

Introduction of a ban on the payment of referral fees in personal injury cases – Equality Impact Assessment

Introduction

This Equality Impact Assessment (EIA) relates to amendments to the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill to introduce a ban on the payment and receipt of referral fees in personal injury cases. The proposals are to be tabled as amendments to the LASPO Bill at Commons Report Stage.

Equality duties

Under the Equality Act 2010 section 149, when exercising its functions, Ministers and the Department are under a legal duty to have ‘due regard’ to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
- Advance equality of opportunity between different groups (those who share a protected characteristic and those who do not); and
- Foster good relations between different groups.

Paying ‘due regard’ needs to be considered against the nine “protected characteristics” under the Equality Act – namely race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

MoJ has a legal duty to investigate how policy proposals are likely to impact on the protected characteristics and where a potential disadvantageous effect is identified how that is either mitigated or justified by reference to the objectives of the policy. MoJ records its fulfilment of its duties by completing an Equality Impact Assessment (EIA).

Summary

We have considered the impact of the proposals against the statutory obligations under the Equality Act 2010 in respect of potential claimants, those employed by or who own intermediary businesses who make referrals, and solicitors. These are outlined below.

Direct discrimination

The proposal to introduce a ban on the payment and receipt of referral fees in personal injury cases will apply to all referral agencies, solicitors and claimants irrespective of their protected characteristics. There is therefore no direct discrimination within the meaning of the 2010 Act.

Indirect discrimination

Because of the limited data on the protected characteristics of claimants who are typically the subject of such referral arrangements it is difficult to undertake any detailed analysis. However we have in this analysis identified how those claimants who are disabled might potentially be more likely to be affected by the banning of referral fees, although we expect this impact to be minimal.

In relation to the referral agencies we have identified the potential for differential effects in respect of age, race, and sex.

Discrimination arising from disability and duty to make reasonable adjustments

In so far as the proposal extends to disabled claimants, defendants, those employed by or who own intermediary businesses and solicitors, we believe that the policy is proportionate, having regard to its aim as stated below.

Harassment and victimisation

We do not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act as a result of these proposals.

Advancing equality of opportunity

We don't think these proposals impact on the duty to advance equality of opportunity.

Fostering good relations

We have considered this objective but do not think it is of particular relevance to the proposals.

Having paid due regard to the potential differential impacts identified in the 'analysis' section below, the government is satisfied that it is right to introduce a ban on the payment of referral fees in personal injury cases.

Aims and outcomes for the policy

Referral fees are paid by solicitors to intermediaries who 'refer' business to them. Claims management companies (CMCs) and insurers are the main recipients of referral fees from solicitors in return for gaining access to claimants. CMCs may undertake a range of actions, including advertising, sending text messages and cold calling to identify potential claimants and encourage them to make a claim. Some CMCs also offer financial inducements to people to make claims, where the claimant receives a reward prior to the case being settled. In addition to attracting potential claims some CMCs undertake vetting and sifting activities on behalf of solicitors to ensure that claims are meritorious. In cases where policy holders contact insurers to make a claim on their motor insurance policy, the insurer can check if there is a related personal injury claim and then refer them to a lawyer in return for a fee. In addition to insurers, other bodies which hold details of claimants, e.g. car hire companies, accident management companies and garages, also sell lawyers access to these claimants for a fee.

Concerns have been raised about the high costs of civil litigation in England and Wales. As a result, Lord Justice Jackson was appointed in late 2008 by the then Master of the Rolls to review the rules and principles governing the costs of civil litigation. Lord Justice Jackson's report contains 109 recommendations, including on the reform of no win no fee conditional fee agreements (CFAs). Lord Justice Jackson recommended that the payment of referral fees should be banned. The government's consultation paper on Lord Justice Jackson's recommendations

indicated that it would await the conclusions of the LSB's report¹ before reaching a conclusion on the way forward on referral fees. Having considered the LSB report, the work of the Transport Select Committee, and the impact on equality, the government has selected the option of banning referral fees, as outlined below. The main policy objectives are:

- **to reduce the overall level of legal costs in personal injury cases**, and related insurance costs. This may stem from the costs per case being lower and from there being fewer cases;
- **to discourage people from bringing unnecessary claims for compensation**, including unmeritorious lower value claims. The government is already implementing significant changes to CFAs (abolishing recoverability of success fees and after the event insurance premiums from the losing side), which should encourage claimants to consider whether they ought to be pursuing their case, and the ban on referral fees would complement and enhance these other reforms;
- **to prohibit the payment of referral fees for gaining access to personal injury claimants**. Lord Justice Jackson considered that such payments to intermediaries were wrong in principle. The government considers that it is not in the public interest for firms to receive direct payments for proactively seeking out people who have suffered a personal injury and encouraging them to make claims.

Methodology and evidence sources

The government does not have access to comprehensive data covering those employed by or who own intermediary businesses, law firms, CMCs and others. Further, the government does not hold information about claimants, and their characteristics, or those whose cases are considered to be without merit. Therefore, it is not possible to identify whether claimants in cases where a referral fee has been paid are more or less likely to possess one of the protected characteristics. Similarly, it is not possible to identify whether certain types of law firms, in terms of the characteristics of practitioners, are more or less likely to pay referral fees under the current regime or the effect that banning referrals will have on those working for or owning intermediary businesses or solicitors practices.

Although there is a lack of comprehensive statistical evidence on the payment of referral fees, which is inevitably held by private companies and individuals, we do have access to a range of qualitative evidence:

- Lord Justice Jackson's review of the costs of civil litigation;
- the Legal Services Board commissioned research by Charles Rivers Associates. The Charles Rivers Associates findings were based on interviews with the approved regulatory bodies and industry representative bodies and over 40 interviews with a cross section of different types of legal service providers, intermediaries and other stakeholders;

¹ LSB report by Charles Rivers Associates "Cost Benefit Analysis of policy options related to referral fees in legal services" May 2010.

- the Transport Select Committee also considered the issue of referral fees in their report 'The Cost of Motor Insurance';
- Moulton Hall Market Research prepared a report on 'Referral Arrangements and Legal Services' for the Law Society in June 2007. This was based on 34 face to face in depth interviews with law firms (see section 6 below for more details of their findings);

We have also reviewed the Claims Management Regulation annual report for 2009/10 which gives a demographic breakdown of claims management businesses. This is based on an Ethnicity and Diversity Survey completed by 1,609 firms.

Stakeholder consultation and engagement

Lord Justice Jackson carried out a year long review of the costs of civil litigation, and consulted extensively. During his review, the issue of referral fees came up in at least 5 meetings or seminars. He also received views on referral fees on the written submissions from the Claims Standards Council, Before The Event (BTE) insurers, Trade Unions, Personal Injury Bar Association (PIBA), Bar Council, several solicitors firms, Accident Compensation Solicitors Group, Association of Personal Injury Lawyers (APIL), the Law Society, Lloyd's Market Association and District Judges. PIBA had carried out a survey of its members; 255 favoured abolition of referral fees for personal injury cases, 39 opposed the abolition, and five favoured regulation or capping. Further detail on responses to Lord Justice Jackson can be found at pages 195 - 202 of his final report. Lord Justice Jackson recommended that referral fees should be banned in personal injury cases.

The government then consulted on implementing a package of reforms to civil litigation funding and costs. Whilst this consultation did not cover the recommendation to ban referral fees, some of the 625 respondents did raise the issue in their responses and were in favour of a ban. These came mainly from defendants, including insurers.

There were no references to equalities issues in relation to a ban on referral fees in any of the responses.

Following the introduction to Parliament of the Legal Aid, Sentencing and Punishment of Offenders Bill, a number of representative organisations have been calling on the government to ban referral fees, and have submitted their views. We know that the following organisations are supportive of a ban on referral fees.

Senior judiciary

Association of British Insurers (ABI)

Forum of Insurance Lawyers

NHS Litigation Authority

Law Society

Bar Council

Several Members of Parliament, including the Chair of the All Party Parliamentary Group on Insurance and Financial Services, and the Chair of the Justice Committee

The Ministry of Justice has also been assessing the impact of the introduction of Alternative Business Structures - this work is relevant to the ban on referral fees, as both policies will impact on the way the legal services market operates.

Analysis

This analysis examines the proposal to introduce a ban on the payment and receipt of referral fees in personal injury cases.

Impacts on potential claimants

If referral fees were to be banned, it is possible that some claimants may experience higher search and selection costs in future from having to shop around to find a lawyer instead of relying upon CMCs to do so on their behalf. Claimants who are less capable of selecting the right provider might make worse choices as a result of not drawing on the advice of an intermediary, who might have better knowledge of the providers in the market. The extent of this is unclear.

The Claims Standards Council, in their response to the Legal Services Board's consultation, argued that CMCs have a role to play in finding a suitable service for claimants with particular needs, and a ban on referral fees could hinder this. Some claimants may not pursue cases as a result of the ban on referral fees, for example, because they might be unaware that they can do so, or unaware of the chances of success and of the possible damages available, or are otherwise not persuaded to go through the process. In such cases claimants may lose out from not securing compensation payments. It is possible that banning referral fees may make it more difficult for vulnerable victims of negligence to access legal services, as CMCs will be less likely to seek them out. The extent of any reduction in case volumes is unknown, as is the size of compensation payments involved. However, any impact on claimants is likely to be small as there is nothing to stop law firms from advertising for business themselves, and for claimants to find a lawyer directly.

The Moulton Hall research suggests that clients whose cases are currently referred for a fee might possibly benefit from easier access to legal services under current arrangements but concluded that on balance referral fees were not beneficial to the general public. Claimants might also benefit from selecting their lawyer directly rather than going through an intermediary, who could sell the case on the basis of the highest referral fee. Some claimants might also gain from making a better selection, for example by choosing a higher quality solicitor who may be more suitable for their case or choosing a firm offering better value for money/lower legal costs. The view is supported by the Moulton Hall research which suggested that firms struggle to see what the advantages of referral fees are to clients, and that there may be disadvantages. The disadvantages were identified as a lack of freedom of choice of solicitor, a potentially poor quality of service, where the case is treated as a commodity, and the possibility that complex issues are not picked up or handled appropriately.

There may also be benefits to potential claimants, i.e. to members of the public, from reduced exposure to particular activities by some methods of introduction, such as cold calling and texting. The ABI states that banning referral fees will lead to a reduction in motor insurance premiums. This would benefit consumers generally.

The potential impacts on potential claimants with protected characteristics arising from the government's proposals to introduce a ban on the payment of referral fees in personal injury cases are described below.

Potential Age Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Disability Impacts

Given that these cases are concerned with personal injury claims, it is possible that disabled people may be over-represented amongst claimants compared to the general population due to cases where the claimant is disabled precisely because of the injury in question. Therefore there is the potential for a differential impact in relation to disability.

Banning referral fees may make it more difficult for disabled victims of negligence to access legal services, as CMCs will be less likely to seek them out and victims might be unaware that they can pursue a case, or unaware of the chances of success and of the possible damages available, or are otherwise not persuaded to go through the process. However, we consider that the potential impact is small since the types of cases involved in fee paying referral arrangements are typically relatively low-value claims, with a preponderance of claims at the lower end of road traffic accidents, and less likely to feature serious injuries of a disabling nature to victims.

The policy would ban referral fees and the current methods that claimants use to access information about making claims would not change. For example, we expect charities and lawyers to continue to provide information about making claims. Therefore we do not expect the policy to impact on meritorious cases.

In addition, as noted above, if claimants are more able to choose their lawyer directly, they may be more likely to find a local or specialised service which can be tailored to their needs. This could have a positive impact for claimants with a disability.

Potential Gender Reassignment Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Marriage and Civil Partnership Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Pregnancy and Maternity Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Race Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Religion or Belief Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Sex Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Sexual Orientation Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Impact on defendants

Defendants in cases involving referral fees include businesses, insurances and individuals. These would gain from a lower volume of litigation, which is expected to include a reduction in unmeritorious cases, and associated reduction in compensation payments. Furthermore, where defendants have taken out insurance policies, or defendants are insurers themselves, this may result in lower insurance premiums in response to a lower volume of cases and/or a lower level of costs. Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Impact on those employed by or owning intermediary businesses and solicitor firms

We do not have detailed information on the individuals that would be affected through impacts on intermediary businesses and solicitors, such as their employees, or their owners. However, the impacts on businesses that are identified below are included for indicative purposes. There is some information set out under individual protected characteristics and this is outlined below.

The overall volume of personal injury litigation cases is expected to be lower as some claimants might no longer pursue some cases in future. This would generate a cost in terms of reduced business for lawyers and intermediaries, such as CMCs, who currently work on such cases. The volume of such cases is unknown, but these are expected to be low value cases. Lawyers and intermediaries might respond to this changing pattern of demand by focusing on other areas of business. The overall impact on suppliers is unknown, however at a minimum, adjustment costs would be incurred.

In relation to claims which continue to be made in future, lawyers may incur additional advertising and promotional costs associated with attracting claimants, and costs associated with dealing with and informing potential clients, instead of paying referral fees to intermediaries to attract claimants. However these costs may be lower than paying the current referral fees as there will be more direct control on such advertising. Any such changes in lawyers' costs might be reflected to some extent in their fees.

Lawyers might also be liable to meet (via licensing fees) any increase in regulatory costs associated with banning referral fees

Intermediaries, such as CMCs, would no longer be remunerated for providing access to claimants in personal injury cases. This is expected to lead to a reduction in the level of their business, with more claimants dealing directly with lawyers in future. The impact would depend upon their reliance on referral fee income for personal injury cases.

As for lawyers, CMCs might respond to this by focussing on other areas of business, or by changing their business models. The nature and extent of these other possible areas of business is unknown. Some indicative findings from the LSB suggest that some of the larger firms in the claims management industry see their primary role as marketing, and the ABI report identified that the two advertisers within the UK personal injury market were CMCs. Therefore advertising may be an attractive area for CMCs in which to develop their business. At a minimum, adjustment costs would be incurred.

CMCs might also be liable to meet (via licensing fees) any increase in regulatory costs associated with banning referral fees. If CMC regulatory costs are fixed to some extent and CMCs withdraw from the market the regulatory costs per remaining CMC may rise. The timing of the implementation of a ban would be an important factor in determining the impact of CMC regulatory costs.

Lawyers would benefit from no longer paying referral fees. There is anecdotal evidence that currently referral fees may range between £250 to £800 per case, but can be higher². Lawyers may also benefit from getting more direct control of screening and vetting potential clients rather than relying on intermediaries to do this. The Law Society considers that this would benefit the legal profession. This may also remove duplication of vetting and related costs in relation to cases that, in the past, would have been referred by intermediaries to successive lawyers. The Moulton Hall report considers that, in the personal injury sector, lawyers would benefit from competing on reputation rather than on the ability to pay referral fees.

Insurers as intermediaries may lose out from reduced referral fee income. However, they would gain from the reduced volume of claims as defendants, and also from the reduced legal costs which losing defendants such as insurers have to meet.

The potential impacts on those employed by, or owning, intermediary businesses and solicitor firms with protected characteristics arising from the government's proposals to introduce a ban on the payment of referral fees in personal injury cases are described below.

Potential Age Impacts

Based on the Ethnicity and Diversity Survey 2009 carried out by the Regulator, the largest impact on CMCs in absolute terms is expected to be from those operating claims management businesses who were aged 25-34 years old (33 per cent). This compares to 13 per cent of the general population.

Therefore there is the potential for a differential impact on CMCs in relation to age.

Potential Disability Impacts

Based on the Ethnicity and Diversity Survey 2009 carried out by the Regulator, the largest impact on CMCs in absolute terms is expected to be from those who did not employ staff with a disability, as one per cent of CMCs in the survey confirmed 'that the business employed staff with a disability that would affect how they interact with us'. This has to be treated with care but indicates that the impact is bigger on non-disabled people.

² Moulton Hall Report, June 2007 - Referral Arrangements and Legal Services Research Report prepared for the Law Society

Potential Gender Reassignment Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Marriage and Civil Partnership Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Pregnancy and Maternity Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Race Impacts

Based on the Ethnicity and Diversity Survey 2009 carried out by the Regulator, the largest impact on CMCs in absolute terms is expected to be from those operating claims management businesses who were White-British (51 per cent of the total responding to the survey). This compares to 83 per cent of the general population. We also know that at least 38.5 per cent of authorised businesses who responded were Asian operated, compared to 6 per cent of the general population.

Therefore there is the potential for a differential impact on CMCs in relation to race.

For law firms, the available evidence suggests that there is a concentration of Black, Asian and Minority Ethnic (BAME) practitioners in small law firms. There could therefore be a potential disproportionate impact on BAME practitioners, if the ban on referral fees impacted on small firms more than larger firms. However, interview evidence from Charles Rivers Associates suggests that large solicitor firms, conducting large volumes of work are more likely to pay referral fees than small firms. This is backed up by the Moulton Hall paper, which found that those firms which pay referral fees conduct more cases and have a higher turnover than those which didn't.

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact on practitioners in law firms.

Potential Religion or Belief Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Potential Sex Impacts

Based on the Ethnicity and Diversity Survey 2009 carried out by the Regulator, the largest impact on CMCs in absolute terms is expected to be on males (84 per cent). This compares to 49 per cent of the general population.

Therefore there is the potential for a differential impact on CMCs in relation to sex.

Potential Sexual Orientation Impacts

Due to limitations in the available evidence we are unable to rule out the potential for any differential impact.

Mitigation and Justification

The evidence suggests that there is the potential for a differential impact in relation to disabled people who are potential claimants. We consider that any impact would be small as the ban on referral fees is intended to prevent unmeritorious cases.

We believe that those with meritorious claims including disabled people will continue to be able to bring cases forward as they will still be able to seek legal advice through intermediaries or directly from lawyers. We do not expect impacts to be significant on such groups as the policy is most likely to affect lower value or unmeritorious cases.

The evidence suggests that there is the potential for a differential impact in relation to age, race and sex in relation to suppliers. We consider the impacts to be justified as a proportionate means of reducing unnecessary litigation.

Monitoring

The prohibition is to be tabled as an amendment to the Legal Aid, Sentencing and Punishment of Offenders Bill at Report in October 2011. Royal Assent is expected in spring 2012, with implementation to follow at a later date. It is envisaged that the MoJ would conduct an impact evaluation of referral fees with the other Jackson proposals after three to five years of implementation.