

# LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY

#### **Part 2: Litigation funding and costs**

##### **Referral fees**

##### ***Section 56: Rules against referral fees***

326. **Section 56** prohibits the payment and receipt by “regulated persons” of referral fees in respect of claims for personal injury and death. In particular, section 56 makes provision to prevent the prohibition on the payment of referral fees in personal injury cases being avoided by presenting the referral fee as a payment for the referral of a connected claim (for example, in a road traffic accident, a credit hire claim or a claim for damage to other property), irrespective of when the referral of information relating to that connected claim occurs. “Regulated person” is defined in section 60 and includes claims management companies (“CMC”s), barristers and solicitors, as well as descriptions of authorised persons under the Financial Services and Markets Act 2000 (such as insurers) if specified in regulations by the Treasury. The prohibition extends to the receipt of a referral fee by a regulated person from a party who, although not a regulated person, provides services to the regulated person’s client in connection with their claim, for example a doctor who provides a medical report at the request of a solicitor and who pays the solicitor a fee for the referral. It also enables the Lord Chancellor to make regulations to extend the ban to other types of claim and legal services (defined in *subsection (6)*).
327. As regards the meaning of “referral”, the effect of *subsection (5)* is to treat a referral as the provision by a person other than the client of information that a regulated person authorised to provide legal services would need to make an offer to the client to provide legal services.
328. *Subsection (8)* provides that a referral fee can be any form of consideration (which could, depending on the circumstances, include, for example, an offer by a solicitor to take on other work at a reduced rate or for no payment at all), other than normal hospitality, whether paid to the referrer directly or to a third party.

##### ***Section 57: Effect of rules against referral fees***

329. **Section 57** requires relevant regulators to have arrangements in place to monitor and enforce the prohibition on the payment or receipt of referral fees. It also permits regulators to make rules and to use existing powers to enable them to monitor and enforce the prohibition. Under this section, some payments by or to a regulated person may be treated as a referral fee, unless the regulated person can show that the payment was for the provision of a particular service or another reason, and not for the referral – this might include, for example, the payment by a solicitor to a CMC for the obtaining

of a medical report prior to the referral of a claim. The Lord Chancellor may make regulations specifying the maximum amount that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

330. The provisions in section 57 referred to above do not apply where the Financial Services Authority (FSA), which is responsible for the regulation of insurers, and in respect of whom section 58 makes similar provision, is the relevant regulator. However, *subsection (5)*, which provides that a breach of the prohibition does not make a person guilty of an offence and does not give rise to a right of action for breach of statutory duty, and *subsection (6)*, which provides that a contract to make or pay for a referral or arrangement in breach of the prohibition is unenforceable, apply to all regulated persons.

### ***Section 58: Regulation by FSA***

331. **Section 58** enables the Treasury to make regulations which will enable the Financial Services Authority to monitor and enforce the prohibition on payment and receipt of referral fees in respect of those it regulates. As section 57 allows regulators to use existing powers to enforce the prohibition, so section 58 allows the Treasury to make regulations enabling the FSA to use existing provisions in the Financial Services and Markets Act 2000<sup>1</sup> for the same purpose. In addition, the regulations may make provisions similar to those under section 57 which require regulated persons to show that a particular payment is not a referral fee and to specify maximum amounts that can be paid for certain services, above which a regulated person will be required to show that the payment is not, or does not include, the payment of a referral fee.

### ***Section 59: Regulators and regulated persons***

332. **Section 59** lists both the “regulators” who are required to monitor and enforce the prohibition on the payment and receipt of referral fees in respect of personal injury claims (namely the FSA, the Claims Management Regulator (CMR), the General Council of the Bar and the Law Society or any other regulatory body specified in regulations by the Lord Chancellor) and the “regulated persons” who are subject to the prohibition (namely CMCs, barristers and solicitors, and insurers (see the note to section 58 above) and any person specified by the Lord Chancellor).
333. In addition, in respect of any other type of claim or the provision of legal services to which the prohibition might be extended by regulations under section 56(4)(c), section 59, *at subsection (2)*, lists those regulators who could be required to monitor and enforce the prohibition. Again the relevant regulators include both the FSA and the CMR, but *subsection (2)* also recognises that, in extending the prohibition, other providers of legal services, who are required to be regulated by other regulatory bodies, may be brought within the prohibition. The subsection has been drafted to ensure that all potential regulated persons and regulators, who are, in fact, identified in Part 3 of the Legal Services Act 2007<sup>2</sup>, can be made subject to the provisions in sections 56 and 57 should the need arise. Further, *subsection (2)* ensures that Alternative Business Structures (see Part 5 of that Act) can also be specified, by the Lord Chancellor, as regulated persons and be made subject to the prohibition as and when it becomes necessary to do so.

### ***Section 60: Referral fees: regulations***

334. **Section 60** provides that any regulations made under sections 56 to 59 will be made by statutory instrument, subject to the affirmative procedure.

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<sup>1</sup> 2000 c.8  
<sup>2</sup> 2007 c.29