

<p>Title: Application for Lord Chancellor to make regulations under S59 (1) & (2) Legal Aid, Sentencing and Punishment of Offenders Act 2012 to include Chartered Institute of Legal Executives</p> <p>IA No: MoJ036/2014</p> <p>Lead department or agency: Ministry of Justice</p> <p>Other departments or agencies: Chartered Institute of Legal Executives, ILEX Professional Standards Ltd</p>	Impact Assessment (IA)			
	Date: 07/10/2014			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary Legislation			
Contact for enquiries: Admin.justice@justice.gsi.gov.uk				

Summary: Intervention and Options	RPC Opinion: Not applicable
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
NQ	NQ	NQ	No	Zero net cost

What is the problem under consideration? Why is government intervention necessary?

The concern highlighted by Lord Justice Jackson in his *Review of Civil Litigation Costs* is that referral fees in personal injury cases contribute to the high costs and volume of personal injury litigation. The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 introduced a ban on payment and receipt of referral fees in personal injury cases by "regulated persons". Forthcoming legislative changes will bring practitioners to whom the Chartered Institute of Legal Executives (CILEx) award rights to conduct litigation (CILEx Litigators) within the ambit of the referral fee ban. The issue under consideration is that, in order for the ban to be applied to them, regulations are required to be made under section 59 (1) of LASPO to add CILEx to the list of relevant regulators and to specify the group of practitioners whom it will regulate for this purpose.

What are the policy objectives and the intended effects?

The policy objective is to prohibit CILEx Litigators from accepting or paying referral fees for giving or gaining access to personal injury claimants. Banning referral fees will prevent overall legal costs in personal injury cases handled by CILEx Litigators (and therefore across the industry) from rising. The ban, through the reduction of associated advertising, should also reduce the volume of personal injury litigation handled by CILEx Litigators (and therefore across the industry) by discouraging people from bringing unnecessary claims for compensation, including unmeritorious claims.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The option considered in this impact assessment is outlined below:

Option 1: Extend the referral fee ban to cover CILEx Litigators. The Lord Chancellor will make regulations to include CILEx in the list of regulators for the referral fee ban and CILEx Litigators as the group of the regulated community who may carry out prescribed legal business, as provided for by s59(1) of the LASPO Act.

The Government is implementing option 1.

Will the policy be reviewed? It will not be reviewed.					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: NA		Non-traded: NA

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ Shailesh Vara _____ Date: 7 October 2014 _____

Summary: Analysis & Evidence

Policy Option 1

Description: Extend the referral fee ban to cover CILEx Litigators

FULL ECONOMIC ASSESSMENT

Price Base Year N/A	PV Base Year N/A	Time Period Years N/A	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: NQ
COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Cost (Present Value)
Low					
High					
Best Estimate	NQ		NQ		NQ
Description and scale of key monetised costs by 'main affected groups'					
The costs associated with this option cannot be monetised.					
Other key non-monetised costs by 'main affected groups'					
Intermediaries would not receive referral fee income. Intermediaries and CILEx Litigators would have reduced business due to the associated fall in case volumes. Claimants may pursue fewer personal injury cases and receive less compensation in aggregate. Regulatory bodies would incur increased regulatory costs of monitoring and enforcing the ban, these are likely to be passed on to regulated entities through licensing fees.					
BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)		Total Benefit (Present Value)
Low					
High					
Best Estimate	NQ		NQ		NQ
Description and scale of key monetised benefits by 'main affected groups'					
The benefits associated with this option cannot be monetised.					
Other key non-monetised benefits by 'main affected groups'					
CILEx Litigators would not have to pay referral fees. Insurers and other defendants would gain from reduced aggregate compensation paid and reduced overall legal costs. This may feed through into lower insurance premiums.					
Key assumptions/sensitivities/risks					Discount rate (%)
					NA
Based upon comparisons with a hypothetical base case where CILEX regulated firms would in future offer and receive referral fees in personal injury cases. Currently they are unable to do so. It is assumed that banning referral fees will lower the overall volume of personal injury cases. It has been assumed that referral fees paid may be recoverable indirectly from claimants or defendants (through legal fees and recoverable costs), and that ultimately referral fees increase the overall costs of litigation per case. It has been assumed that these impacts only arise in cases not subject to Fixed Recoverable Costs. It has been assumed that case outcomes will remain the same for cases that continue to proceed.					

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £:			In scope of OITO?	Measure qualifies as
Costs: £	Benefits: n/a	Net: £	No	Zero net cost

Evidence Base

1. Introduction

Background

- 1.1 CILEx is an approved regulator under the Legal Services Act 2007 (the Act). It is the professional and membership body for Chartered Legal Executives (Fellows of CILEx) and other grades of CILEx member.
- 1.2 The Act requires approved regulators to separate their professional and regulatory activity. CILEx has, in accordance with the Act, delegated its regulatory activity to ILEX Professional Standards Ltd.
- 1.3 The Act prescribes legal activities which are reserved or regulated. Reserved and regulated legal activities can only be undertaken by 'authorised persons'. The 6 reserved activities are the conduct of litigation, exercise of rights of audience, probate activity, conveyancing activity, administration of oaths and notarial activities.

Referral fee ban under LASPO

- 1.4 Prior to the introduction of the referral fee ban, referral fees were paid by solicitors to third parties who 'referred' business to them. Claims management companies (CMCs) and insurers were the main recipients of referral fees from solicitors in return for gaining access to claimants.
- 1.5 There were concerns that referral fees were contributing to the high costs of litigation and might be associated with an increased volume of less meritorious claims. Further, this may have been feeding through into higher overall insurance premiums.
- 1.6 The LASPO Act introduced a ban on payment and receipt of referral fees in personal injury cases by "regulated persons" (i.e. solicitors, barristers, CMCs and insurers). The ban was effective from 1 April 2013. Relevant provisions can be found in sections 56-60¹ of the LASPO Act.
- 1.7 The ban applies to legal services that relate to a claim or potential claim for damages for personal injury or death, or any other claim arising out of circumstances involving personal injury or death. The LASPO Act enables the Lord Chancellor to make regulations to extend the ban to other types of claim and legal services if the case is made for such an extension: and to specify additional regulators and regulated persons for the purposes of the ban, also by making regulations.²

Extension of CILEx's regulation of reserved legal activities

- 1.8 CILEx is already designated as an approved regulator under the Legal Services Act 2007 (LSA) for the reserved legal activities of the exercise of a right of audience, the administration of oaths and the conduct of litigation. It is also a designated qualifying regulator under the LSA for immigration advice and immigration services. In 2013 CILEx applied to extend its practising rights by becoming an approved regulator for the reserved legal activities of reserved instrument activities and probate activities. The Order achieving this was laid before the summer and will come into effect later this autumn. In conjunction with this, the Legal Services Board will shortly be making a recommendation to the Lord Chancellor to approve another Order under section 69 of the LSA to give CILEx powers to make regulatory arrangements that enable it to regulate entities for the first time. These include powers to

¹ <http://www.legislation.gov.uk/ukpga/2012/10/part/2/enacted>

² <http://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/referral-fees-ia.pdf>

make rules to provide for a compensation fund and to intervene into entities. If the Lord Chancellor accepts, the section 69 Order is expected to be laid in October, for commencement by the end of the year. Following this, CILEx will make rules, and begin regulating entities.

1. 9 Once the LSA s69 Order is made, CILEx regulated practitioners authorised to conduct litigation (CILEx Litigators) will fall within the ambit of section 56 of LASPO which implements the referral fee ban. However, in order for the ban to be applied to them, regulations are required under section 59 (1) of LASPO to add CILEx to the list of relevant regulators and to specify the group of practitioners whom it will regulate for this purpose.
1. 10 In line with the LSA regulatory objective to protect and promote the public and consumer interest, IPS has therefore sought for such regulations to be made.

Problem under consideration

1. 11 Currently CILEx is not included within the list of regulators for the referral fee ban. This list can be found in section 59 of the LASPO Act.
1. 12 CILEx Litigators are not currently permitted to litigate in personal injury cases (except under the supervision of an authorised person to whom the referral fee ban already applies) and therefore are not currently in a position to pay or receive referral fees. Implementation of the LSA s69 Order will bring them within the ambit of the referral fee ban. Without the necessary regulations being made, however, the ban will not be applied to them and they would therefore be able to accept fees for referrals they make or pay fees for referrals made to them in respect of personal injury cases.
1. 13 The problem under consideration is that allowing CILEx Litigators to pay and accept referral fees could contribute to higher legal costs. Claimants are not always exposed to the costs that referral fees generate as these are recoverable from the losing defendant. A claimant might therefore have limited interest in the size of the referral fee attached to their case, and the losing defendant is unable to control such costs. This will only apply in cases where Fixed Recoverable Costs do not exist.

Policy objective and policy options

1. 14 The policy objective is to prohibit CILEx Litigators from accepting or paying referral fees for giving or gaining access to personal injury claimants. Banning referral fees will prevent overall legal costs in personal injury cases rising as the referral fee will not be included in the costs recoverable from the losing defendant. This applies only where fixed recoverable costs do not apply.
1. 15 A ban on referral fees, through the reduction of associated advertising, should also discourage people from bringing unnecessary claims for compensation, including unmeritorious claims.
1. 16 Extending the referral fee ban would create a level playing field across the personal injury profession and between the relevant regulators and regulated groups. If CILEx Litigators were not included with the referral fee ban, this may give them an unfair advantage within the personal injury market. Paying referral fees could distort consumer choice across different types of litigation practitioners, potentially leading to an increase in the volume of work that CILEx Litigators might undertake.

Option 1: Extend the referral fee ban to cover CILEx Litigators

1. 17 Under option 1, the Lord Chancellor will make regulations to extend the list of regulators whose members are required to comply with the referral fee ban, to include CILEx as a regulator and CILEx Litigators as the group of the regulated community who may carry out prescribed legal business, at s59(1) of the LASPO Act.

Economic rationale

1. 18 The economic rationale is that referral fees might be adding to the overall legal costs of resolving a case without making a material difference to case outcomes. If so then a reduction in legal costs associated with banning referral fees would generate an improvement in overall resource efficiency.

Main affected groups

1. 19 The proposals are likely to affect the following groups:
 - a. CILEx Litigators
 - b. Intermediaries
 - c. Claimants
 - d. Insurers
 - e. Defendants
 - f. Regulators
 - g. HMCTS

2. Costs and Benefits

2. 1 This IA identifies, where possible, the monetised and non-monetised costs and benefits for individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact might be on society from implementing these proposals.

Option 0 – Base case (do nothing)

Description

2. 2 Under the do nothing base case, the proposals highlighted in Option 1 would not be implemented. The do nothing is compared to itself and therefore the costs and benefits are necessarily zero, as is its Net Present Value (NPV).
2. 3 The Order bringing CILEx Litigators within the ambit of the referral fee ban has not yet been made. As they are not currently permitted to litigate in personal injury cases (except under the supervision of an authorised person to whom the referral fee ban already applies), they therefore are not currently in a position to pay or receive referral fees.
2. 4 This impact assessment uses a theoretical base case which considers a future market where CILEx Litigators are permitted to conduct personal injury litigation, but the referral fee ban has not been extended to them. In this base case, we assume that CILEx Litigators accept and pay referral fees for giving or gaining access to personal injury claimants. We consider that they may offer referral fees in cases not subject to the Fixed Recoverable Costs regime and that as a consequence this may generate higher recoverable costs in those cases.

Option 1: Extend the referral fee ban to cover CILEx Litigators

Description

2. 5 Under this option the ban on payment and receipt of referral fees in return for gaining access to personal injury cases would be extended to include CILEx Litigators.
2. 6 IPS has carried out research into likely demand from CILEx's qualified members for authorisation to practise litigation. It is estimated that, in year one of the scheme, the demand for litigation practice rights will result in between 160 and 650 applications. It is therefore assumed that this number of CILEx Litigators will be prohibited from the payment or receipt of referral fees.
2. 7 The extension of the referral fee ban to CILEx Litigators is expected to reduce the volume of litigation as it is anticipated that a dampener would be placed on activity which encourages more claims than would otherwise be the case. As a result of less litigation, it is assumed that the overall sum of damages paid to individuals would be lower, as would overall costs paid by defendants. These damages and legal costs may be paid by businesses or by other individuals (e.g. via insurance). CILEx Litigators would also save from not paying referral fees. The overall costs of litigation per case may therefore fall as a result of banning referral fees.

Assumptions and risks for Option 1

2. 8 It has been assumed that banning referral fees would reduce the overall volume of personal injury litigation cases.
2. 9 It has been assumed that referral fees paid may be recoverable indirectly from claimants or defendants (through legal fees and recoverable costs), and that ultimately referral fees increase the overall costs of litigation per case. This would only apply in cases where the Fixed Recoverable Costs regime does not apply.
2. 10 It has been assumed that case outcomes will remain the same for cases which continue to proceed.
2. 11 It has been assumed that CILEx Litigators will in future spend more on alternative arrangements for acquiring business such as advertising, but that doing so might generate savings for CILEx Litigators compared to the cost of paying referral fees.
2. 12 It has been assumed that more cases might be acquired through paying referral fees than by acquiring business directly through advertising, and that these additional cases might be weaker and less meritorious.
2. 13 It has been assumed that defendants are mainly insurers.

Costs of Option 1

Cost to CILEx Litigators

2. 14 The overall volume of personal injury litigation cases is expected to be lower as claimants might no longer pursue some cases in future. This would generate a cost in terms of reduced business for CILEx Litigators who could work on such cases in the future. CILEx Litigators could respond to the change in pattern of demand by focussing on different areas.
2. 15 CILEx Litigators may also incur additional advertising costs associated with attracting claimants, instead of paying referral fees to intermediaries to attract claimants. We assume that these other advertising costs would be lower than offering referral fees.
2. 16 Providers might also be liable to meet (via licensing fees) any increase in regulatory costs associated with banning referral fees (see below).

Costs to intermediaries

2. 17 Intermediaries 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. The impact would depend upon their reliance on referral fee income from personal injury cases. As with providers, intermediaries could respond by focussing on other areas of their business.
2. 18 Intermediaries might also be liable to meet (via licensing fees) any increase in regulatory costs associated with banning referral fees (see below).

Costs to claimants

2. 19 Some claimants may experience higher search and selection costs in future from having to shop around to find a lawyer instead of relying upon an intermediary to do so.
2. 20 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.

Cost to regulators

2. 21 There may be costs to the regulators of CILEx Litigators and intermediary firms from monitoring that no referral payments are made, and taking enforcement action if necessary. Regulators include the Financial Conduct Authority for insurers, IPS for CILEx members and the Claim Management Regulator. Regulatory costs are usually covered by fee income from those subject to regulation; hence regulators themselves might incur no change in net costs.

Costs to HMCTS

2. 22 HMCTS may experience a reduced volume of cases, and associated reduced court fee income. However HMCTS operates a full cost recovery regime, under which any reduced court fee income would reflect reduced operating costs. The overall financial impact on HMCTS is, therefore, considered to be neutral.

Benefits of Option 1

Benefits to CILEx Litigators

2. 23 CILEx Litigators would benefit from not having to pay referral fees to intermediaries for access to personal injury claimants.

Benefits to advertisers

2. 24 CILEx Litigators might make greater use of advertisers and other promotional activities in future in order to attract claimants directly rather than going through intermediaries.

Benefits to claimants

2. 25 Claimants might benefit from selecting their lawyer directly rather than by going through an intermediary, who decides to whom they would sell the case on the basis of the highest referral fee, if this improves the exercise of their choice or if this provides them with more reassurance about the lawyer that is dealing with their case. Claimants might gain from making a better selection, for example by choosing a higher quality legal professional that may be more suitable for their case.
2. 26 There may be benefits to potential claimants, i.e. to members of the public, from reduced exposure to particular activities by some introducers, such as cold calling and texting.

Benefits to insurers

2. 27 Insurers, who are losing defendants, would benefit from the reduced costs to the extent that referral fees increase overall legal costs which are recoverable from the losing side.
2. 28 Insurers would also benefit from an overall reduction in the volume of personal injury cases, as they would no longer need to defend them, or pay out compensation in these cases. Any associated saving to insurers could be passed on to defendants via a reduction in insurance premium levels.

Benefits to HMCTS

2. 29 HMCTS may experience a reduced volume of cases, and associated reduced court fee income. However HMCTS operates a full cost recovery regime, under which any reduced court fee income would reflect reduced operating costs. The overall financial impact on HMCTS is, therefore, considered to be neutral.

Annex A- Small and Micro Business Assessment

For the purposes of this assessment, the parameter used to define small businesses is up to 49 full time employees, and for micro businesses up to 10 employees.

The policy objective is to prohibit CILEx Litigators from accepting or paying referral fees for giving or gaining access to personal injury claimants. Banning referral fees will prevent overall legal costs in personal injury cases rising as the referral fee will not be included in the costs recoverable from the losing defendant. This applies only where fixed recoverable costs do not apply.

For the purpose of the small and micro businesses assessment, the following exemptions were considered:

- Full exemption
- Partial exemption
- Extended transition period
- Temporary exemption
- Varying requirements by type and/or size of business
- Direct financial aid for smaller businesses
- Opt-in and voluntary solutions
- Specific information campaigns or user guides training and dedicated support for smaller businesses

If the proposals were not applied to micro businesses then it is unlikely that they would be applied at all. This is because partial application to part of the industry would not meet the policy objectives, and would also generate competition issues. Partial application might also lead to some businesses reconfiguring and becoming micro businesses in order to avoid the referral fee ban.