EXPLANATORY MEMORANDUM TO

THE REFERRAL FEES (REGULATORS AND REGULATED PERSONS) REGULATIONS 2014

2014 No. 3235

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) introduced a ban on payment and receipt of referral fees in personal injury cases by legal services providers (including solicitors, barristers and Claims Management Companies), with effect from 1 April 2013. These Regulations extend the ban to include appropriately qualified practitioners regulated by the Chartered Institute of Legal Executives (CILEx).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Government banned the payment and receipt of referral fees by specified legal services providers in personal injury cases through provisions in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Section 59(1) of the Act specifies both the regulators who are required to monitor and enforce the ban and the regulated persons who are subject to it, and also enables the Lord Chancellor, by regulations, to specify additional regulators and regulated persons to whom the relevant provisions of the 2012 Act will apply. The ban came into force on 1 April 2013. Currently, the relevant regulators are the Solicitors Regulation Authority, the Bar Standards Board, the Claims Management Regulator and the Financial Conduct Authority. These Regulations specify CILEx as a regulator and Chartered Legal Executives as regulated persons for the purposes of the ban.

4.2 CILEx is designated as an approved regulator for certain reserved legal activities including the exercise of rights of audience and the conduct of litigation.

4.3 The Legal Services Board (LSB) made a recommendation to the Lord Chancellor on 19 September 2014, for an Order to be made under section 69 of the Legal Services Act 2007 to modify the functions of CILEx. If this Order (the Chartered Institute of Legal Executives) (Modification Of Functions) Order 2014) is made it will enable CILEx to make rules to provide for a compensation fund and also give it powers, via an order of the

High Court, to intervene in the activities of a regulated entity. These arrangements will enable CILEx to regulate entities for the first time.

4.4 As a consequence, CILEx regulated practitioners authorised to conduct litigation (CILEx Litigators) will fall within the ambit of section 56 of LASPO which implements the ban on the payment and acceptance of referral fees in personal injury claims. However, 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 those practitioners whom it will regulate for this purpose. It is proposed that these Regulations will come into force on the same date as the Chartered Institute of Legal Executives (Modification of Functions) Order 2014.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State, Shailesh Vara MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Referral Fees (Regulators and Regulated Persons) Regulations 2014 are compatible with the Convention rights."

7. Policy background

- ***What is being done and why***

7.1 In the absence of these Regulations, CILEx practitioners would be able to accept and make referral fee payments. This would place them at an unfair advantage over other legal services providers who are banned from making or accepting referral fee payments for the same areas of work. The policy objective is therefore to prohibit CILEx practitioners from accepting or paying referral fees for giving or gaining access to personal injury claimants. Banning referral fees prevents overall legal costs in personal injury cases from rising. The ban, through the reduction of associated advertising, also reduces the volume of personal injury litigation by discouraging people from bringing unnecessary claims for compensation, including unmeritorious claims.

8. Consultation Outcome

8.1 There is no statutory requirement to consult on this amendment. However, the views of the regulatory bodies already included in the referral fee ban have been sought.

8.2 In relation to the referral fee ban as a whole, concerns were raised in the past 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. If this recommendation was not accepted he proposed that referral fees should be capped at £200 in personal injury cases.

8.3 Having considered the recommendations included in Lord Justice Jackson's Final Report, the Government published its consultation 'Proposals for Reform of Civil Litigation Funding and Costs in England and Wales' in November 2010. This consultation did not include Lord Justice Jackson's recommendations on referral fees as the Government wished to consider parallel research by the Legal Services Board (LSB) before confirming its position, and this research was not complete at the time. The Government published its response in March 2011 and is now implementing the key recommendations on the reform of CFAs. The Government consultation and response may be found at www.gov.uk/government/publications.

8.4 The Government's consultation paper on Lord Justice Jackson's recommendations indicated that it would await the conclusions of the LSB's report before reaching a conclusion on the way forward on referral fees. Having considered the LSB report, and the work of the Transport Select Committee, the Government selected the option of banning referral fees.

9. Guidance

9.1 CILEx has been provided with an opportunity to provide its views on the Instrument. It will also be providing guidance to its members.

10. Impact

10.1 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on www.legislation.gov.uk.

10.2 This extension of the ban of referral fees is expected to reduce further the volume of personal injury litigation as it is anticipated that a dampener will be placed on the activity of CMCs and other intermediaries which encourage more claims than would otherwise be the case. As a result of less litigation, the overall sum of damages paid to individuals is likely to reduce, as will overall costs paid by defendants. These damages and legal costs may be paid by businesses (including charities and voluntary bodies) or by other individuals (e.g. via insurance). CILEx Litigators will also save from not paying referral fees. The overall costs of litigation per case may therefore fall as a result of this extension of the referral fees ban.

10.3 The impact on the public sector is nil.

11. Regulating small business

11.1 The legislation applies to small business. These may be less able to absorb the impact of the change or to redirect resources to other areas. However, smaller legal providers may gain because of a better ability to compete on quality of service than on the amount of referral fees paid. Also smaller advertisers might gain by securing more business.

12. Monitoring & review

12.1 The ban on referral fees contained in LASPO will be reviewed as part of the wider post implementation review plan which the MoJ is committed to undertaking 3-5 years after implementation.

13. Contact

Karen Bibb, Civil Litigation, Funding and Costs Policy at the Ministry of Justice. Tel: 020 3334 3138 or email: civil.justice@justice.gsi.gov.uk can answer any queries regarding the instrument.