve is not going to do anyone (except himself) any good.
- b. The second reason given is that the referral of clients to lawyers might "*reduce the costs of providing such services*". The term "*such services*" must refer to "*advice at police stations*", or to follow on legal advice. This is irrational. The cost is fixed by the state and paying an intermediary can have no effect save to reduce quality and import unethical and inappropriate practices that damage the public interest. Further the consultation seems to take no account of the Government's proposed new system of providing for duty advice at police stations.

*Rationale 4 - promoting the interests of "consumers of legal services"*

25. For the reasons given above, the CBA is unable to see how the removal of Outcome 9.6 would promote the interests of lay clients who are within the scope of that Outcome.

*Rationale 5 - 'navigation' of the legal service market by defendants to criminal charges*

26. Referral fees have no place in enabling "*the criminal client to navigate between police station advisers, solicitor and advocate*" (consultation paper, paragraph 85). There is no evidence of difficulties with 'navigating' the legal services market in the areas covered by Outcome 9.6; if there were such evidence the answer would lie in better training for custody sergeants in police stations and those who provide advice. Referral fees are not the answer to any such notional difficulties. Further the consultation seems to take no account of the Government's proposed new system of providing for duty advice at police stations.

## **Conclusion**

27. The current ban is entirely appropriate and in the public interest. For the reasons given above, Outcome 9.6 should be retained, and not removed.

## **Postscript**

28. Although not strictly within the principle thrust of our Response, we cannot let pass without comment the material set out at paragraph 82 of the consultation document. Anecdotal evidence suggests that the practice of 'swapping' cases amongst solicitors is widespread in the majority of multi-handed trials. If the SRA is serious about rooting out improper behaviour, it should simply dip sample multi-handed cases across the nation. Of course there will be many cases where referrals and recommendations are made entirely properly. However we suspect that any careful investigation would also reveal many examples where firms of solicitors become involved that lack any reasonable connection to place or client, or indeed any particular or specialist expertise. To the question "why was such a firm instructed?" there may be no easy answer.

**CBA**  
**11<sup>th</sup> June 2015**