



Personal Injury Claims Management Regulation
An Update from NewLaw Solicitors

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Introduction

This update follows our previous briefing document in relation to the Motor Insurance Regulation Bill (MIRB).

The referral fee ban is gathering momentum. As anticipated, it would seem that the provisions of the MIRB that are likely to be implemented shall be introduced via other legislation.

Despite widespread concerns that it would be difficult to come up with a definition that will work, the government has now set out its proposed amendments within the Legal Aid, Sentencing and Punishment of Offenders Bill.

The amendments also provide for stricter regulation of personal injury claims management services, the processing of personal data and third party capture activity.

Summary of Proposals

1. A regulated person who is paid for referring legal business to another person or who pays another person for a referral is in breach of the provision. Payment is not restricted to a money payment and covers any form of consideration.

Legal services are described as a claim or potential claim for personal injuries or death.

A breach of this provision does not give rise to a criminal offence.

2. There will be no entitlement to compensation for whiplash injury unless the speed of any vehicle involved in the collision exceeded 5 mph or medical evidence proves that the injured person was susceptible to neck or back injury.
3. An unsolicited telephone call or SMS text message for the purpose of inducing a claim for personal injury may lead to:
 - The telephone line used (and all other telephone lines used by the same business/individual) being disconnected for 12 months or longer.
 - The business or individual involved not being reconnected to an alternative telephone line for the same period.
 - Criminal sanctions.

4. Personal data cannot be processed without the **explicit** consent of the individual concerned where that person has suffered or may have suffered personal injuries.

An individual or data controller providing consent to obtaining, disclosing or selling personal data as above would be subject to **criminal sanctions**.

5. It shall be an **offence** for an insurance company to make an unsolicited approach to a third party making a claim for personal injury against its insured with an offer to settle the claim. The criminal sanction proposed for a breach of this provision is an unlimited fine.

If the third party solicits such an offer then the insurance company must first obtain adequate medical evidence and share this with the claimant prior to making any offer.

6. Claims management companies must provide a written statement to their customer advising: -
 - That they are not authorised to conduct proceedings;
 - that they shall sell the claim to an organisation that is so authorised; and
 - confirming the average payment per case that they have received during the last 12 months.

Failure to provide such a statement or include the correct information shall carry a criminal sanction.

Potential Consequences of the Bill

1. Referral Fee Ban

Our view of the definition of referral is that joint venture alternative business structures for the purpose of delivering legal services would not breach this provision.

The criminal sanction relating to referral has been removed and it is proposed that any breach would be regulatory. Regulation would be shared by the FSA, the Claims Management Regulator, the Solicitors Regulatory Authority and the Bar Council.

Whilst specific regulatory sanctions are yet to be defined, it would still seem more likely than not that direct income derived from the referral of personal injury claims shall cease, to be replaced by alternative commercial relationships between lawyers and the claims industry.

Perhaps the most significant development that arises is the extension of the ban beyond road traffic accidents. All claims for personal injury and death are now contemplated. This will affect employer's liability, public liability, clinical negligence and industrial disease claims.

It is worth noting that the definition does not currently encompass other commissions involving hire or repair.

2. Whiplash Claims

The initial provisions have been watered down significantly to the point of becoming almost irrelevant. Jack Straw had wanted the relevant speed threshold to be set at 15 miles per hour. The new 5 mph threshold is likely to allow the majority of claims to proceed in any event.

Jack Straw's other barrier to compensation (that there must be an accompanying bony or other diagnosable injury) has been removed and the new provision does little other than to re-state the existing common law principle of the egg shell skull rule.

Interestingly, as matters stand, despite whiplash being defined as an injury to the neck, if the claimant can demonstrate a susceptibility to injury to the **back** (only required if the collision occurred at less than 5 mph) then this would provide a legitimate route to compensation for 'whiplash' in any event.

It is difficult to see how this drafting would have any impact on the number of whiplash claims pursued. Arguably it works in favour of the claimant in that it has the potential to introduce a presumption in favour of whiplash where the speed of collision exceeded 5 mph.

3. Cold Calling

These provisions are extremely draconian and signal a move towards eradicating cold calling in any format. It should be noted that these sanctions apply to all personal injury claims and are not restricted to road traffic accidents.

All businesses involved in outbound activity would need to be extremely aware of the danger of falling foul of the description 'unsolicited'. This is a wide term and on the face of it might cover all outbound communication that is not requested by the person receiving the communication.

The full force of the proposed sanction could have the consequence of bringing an end to the future activity of the business or individual involved if they are found to have contravened this provision.

It would be extremely important for anybody involved with outbound activity to ensure that not only did the individual being called provide their explicit consent to their data being processed (to comply with the data protection requirements below) but also that they had requested or asked for a call to be made. It is unclear at this stage whether such a request might be implied from other surrounding circumstances.

The simple fact that the individual has been a customer previously or that the primary purpose of the call is for customer service may not necessarily mean that the call is necessarily solicited.

It would be extremely prudent to obtain guidance from the Information Commissioner in this regard prior to engaging in such activity if these provisions are implemented.

4. Data Protection/Third Party Capture

The provisions relating to personal data should be considered in the context of third party capture activity. It is suggested that personal data shall not be treated as processed lawfully for the purpose of the Data Protection Act where the data suggests that the individual concerned 'may have suffered' personal injuries.

On the face of it, it is difficult to see how an outbound call might be made to a third party for the purpose of capture without first processing their data. It is arguable that the third party in any road traffic accident 'may have' suffered personal injuries.

The further express provisions relating to third party capture may be an unwelcome and unintended consequence for the ABI. If the proposed amendments were to be passed they would see an end to 'pre-med' offers from insurers to unrepresented claimants.

This would prevent insurers from making the costs savings that are achieved by 'pre med' offers and may even lead to a higher number of previously unrepresented claimants instructing solicitors.

Observations

It must be kept in mind that these are proposed amendments at this stage and are subject to change. There have been two versions of the referral fee definition proposed to date, the first carried criminal sanctions.

We have set out the most recent proposals as these represent the coalition government's amendments moved by Kenneth Clarke and perhaps the more likely to be passed. It may be that the other criminal sanctions relating to data and cold calling are also transformed into regulatory offences in due course.

There is no reference at this stage to the proposed reduction in fixed legal fees relating to low value personal injury road traffic claims. However, we anticipate that this issue has not gone away but is likely to be dealt with outside of the Legal Aid, Sentencing and Punishment of Offenders Bill.

There are no draft provisions relating to postcode pricing of motor insurance premiums and it seems likely that Mr Straw has given up this issue in favour of pushing through some of the other proposals

There shall be further proposed amendments and other developments before the legislation is passed. However, the momentum does appear to be towards a referral fee ban and tighter regulation of claims management activity.

Whilst we are confident that there are legitimate alternative commercial propositions, timing is an important issue and all businesses involved in the compensation industry should now give consideration to their future strategy.

NewLaw Solicitors

NewLaw Solicitors is a fresh thinking legal practice. It is the trading style of NewLaw Legal Limited. The company trades within a corporate structure that delivers a modern, nimble approach to legal services that cannot always be achieved via more traditional Partnership models.

Founded in 2004, the firm has its roots firmly within the insurance industry. Chief Executive Helen Molyneux was Head of Insurance at Eversheds. Other senior managers including the Strategic Partnerships Director Philip Dicken are also insurance lawyers of many years experience.

NewLaw now employs over 270 people from its Head Office in Cardiff and is the 7th fastest growing company in Wales. With an almost infinitely scaleable infrastructure, NewLaw currently processes in excess of 20,000 personal injury claims each year.

The firm has a growing reputation for providing claimant personal injury legal services of the very highest quality on a business to business basis on behalf of its strategic partners.

We pride ourselves on our integrity, service delivery and innovative commercial proposals. We shall not compromise on any of these.

We understand that everything that we do reflects upon the brand of our business partners, hence our unwavering dedication to delivering legal services of the highest quality.

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