JOINT RESPONSE OF THE BAR COUNCIL AND CRIMINAL BAR ASSOCIATION TO THE LEGAL SERVICES BOARD DISCUSSION DOCUMENT ON THE REGULATORY TREATMENT OF REFERRAL FEES, REFERRAL ARRANGEMENTS AND FEE SHARING

Introduction

1. The General Council of the Bar (the Bar Council) is the governing body for all barristers in England and Wales. It represents and, through the independent Bar Standards Board, regulates over 15,000 barristers in self-employed and employed practice. Among its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners, to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of service to all clients, and to work for the efficient and cost-effective administration of justice. This response is made by the Bar Council acting in its representative capacity, in the public interest.

2. The Criminal Bar Association (the CBA) represents about 3,600 employed and self-employed members of the Bar who prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and high ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy help to ensure that all persons enjoy a fair trial and that the adversarial system, which is at the heart of our criminal justice system, operates effectively.

3. On 4 December 2009 the Legal Services Consumer Panel (the Panel) invited responses to its call for evidence on referral arrangements.

4. The Legal Services Board (the LSB) subsequently invited the Bar Council to meet

Charles Rivers Associates, whose services had been engaged by the Panel, to discuss referral fees. On 4 February 2010 representatives of the Bar Council gave evidence to Charles Rivers Associates. They were Nicolas Bacon (a member of the Bar Council's Remuneration Committee), Christopher Convey (a member of the Bar Council's Professional Practice Committee) and Adrian Vincent (Head of Remuneration and Policy, Bar Council).

5. In February 2010 the Bar Council submitted a detailed response to the Panel's call for evidence on referral arrangements (annexed for ease of reference).

6. The Bar Council's conclusions were as follows:

(a) **Referral fees represent an unwarranted and unjustifiable threat to the public interest in the efficient and effective provision of legal services to consumers.** Their authorised existence represents an ongoing threat to public confidence in the legal professions. **They should be prohibited**.

(b) The failure of the solicitors' 2004 'safeguards' to protect the public from abuse by a number of solicitors operating a referral fee payment scheme demonstrates that **attempts to provide a regulated system of referral fees have failed**. Such 'safeguards' cannot adequately overcome the inherent risks and negative outcomes within such a scheme. **Individuals will be represented on the basis of the financial interests of those party to the payment, the details of referral fees will remain unexposed, costs will almost certainly increase, any such increase will be passed on to the public, and the field of providers of legal services may well be reduced. All of this is likely to occur without any increase in the quality of representation.**

(c) The Bar Council invites the LSB to make representations to the LSC to clarify **the effect of the Unified Contract Standard Terms 2007 and the 2007 Funding Orde**r to **make it clear that both the payment and the receipt of any referral fee, and the practice of becoming "Instructed Advocate" in order to exploit the fund-holding position, are prohibited.**

(d) Whatever views the LSB might arrive at in relation to referral arrangements in privately funded work, the Bar Council submits in the strongest possible terms that **there can be no half way house compromise in relation to advocacy, where the right of the consumer to the optimal choice of representative in court cannot be allowed to be prejudiced by referral fees.**

7. The Panel issued a report in May 2010 highlighting serious concerns about how referral fees were affecting the provision of legal services in conveyancing and personal injury cases.

8. Notwithstanding that conclusion, the Panel recommended that "Referral arrangements should continue to be permitted, but the LSB should review the market in three years time." It made 11 other recommendations aimed at the three concerns which they had identified.

9. On 9 June 2010 the Bar Council responded to the publication of the Panel's Report, and one by Charles Rivers Associates, taking issue with a number of the propositions and assumptions in the Rivers Report which had been carried through as premises in the Panel Report.

10. The Legal Services Board (LSB) has now issued its Discussion Document *Referral Fees, referral arrangements and fee sharing*. The foreword to that paper states "[T]he view of our Consumer Panel can be summarised in their conclusion of 'reveal, regulate so retain'. The Panel argue that the last element depends on the delivery of the first two, which are of equal importance. The Board broadly believes that this provides a clear basis for further discussion. Our preliminary hypothesis is that the simple solutions of an outright ban or a *laissez faire* free for all are both unacceptable. The first proposition, in our view, would be a wholly disproportionate action when the economic evidence is that consumers do not suffer detriment from the existence of referral fees and, indeed, that there may even be access to justice benefits from their retention. Lawyers are under no obligation to pay such fees: independent marketing is a viable alternative. To outlaw such practices when viable alternatives exist therefore could fail a test of regulatory proportionality."

11. The overarching principles behind the LSB's approval of referral fees are:

    (a) Although there is overwhelming evidence that they affect the independence of legal advice, this can be remedied by better regulation;

    (b) They increase access to justice because referrers, such as claims management companies, are better at marketing than lawyers and thus make consumers aware of their rights to compensation; and

    (c) They improve competition, and thus drive down prices; this competition occurs at two levels: between law firms and introducers to attract clients and between law firms to occupy valuable spots on introducer panels.

In the section below we summarise our responses to the LSB's Discussion Document.

Executive Summary

Questions 1 and 2

Currently, Barristers are prohibited from accepting referral fees by the *Code of Conduct of the Bar Council of England and Wales*. When the original consultation paper was produced both the Bar Council and the Law Society were strongly opposed to referral fees. The Office of Fair Trading (OFT) raised concerns about conflict of interest, and the recommendation from Lord Jackson's Review of Civil Litigation Costs was to ban referral fees. The only support appeared to come from those with a financial interest in the arrangement.

Despite the suggestion that referral fees widen access to justice in fields like personal injury, the Bar Council and the CBA have concerns about the objectivity of the analysis which has lead to this conclusion. The basis of this conclusion appears to be the Legal Services Consumer Panel Report of May 2010. However we have raised our concerns about a number of areas including insufficient evidence such as a failure to interview personal injury barristers, ignoring the economic pressure to settle to preserve profit and under-representation of other explanations for lack of complaints.

Question 3 to 5

The Bar Council does not agree with the LSB's analysis of the operation of referral fee arrangements in criminal advocacy. It considers that there is a significant amount of evidence that lawyers are putting financial interests ahead of their duties to clients.

There appears to be no recognition of the financial incentives for solicitors' firms to instruct their own in-house advocates, irrespective of competence. The Joint Advocacy Group Consultation Paper on Quality Assurance for Advocates highlights this state of affairs in the context if the current crisis in legal aid funding. It is increasingly common for employed, in-house advocates to accept instructions in cases outside their competence, and in particular, for inexperienced advocates to be the junior in two counsel cases.

In the context of criminal law, given the requirement for a lawyer by a lay client, it cannot be argued that referral fees assist the consumer in finding the best lawyer.

The Bar Council's February 2010 submission highlighted why referral fees are not in the interests of justice. Where a referral fee exists a solicitor will instruct counsel most likely to pay the firm a fee, in the financial interest of the firm, rather than on

merit, in the lay client's interest. The regulatory objectives enshrined in the Legal Services Act 2007 are undermined by payment of referral fees. The payment of referral fees reduces the range of legal service providers available to vulnerable consumers. Referral fees are more often than not operating outside the rules set down to regulate them both looking at a regional and national level.

The Jackson Review found that rather than improving the choice and quality of service available to consumers, referral fees arrangements simply lead to awarding cases to the highest bidder which failed to match cases to solicitors.

In the sphere of publicly funded criminal defence work, it may appear unethical to treat defendants – consumers – as a commodity to be auctioned off for profit. Experience of abuse of the referral fee system could be evidenced with Annexe 2 of the 2008 Bar Council dossier containing 37 examples of abuse found in the South Eastern Circuit by practitioners and the judiciary.

Further, under the MoJ/LSC proposed new arrangements for legal aid contracting there is likely to be set up a system whereby contracting units refer work to each other. If referral fees are allowed then this will encourage the full scale trading in litigation such that contractors will seek to win contracts so that they can then sell litigation. This will serve to take money that was intended to pay for lawyers' services to vulnerable defendants and channel it into the pockets of unprincipled contractors. This will exert a serious downward effect on quality.

Recognition of the potential for conflict of interest can be found in the judgment of *Alexander Woodside v HM Advocate*, a Scottish case quoted by Desmond Browne QC, a former Chairman of the Bar, in June 2009. The Scottish Appeal Court recognised that there was an inherent difficulty in a solicitor who worked for a firm which could provide higher rights advocacy themselves giving a client disinterested advice on representation. This difficulty was magnified when there was a financial interest in the decision of who was to be instructed. A practice involving instruction only of advocates who pay money to receive those instructions limited choice. The conflict which arises between the duty to instruct an advocate in the best interest of the client and the financial interest of the solicitor could be seen to offend the rules within the Solicitors Code 2007 (in particular rules 1.04(2) 1.02 and 1.06).

The reduction in the use of the services of the Bar does not reflect a decrease in the quality of service from the Bar, but an increase in the precedence of the financial interest of solicitors in the context of litigator remuneration. Inherent in the nature of referral fees is an element of reward for the referral of work. This leads to a

perception of financial advantage being more important than quality of service. There is a very real danger that serious miscarriages of justice will result.

These arguments against referral fee arrangements are both cogent and powerful. Because referral fees are currently prohibited the system can be manipulated to permit the distribution of work on a fee-sharing basis to those who are willing to do the work at the lowest price. This is commonly arranged by ensuring that the "instructed advocate" is an employee of the solicitor where there is no intention that that person should conduct the trial. The fee is paid to the solicitor's firm and the actual advocate has to agree to 'fee-sharing' by accepting only a proportion of the fee even though the instructed advocate is not the one who conducts the case.

The Bar has always maintained that such an arrangement, which effectively involves payment without actually working to justify receipt of those funds, amounts to a breach of the "instructed advocate" statutory obligations (Para 20(10) Schedule 1 Funding Order 2007; section IV.41.8 Consolidated Criminal Practice Direction 2007; LSC Unified Contract Standard Terms 2007). Moreover, it cannot be said to be in the best interest of the lay client.

The recently published guidance "Sharing/Referral Fees – Important guidance for holders of LSC Crime Contracts December 2010" , after three and a half years during which the Bar's concerns have not been answered, has finally confirmed that such an arrangement is in fact prohibited. It goes on to set out the limited circumstances in which the "instructed advocate" who has primary responsibility for a case can withdraw with an obligation to notify the litigator so that a substitute advocate can be instructed as soon as possible.

The guidance also confirms that section 51 funding is covered by the Litigator Graduated Fee Scheme not the AGF scheme. Further investigation has found that the £100 payment for such hearings is being sought as a fee for the introduction of work. This, it is argued, demonstrates that avoidance of regulations prohibiting such behaviour continue in the context of current commercial pressures.

It is a misunderstanding that the Bar Protocol on fee-sharing might have an effect similar to price fixing which the Bar Council have sought to rectify at roundtable events and in a letter of June 2010. Fixing of a price only occurs in the context of set funding for elements of advocacy under the statutory instrument. The purpose of the (non-mandatory) Protocol is to distribute the case fee fairly. It protects the rights of the client, not the Bar.

A similar protocol should apply to all and be enforced. QAA does not provide sufficient protection against exploitation of the referral fee system. It is unlikely that a solicitor's recommendation for the appropriate advocate will be challenged by the lay client. Equally unlikely is the practice of informing lay clients of their right to 'shop around'.

The Bar Council and CBA remain firmly committed to the view that the payment of referral fees is undesirable and unnecessary.

Question 6

Although it is agreed that disclosure and transparency help embed honesty the reason why disclosure rules have so far proved unsatisfactory is the impact on consumer behaviour. As a result information is often 'hidden'. As such disclosure after contact with a lawyer is of little real use. The proposals will assist in improving disclosure but the practical benefits are minimal.

Question 7

One option to consider would be to impose a requirement that those it regulates are only permitted to enter into arrangements with referrers who agree to make full disclosure of referral arrangements at the time of the referral.

Questions 8 & 9

It is agreed that potential costs of disclosure of referral arrangements are minimal and are outweighed by the public interest.

Question 10

There is insufficient information about the active approach.

It is suggested that regulatory body results should be published. The Consumer Panel findings are that in 2007 up to two-thirds of firms inspected were not compliant with SRA rule 9. There is no discussion about the current regulatory regime of the SRA. In the absence of data, question 10 is incapable of answer.

Questions 11 & 12

We have not felt able to comment on these questions in the absence of specific proposals.

12. In the remainder of this response, we explain our observations in more detail.

Question 1

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

Question 2

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

The Bar Council's original submission in February 2010 focused primarily upon the market in which barristers compete with each other, and other advocates, for instructions from solicitors. The Bar's Code of Conduct prohibits the payment of referral fees, so the current arrangements for the payment of referral fees are outside our direct experience.

13. However, we offer the following comments.

14. The Consultation Paper records the views of a number of more or less disinterested responses to the original consultation paper:

(a) The Bar Council – strongly opposed to referral fees;

(b) The Law Society – equally strongly opposed;

(c) The study conducted by the Office of Fair Trading study into the home buying and selling market which recommended the Government consider a statutory response to the 'more than theoretical risk' of the conflict of interest inherent in the payment of referral fees to estate agents; and

(d) Lord Justice Jackson's Review of Civil Litigation Costs which recommended banning referral fees.

15. The only support for the current arrangements came from those who currently have a direct financial interest in the present system – those to whom the fees are paid. From whence are likely to come more objective and unbiased opinions?

16. The Bar Council whole-heartedly agrees that the consumer voice should not be lost amongst the competing claims within the legal services market, however we note that there is little sign of the consumer voice in the paper.

17. The discussion paper states in its conclusions on the operation of referral fees in personal injury and conveyancing that "seeking to ban a particular type of transaction is at the most interventionist end of the powers of a regulator…..we have identified areas such as disclosure and its interaction with consumer choice that are not currently ensuring sufficient consumer protection. However, weighed against this, 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."

18. Whilst the Bar Council agrees that banning something is at the most interventionist end of the powers of a regulator we also believe that the analysis of the operation of the present system does not appear to have been undertaken from a neutral standpoint, but rather from one which seeks to justify and excuse the many and varied problems that exist with the payment of referral fees.

19. The paper identifies:

(a) Concerns that the independence of lawyers is being compromised;

(b) Concerns over independence;

(c) Concerns over delivering the highest quality service to the client; and

(d) Complaints over pressures on consumers in favour of the law firm which has the relationship with the referrer.

20. Against this the only significant benefit identified is said to be 'widening access to justice - particularly in the personal injury arena'.[1] There is also a suggestion that fees paid by consumers were lower in transactions involving an element of referral.

21. Perhaps the most striking claim is that "justified claims are being made that would not otherwise have been pursued – contributing to the widening of access to justice."

22. The paper relies heavily for its conclusions on the Legal Services Consumer Panel report of May 2010. The Bar Council wrote to the LSB in June 2010 outlining our concerns over that report.

23. In summary we pointed out that:

(a) The investigation was not supported by much evidence.

[1] Executive Summary paragraph 1.10.

(b) No Personal Injury (PI) barristers were interviewed. No 'deeper digging' was, for example, undertaken to see if early settlements in PI cases really do happen. In fact, the review indicated that referral payments for PI claims have reached £800. To put this in context, under Part 45.9, the base fee for a claim falling within the predictive costs regime is £800 and the maximum percentage on top of that (subject to special cases) is £1,750 + VAT. The minimum would be £200. These are profit costs. They are fixed and they have not gone up since the predictive regime was introduced. It is not seriously realistic to suggest that the cases can be run for £200 profit cost or even £600, or that the percentage of the rare £10k case would cover the losses on the lower value cases. Accordingly, it is unrealistic to expect these cases to be run to a satisfactory standard if they do not settle well in advance of trial. In other words, there appeared to be substantial pressures on claimants' lawyers to settle for less than they might reasonably expect for their clients if the matter were pursued to trial. There is obviously a matching pressure on the defendants' lawyers to settle likewise. What research was conducted to establish if that was the case?

(c) There was too great a reliance on saying that the number of consumer complaints in, for example, conveyancing was low. Equality and Human Rights Commission guidance cautions against assuming that an absence of complaints means that everything is alright; in fact it can be an indication that consumers are insufficiently empowered to complain or that complaints processes are inaccessible.

24. There is no critical analysis of whether referral fees do actually improve access to justice. Indeed paragraph 4.10 makes clear that the LSB has not properly examined this issue critically by its disparaging reference to "an undercurrent of hostility towards the so-called 'compensation culture'".

25. For example, the section in Chapter 5 dealing with the increase in claims for Road Traffic Accidents since the removal of the ban on referral fees by solicitors would appear to support the need for proper research into the phenomenon of the increase in the number of claimants rather than the rather glib assertion that this is evidence of an improvement in access to justice.

26. **Question 3**

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

Question 4

Do you have additional evidence about the operation of referral fees or fee sharing arrangements that should be considered by the LSB?

Question 5

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

27. The Bar Council does not agree with the LSB's analysis of the operation of referral fees or fee sharing arrangements in criminal advocacy.

28. In its conclusions at Paragraph 6.10, the paper states;

> The Bar Standards Board has argued to us that there are real risks to defendants, the justice system and therefore the public interest from lawyer to lawyer referral. Were we to accept those risks in theory we would expect to be able to see evidence of consumer detriment in practice, where such practice is allowed. Conflict of interest arising from referring is argued to exist because the litigating solicitor chooses the advocate and the instructed advocate can sub-contract the work further. If this were to be the case, there would be a clear risk to quality. However, there is no evidence that lawyers are consistently putting financial interests ahead of their duties to their clients.

29. The Bar Council disagrees that there is no evidence that lawyers are putting financial interests ahead of their duties to clients; the only question is how consistently this is happening.

30. The LSB appears to be oblivious to the commercial pressure that prevents barristers from identifying solicitors' firms that instruct in-house advocates, not on their ability properly to represent their lay client, but because of financial incentives. However, the Joint Advocacy Group Consultation Paper on Quality Assurance for Advocates did not shy away from this question.

> The changing face of the legal landscape coupled with competition and commercial imperatives are putting pressure on the sustained provision of good quality advocacy. The economic climate, both generally and in terms of legal aid funds, has created a concern that advocates may accept instructions outside their competence. It is arguable that the funding mechanisms adopted by the Legal Services Commission (LSC) and the rates of pay are failing to secure the quality of advocacy expected and a scheme of regulation of advocacy may bridge that market gap. The judiciary has responded to these matters through judicial pronouncements on advocacy competence and performance.
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> Regulatory intervention into the advocacy market has long been argued as unnecessary as market forces should eliminate the under-performing advocate. However, whilst market forces can generally be relied upon to identify the competent advocate, it is not necessarily the case that the less competent will not be instructed. In addition, it is increasingly uncommon for an advocate to be observed by the selecting professional. It has become apparent therefore that natural selection through market forces is not the answer to assure the quality of all advocates. The public interest and consumer protection requires a more proactive approach to assuring advocacy competence.
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> The comments of the judiciary and others, the fallibility of relying on market forces and the need for consumer confidence all lead to the need for systematic and consistent quality assurance of advocates.

31. The LSB should not require a clearer signal that it is increasingly common for employed advocates to be put into cases beyond their competence because of financial incentives for this to happen. It is particularly common for relatively junior and inexperienced Higher Court Advocates (HCAs) to be instructed as juniors in two counsel cases. It is within the common experience of our members to be asked to lead an HCA in a two counsel case where that HCA has no Crown Court trial experience at all, or very little.

32. The only possible justification for payment of referral fees – that they improve access to justice – does not exist in the field of criminal law. Any defendant by definition knows that they require a lawyer and need no encouragement by a third party to look for one. No one could seriously argue that a payment of a referral fee will enhance the lay client's chances of identifying the best lawyer.

33. The Bar Council's submission of February 2010 set out in detail both how and why referral fees were inimical to the interests of justice and fee-sharing in publicly-funded work was both unjust and, in our opinion, presently unlawful. A copy of that submission is attached. In summary the points made as to why referral fees are not in the interests of justice are as follows.

(a) The ban on the payment of referral fees by barristers exists for a very good

reason: it distorts of the market in which barrister and other advocates compete, in a way that is likely to have a negative impact upon the lay client. If a solicitor knows that he will be paid a referral fee by some counsel, but not by others who may be better suited to the case, the lay client will end up with counsel who has been selected on the basis of what is in the best financial interest of the solicitor, rather than on the basis of merit and the best interests of the client.

(b) Sections 1(1) and (3) of the Legal Services Act 2007, set out the regulatory objectives and the professional principles behind the Act. Payment of referral fees do not enhance the statutory objectives but undermine them.

(c) Those who are not experienced or sophisticated consumers of legal services (generally those most vulnerable to exploitation) are most likely to act upon a recommendation without the facility to question its merits. One impact of the payment of referral fees therefore, whether directly or indirectly, is to reduce the range of legal service providers to a section of consumers who, perhaps, require the most protection.

(d) The experience of the profession in the payment of referral fees has not been a happy one. A report by the Hampshire Law Society stated:

> A recent report from The Law Society Practice Standards Unit also clearly shows that by far the majority of firms paying referral fees are not complying with the Rules, with 39% committing significant breaches and 55% minor breaches. Only 6% of firms visited by the Unit fully complied with the Rules.

(e) In September 2007 the Chairman of the SRA commented:

> Our recent enforcement campaign has revealed some shocking examples of misconduct by some solicitors who have referral arrangements....The solicitors who breach the rules are a minority. However, the actions of this minority can have a significant impact on clients and public confidence in the profession. This is a serious issue for the SRA, which has a duty to regulate in the public interest. It is also a concern for the majority of the profession, who are following the rules.

The Bar Council's submission contained many more comments from the SRA on this issue.

(f) Lord Justice Jackson's *Report Civil Litigation Costs Review: Final Report* (21 December 2009) noted that the OFT was of the view that referral fees should not be banned and set out the justifications for them; they were:

(i) Referrers could develop a better understanding about the legal services on

offer and the service providers than the lay person and as a result they would be in a better position to identify high quality services providers for relative good value and to use their bargaining power in order to negotiate better services and better value.

(ii) Referral arrangements could enhance competition as solicitors would have to compete with each other in order to obtain referral work.
Solicitors who are involved in referral fee schemes also have an incentive to maintain a high standard of service so as to get repeat custom from referred clients as well as the referrer.

In fact Lord Justice Jackson rejected the OFT's arguments. He noted that the evidence which he had received pointed strongly to the opposite conclusion to that reached by the OFT. In very many cases, though not all, referrers simply refer cases to the highest bidder. That was "in no sense matching case to solicitor" or remedying flaws in the market. On occasions it led to "clients being sent to the wrong solicitors with potentially damaging results". However, as has already been pointed out, these justifications do not in any case apply to publicly-funded criminal defence work.

(g) From a purely ethical point of view, some might consider it offensive and wrong in principle for defendants facing criminal charges, especially extremely grave ones, to be treated as a commodity. Criminal cases should neither be 'auctioned off' nor bought in and then sold on at a profit.

(h) The submission reminded the Legal Services Consumer panel that in 2008 the Chairman of the Bar Council had submitted a 150-page dossier of evidence to the then Chair of the SRA and Director of the Bar Standards Board. Annex 2 of the dossier provided 37 examples of abuses compiled by the South Eastern Circuit from information supplied both by practitioners and the judiciary.

(i) On 10 June 2009, the then Chairman of the Bar Council, Desmond Browne QC, wrote to the SRA, LSC and LSB raising again the Bar Council's concern and providing three further specific examples of abuses. His letter stated:

"In February, the Appeal Court in Edinburgh gave judgment in *Alexander Woodside v. HM Advocate*. In the course of his judgment (para.73), Lord Gill emphasised the difficulty of a solicitor giving disinterested advice to his client concerning his choice of advocate:

> "It is 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. There may be an incentive for him not to advise the client of the option of instructing counsel, or a solicitor advocate, from outside his firm, in circumstances where either of those options might be in the client's best interests."

The difficulty is magnified where the decision is tainted by the solicitor's financial interest in the decision as to who to instruct.

...[P]ractices which limit the client's choice because work will be given to advocates only if they pay money to receive it and as a pre-condition in order for an advocate to be instructed at all [are] unacceptable.

...Payments made by the advocate to the instructing solicitor as a reward for the work create a conflict between the solicitor's duty to instruct an advocate in accordance with what the best interests of his client require and the solicitor's own financial interest in the choice of advocate. This offends rule 3.01 of the Solicitors' Code 2007. Such payments also put the instructing solicitor in breach of his duties under the Code:

- to act in the client's best interests – rule 1.04, (2);
- to act with integrity – rule 1.02; and
- not to act in a way that is likely to diminish the trust the public places in the solicitor or the profession – rule 1.06.

...There can be no doubt that referral payments, and the resulting breaches of LSC terms and solicitors' professional obligations, are happening on a widespread scale. The rise of these practices is matched by a marked decline in the use of the Bar, whose Code of Conduct prohibits the payment of referral fees. Solicitors who in the past sent large volumes of work to barristers – which can only have been because they recognised that the Bar's services were in the best interest of their clients – are now not doing so, but instead sending it to third parties. The quality of service available from the Bar has not changed. The only change has been in the rate of litigators' remuneration. It must follow that solicitors are acting in this way out of self- interest and not in their clients' interests.

...I have also recently received reports of disguised referral fees, whereby the solicitor conducting the case agrees with the advocate instructed to conduct the trial that the former will retain a disproportionate share of the advocacy fee for doing the PCMH. As you pointed out in your letter to Tim [Dutton QC] of 31 July 2008, there may be circumstances in which the sharing of the advocate's fee is appropriate. However, it is critical that the division of the fee must reflect the work undertaken by those who share it, and must not contain an element of reward for the instruction. A division of the fee that cannot be justified by reference to the amount of work undertaken must be presumed to contain an element of reward for the referral of the work.

> ...All involved in the administration of the criminal justice system recognize that there is a strong public interest in the continuance of an independent self-employed criminal Bar. But the criminal Bar cannot fairly compete with solicitors so long as the practice of paying unlawful referral fees continues. The unequal terms on which barristers and solicitors compete for work is now having the most serious repercussions for chambers up and down the country. It is no exaggeration to say that the survival of the criminal Bar is at stake.
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> My concern is not merely about the unequal terms upon which the two branches of the profession compete for advocacy work, real though that is. The paramount point is that the public interest requires a fair and transparent market in advocacy services, in which advocates obtain their work in the clients' best interest and solely on the grounds of their competence and suitability for the case. Improper payments threaten to undermine both the reality and the perception of the administration of justice in the Crown Courts. At the very least, they create a perception that financial advantage ranks above the quality of the service, when it comes to the choice of advocate. There is a very real danger that serious miscarriages of justice will result, unless vigorous action is now taken by those with responsibility for eradicating these abuses."

34. Those are all cogent and powerful arguments why referral fees – or fee-sharing, which is simply a disguised from of referral fee payment – should have no place in publicly-funded criminal litigation or advocacy.

35. The LSB notes with apparent equanimity "Instructing Advocates are in a position where they can use negotiations on fee sharing as the basis for the selection of the Substitute Advocate (SA). A solicitor's firm may appoint an external solicitor advocate in preference to an external barrister because solicitors are not constrained by the Bar Protocol. Alternatively, a solicitor's firm may choose an SA on the basis of the most preferential fee sharing arrangement - in effect the SA willing to do the work at the lowest price. The market level for fee sharing was identified as 80% of the fee given to the IA."[2]

36. What does this mean in practice? A solicitor's firm can send an employed advocate to the Plea and Case Management Hearing (PCMH). That person – or rather their firm – will then be paid the full advocate's fee for the case and sub-contract the work to the substitute advocate who will do the case for the lowest fee, the firm pocketing the surplus.

37. Leaving aside for the moment how that can possibly be in the best interest of the lay client, how that can possibly comply with the terms of sections 1(1) and (3) of the Legal Services Act, or even how that is a fair and ethical conduct – to extract money from a publicly paid fee without actually doing any work to justify it – it is also a

[2] Paragraph 6.4.

breach of an instructed advocate's obligations under Paragraph 20(10), Schedule 1 of the Funding Order 2007 and under section IV.41.8 of the Consolidated Criminal Practice Direction (2007) as well as a breach of the Legal Services Commission's "Unified Contract Standard Terms 2007".

38. The Bar Council has previously invited the LSB to make representations to the LSC to clarify the effect of the Unified Contract Standard Terms 2007 and the 2007 Funding Order so as to make it clear that both the payment and the receipt of any referral fee, and the practice of becoming "Instructed Advocate" in order to exploit the fund-holding position, are prohibited.

39. We are unaware that the LSB has done so, but we welcome the publication this month by the LSC of its document 'Sharing/Referral Fees - Important guidance for holders of LSC Crime Contracts December 2010'. This **for the first time** acknowledged that although the revised Advocates Graduated Fee Scheme was introduced three and a half years ago, in April 2007, the contracts, Funding Order and Practice Direction combined have the effect that **an Instructed Advocate is to be appointed on the basis that he/she is to conduct the trial. It is not appropriate to designate an Instructed Advocate where there is no intention for that advocate actually to undertake the trial.**

40. The guidance goes on to confirm the correctness of the Bar's position which we have made clear over the past 3 years; that the Funding Order defines the Instructed Advocate as "the first barrister or solicitor advocate instructed in the case, who has primary responsibility for the case" and sets out the limited circumstances in which the Instructed Advocate may withdraw (see Appendix (2(c)). If it becomes clear that the Instructed Advocate will be unable to conduct the trial then he or she is under a duty to inform the litigator promptly in order that a substitute advocate can be instructed as soon as possible."

41. The Guidance goes on to say:

> The Bar Council has indicated that they believe some litigator firms have been advised to seek a fee of £100 from the Instructed Advocate in cases where the litigator undertook the s51 hearing in the Magistrates Court. The Bar Council believes firms have been told, in error, that this payment reflects the fact that these hearings are governed by the AGF Scheme.
> The Bar Council are correct that such a position is erroneous and fees for s51 hearings, with the exception of a minority of cases where counsel is assigned, as outlined below, are included in the Litigator Graduated Fee Scheme.
>
> *Further investigation of this issue* [our emphasis] has indicated that some litigators, aware of the fact that the s51 hearing has been wrapped up within the LGFS, are actually

claiming a fee of £100 from advocates as a commercial payment for the introduction of work – this issue is covered under 'referral fees' below which, for the avoidance of doubt, are in breach of the LSC Standard Terms.

42. It is difficult to feel much confidence in the power of the regulatory bodies to regulate such behaviour when it is apparently not uncommon now, even though expressly prohibited. We are unaware of what sanctions have been taken against these litigators and seek clarification of that.

43. This illustrates that where commercial pressures are strong those who wish to will always strive to avoid regulation or prohibition by using methods expressly designed to avoid detection and/or regulations.

44. We submit that it would be wrong to argue from this experience that the correct solution is to allow such arrangements but to require that they be transparent. If such practices go on when they are prohibited one has to ask why? The answer can hardly be that the parties involved feel that it improves access to justice for their lay clients, or the quality of their representation.

45. The Discussion Paper refers at Paragraph 6.11 to "concerns that the Bar Protocol might be having effects similar to a price support mechanism. We will further consider its operation with the Bar Standards Board, Bar Council and other criminal advocacy stakeholders during this consultation period to ensure that any such scheme operates in a manner most likely to deliver the regulatory objectives."

46. The Bar Council is disappointed that this observation is made in the paper given that at both the roundtable events and in our June letter we sought to correct this misunderstanding.

47. To the extent that there is any "price fixing" with criminal advocacy it is only through the Statutory Instrument which sets prices for the various elements of advocacy; these prices are simply reflected in the Bar's Protocol.

48. Contrary to a claim in the Legal Services Consumer Panel Report, the Bar's Protocol is *not* mandatory, under the Code of Conduct. Members of the self-employed Bar can agree any fees. However, the Protocol is recommended as it seeks to distribute fairly the case fee on the basis of the prescribed fee levels between advocates in a case, particularly when a case might overrun and the 'case fee pot' dwindle. The Report makes an inappropriate comparison when it suggests that there should be no qualms about Substitute Advocates performing any less a service for, for example, 80% of the prescribed fee, when 80% of the prescribed fee could be payable through application of the Protocol; in fact more emphasis of the footnote of page 111 should be made which explains that such an outcome happens when the Protocol is applied

to reduce all fees payable in a non-standard case where, for example, a case has a greater number of Standard Appearances than anticipated by (and payable through) the Statutory Instrument.

49. In summary, the effect of the Bar Protocol is the exact opposite of the fee-sharing arrangement imposed by some solicitors in that it seeks to divide fairly the fee on the basis of the work done.

50. The Bar Protocol does not protect the Bar: it protects the rights of the client, of the public. We have a unique system in which every accused person has a right to ask for any barrister in England and Wales (undertaking criminal work) to represent him or her and any solicitor higher court advocate who would be prepared to take on the case. Each of those advocates submits themselves to a pricing regime that has been determined and fixed by the Legal Services Commission as being fair and proper remuneration.

51. The protocol (or something very like it) ought to apply to all (not just the Bar) and it ought to be enforced. Past experience of QAA (for example, the current 'grading' of advocates who prosecute) is insufficient protection against the abuses which currently prevail.

52. The reality is that most people accused of a crime are so vulnerable, time scales so short, and the opportunity to consider it so limited, that it is unrealistic they will challenge their solicitor's plan to farm out to a fee-sharing Higher Court Advocate (HCA). In other parts of the report reference is made to transparency and a requirement that clients be informed of their rights to "shop around". That is not the reality in crime.

53. It follows from the responses to previous questions that the Bar Council and CBA remain firmly committed to the view that the payment of referral fees is undesirable and unnecessary in the field of legal services. However, notwithstanding that view we wish to be constructive in our responses to the remainder of the Discussion paper

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

54. We note the Discussion Paper recognises the limitations of disclosure[3] and agree with the proposition that disclosure and transparency help to embed honesty and that transparency is important for the efficient operation of markets.

55. However it is important to note why compliance with any sort of disclosure rules has so far proved unsatisfactory:

[3] Paragraph 7.1.

> Poor compliance with disclosure rules is not surprising given the impact that revelation of the referral might have on consumer behaviour. Across the economy, businesses often comply with disclosure rules in a way that suits their purposes, rather than communicate the information in a format that facilitates the intended outcomes for consumers, for example by hiding key terms in small print.[4]

56. We also note that the LSB recognises that although "the aim should be for consumers to receive information at the point at which it can best aid their decision-making……Ideally, regulatory disclosure should occur when the consumer is first referred to the lawyer by the introducer",[5] the LSB has no power to make this happen. If disclosure occurs for the first time *after* the consumer has contacted and met the lawyer to whom they have been referred, the chances that they will cancel their arrangements with that lawyer and begin to shop around are greatly reduced. Indeed some might say that although disclosure at this stage satisfies the test of honesty, it is almost wholly useless in terms of encouraging the consumer to shop around. This illustrates the argument that if the one of the principal aims of a regulatory system is to improve consumer choice, disclosure in this fashion fails the consumer almost completely.

57. So the answer to the question is 'yes' but the practical benefits to the consumer are minimal or non-existent.

Question 7 Are there other options for disclosure that Approved Regulators should consider?

58. The LSB correctly states "the regulation of introducers is outside the remit of the LSB" and so they go on to conclude that "regulations should continue to require disclosure by the lawyer".[6] It should be possible for the Regulator to require the bodies whom it regulates *only* to enter into arrangements with referrers if those referrers agree to make full disclosure of the referral arrangement at the time of referral. In other words the regulated bodies are forbidden to agree to arrangements with referrers who do not conduct their business in that fashion. The LSB's objective is achieved by appropriate regulation of those bodies which is within its remit.

Questions 8 & 9 What are the issues relating to the disclosure of referral contracts by firms to Approved Regulators and their publication by Approved Regulators and how should these issues be addressed?

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[4] Consumer Panel Report paragraph 8.22.

[5] Paragraph 7.17.

[6] Paragraph 7.17.

59. The LSB cites potential cost and commercial confidentiality as two issues. We agree with the LSB that the potential costs are minimal and far out-weighed by the public interest in collecting and publishing referral agreements for the reasons given in the discussion paper.

60. As to the issue of commercial confidentiality, if the aim is the benefit of the consumer what benefit does the consumer gain from referrers being unable to establish the fees paid to their competitors and having the opportunity to undercut them?

Question 10 Will the proposals assist in improving compliance and enforcement of referral fee rules?

61. Paragraphs 8.1 to 8.17 of the Discussion Paper are headed 'Delivering active regulation' but they say little about how that is to be achieved. Indeed this section of the Discussion Paper says little more than compliance with and enforcement of regulations are essential if a regulatory body is doing its job properly and they should publish their results. This is described as 'an active approach' to the regulation but what does this actually mean?

62. However, paragraph 8.11 records the LSB's concern over the low level of compliance with the *current* SRA rules that are supposed to have regulated referral arrangements since they were first permitted in 1994. Although the paper refers to the Consumer Panel findings it does not quote them. We do so:

> Existing rules should provide for high levels of transparency as both introducers and solicitors must disclose when a referral arrangement takes place and the size of any referral fee… In 2007, up to two-thirds of firms inspected by the SRA were not compliant with its Rule 9. For example, 43.2% failed to disclose to clients its financial arrangements with its introducers, 58.9% failed to obtain an undertaking from its introducers that they will comply with SRA rules and 66.4% failed to give clients a statement that they could raise questions on all aspects of the transaction.

The Discussion Paper is completely silent on the key issues of :

(a) What the current regulatory regime of the SRA is;

(b) Why compliance is so poor; and

(c) Why the SRA has been completely ineffectual in enforcing its own regulations.

Instead it simply talks about the need for 'targets' for compliance.

63. Is the reason for non-compliance that the SRA has been ineffectual because its rules

are badly drafted, or because it has shown a desire to carry out its remit? Surely the answer to those questions must be no. Is the answer that the incentives to fail to comply, because of market forces, will always outweigh any incentive to act properly and in compliance with the rules? Or is it because there is no mechanism that can effectively expose widespread non-compliance?

64. It follows that in the absence of any data in the discussion paper or the Consumer Panel Report that bears upon these questions, it is not possible to answer Question 10.

Questions 11 & 12 What measures should be the subject of key performance indicators or targets? What metrics should be used to measure consumer confidence?

65. In the absence of specific proposals, we have not felt able to respond to these two questions.

21 December 2010