

The Draft Legislative Programme Consultation



**A response from the Association of Personal Injury
Lawyers (APIL)**

July 2008

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation, formed by claimant lawyers with a view to representing the interests of people injured through negligence. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the association are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Introduction

APIL welcomes the opportunity to respond to the draft legislative programme. This is a wide-ranging programme and, due to the specialised nature of the association, we will focus in this response only on those areas which fall within the expertise of our members, and will concentrate our responses on questions three and four.

Question 3

Which bills are most important to you – and why?

The issues of greatest concern to APIL members and the injured people they serve are the Coroners and Death Certification Bill and the Draft Civil Law Reform Bill

1. Coroners and Death Certification Bill

The association was involved in consultation during the reviews which led to this Bill and has always welcomed and supported this initiative. The current system under which coroners and inquests operate in England and Wales is inefficient and archaic and coroners have long been considered by many to be a law unto themselves.

Despite recommendations over the years which would have eradicated many anomalies in the system, there has never – until now – been the political will to bring coroners into a formal system, imposing on them all the checks and balances which apply to the established legal profession.

There is much in the Bill which we support, particularly the creation of the post of chief coroner, the move towards largely full-time coroner posts, the requirement for organisations to report on coroners' findings, and the requirement for the chief coroner to lay an annual report before Parliament.

We were also delighted to see the introduction, prior to this Bill, of the Coroners (Amendment) Rules 2008, a move which underlines the Government's commitment to these issues. The amended rule 43 places a statutory duty on organisations to respond to coroners' reports within 56 days, and to include action which should have been taken in order to prevent future deaths. Bereaved families and interested parties will also have access to reports to ensure they are aware of action being taken.

There are, however, aspects of the Bill which are still cause for concern and which do not best serve the needs of bereaved families. Our key concern is that no emphasis is laid, either in the Bill or in the draft charter for bereaved people, on the right to legal advice and representation.

At inquests, bereaved families often find themselves alone in the coroner's court, while other parties usually appear with legal representation. Bereaved people who do not have access to a lawyer are likely to be seriously disadvantaged in such circumstances and there is far less chance that the relatives will be satisfied with the outcome. This could jeopardise public confidence in the new system.

The funding of legal advice for bereaved relatives is a particular concern and we believe the power to award public funding for them should lie with the coroner, following application to the coroner from the bereaved. The experience of APIL members is that provision of so-called 'exceptional funding' is very limited and that many 'borderline' cases are denied funding which leaves bereaved relatives in an intolerable position. Any recommendations for funding from the coroner should be binding on the Legal Services Commission.

We are also concerned that the new coronial system will be resourced at a local level rather than funded centrally, which could lead to local authorities providing different levels of funding, leading to different standards of service. This will negate one of the key reasons for reforming the system in the first place by perpetuating fragmentation in the service. APIL contends that the new system must be funded centrally by the Ministry of Justice.

2. Draft Civil Law Reform Bill

The association welcomes the Government's intention to bring forward a Draft Civil Law Reform Bill. The Government's consultation *The Law on Damages* closed a year ago and we hope to see many of the proposals in the draft legislation.

We hope the focus of the draft Bill, insofar as it relates to damages, will be the principle of full and fair compensation for the claimant or bereaved families, and full retention of the current legal principle that the person who has caused injury through negligence should pay damages.

One issue on which we hope the Government will provide real leadership in this draft Bill relates to the Law Commission's proposals on increasing compensation for pain, suffering and loss of amenity. The Law Commission said in 1999 that for compensation awards over £3,000, there should be an increase of between 50 and 100 per cent. It also said that, if its recommendations were not implemented by the judiciary within three years, they should be implemented through legislation. The following year, in its decision in *Heil v Rankin*, the Court of Appeal failed to implement the minimum recommendation and remarked that Parliament was the forum for such a change. Yet the Government has said this is an issue for the courts, and did not address the issue in the consultation. This draft legislation is surely a golden opportunity for the Government to grasp the nettle and implement the Law Commission's recommendations on this matter in full.

But there was much in the Government's proposals in its consultation *The Law on Damages* which is to be welcomed and which we hope will be included in the draft Bill. We agree fundamentally, for example, that where there is a statutory duty on public bodies to provide care and accommodation services to the claimant, the defendant should pay for the costs of that care.

We agree with government proposals to extend the categories of those who can claim for financial losses following a wrongful death, as the current list is far too restrictive and unfair. Bereavement damages must also continue to be available. It is important not to lose sight of the fact that, where bereavement has occurred through the negligence of another party, the fact that a loved one has died needlessly can only increase the sense of pain and loss of the bereaved. This should be compensated for as much as possible by the wrongdoer, even though, obviously, no amount of money can take away the pain of losing a loved one. APIL also believes that the current amount of £11,800 is not enough. We would prefer for cases to be dealt with on their merits, as is the case in Scotland. At the very least, this figure should be updated on an annual basis.

We welcome the fact that the Government is to examine claims against insurers by people other than the insured person, which was the subject of a Law Commission report and draft Bill published in 2001.

This issue is of particular importance to people who contract so-called long-tail diseases from the workplace, due to the negligence of the employer. These are typically people suffering from asbestos-related diseases, such as the terminal cancer mesothelioma. Claiming damages for their injuries is a hugely time-consuming and complicated task, which is particularly difficult for terminally ill claimants who are obviously at their most vulnerable.

One of the difficulties is that companies can cease to exist in the intervening years between exposure and diagnosis, either because they have been struck off or because they have been dissolved. For a claimant to be able to claim compensation from a defunct company, the company must effectively be 'resurrected', which then makes the company's insurer liable to indemnify it. This procedure is cumbersome, slow and expensive.

Proposals to amend the Companies Act 2006 by the Department for Business Enterprise and Regulatory Reform (BERR) will assist to a degree, but the ideal solution to this problem is to give the claimant a right of action direct against the insurer. This would remove the need for claimants to go to the time and expense of resurrecting a dissolved company and would reflect the European Communities (Rights against Insurers) Regulations 2002 which allows claimants in road traffic accident cases to issue proceedings directly against the insurance company.

Question 4

Are there important issues which are not covered by the Draft Legislative Programme that you would like to see included? If so, what are they?

APIL believes the Health and Safety at Work Act 1974 should be amended to impose statutory health and safety duties on company directors, to ensure employees' health and safety is taken more seriously than company finances in the boardroom.

The current system relies on a voluntary approach, informed by recently updated guidance from the HSE, and reinforced by the threat of prosecution under the Health and Safety at Work Act 1974 (HSAW). This reinforcement, though, is of limited effectiveness as no director of a large or medium sized company has ever been convicted under section 37 of the HSAW. There are no statutory, positive duties upon individual directors to take a proactive approach to health and safety issues within their company.

Reliance on guidance can obviously lead to the standards of health and safety differing markedly from company to company. Creating positive duties on directors will ensure that health and safety standards are applied uniformly across all organisations. While guidance may be useful for more responsible employers, rogue bosses, who care more for profit than safety, will simply ignore it. We believe it cannot be right that some workers face increased risk because their management does not choose to follow, or simply ignore, the voluntary guidance.

We believe positive duties will motivate directors to take a more proactive approach to all aspects of health and safety within their company. Directors play a critical role in setting the ethos and standards of a company and if leadership is provided at a boardroom level then it will percolate throughout the entire organisation. 'Leadership by example' can only be good for a business and will boost staff morale and motivation.

APIL welcomed the Corporate Manslaughter and Corporate Homicide Act but was disappointed there was no provision for directors' health and safety duties within it. The new offence applies to companies only and secondary liability is specifically excluded. It may well encourage some companies to improve health and safety procedures but culpable individual directors would still be able to hide behind the 'corporate veil'. The Act does not, therefore, provide adequate incentive for directors to take full responsibility for health and safety issues.

The Work and Pensions Committee recently called for a review of the issue of statutory directors' health and safety duties in three years (which would give the voluntary guidance time to take effect). While a review is certainly welcome, three years is too long a period to rely on a combination of voluntary guidance and a weak Corporate Manslaughter Act to persuade directors to clean up their act.

In the year 2006-7, 241 people suffered fatal injuries at work, and APIL believes that only legislation to introduce positive health and safety duties for directors will improve accountability and ensure employee safety is taken with the utmost seriousness at boardroom level.

Concluding remarks

Between them, APIL's 5,000 members have a wealth of expertise and experience in issues which affect injured people and their bereaved relatives. We have long experience of co-operating with the Government, stakeholders and opinion-formers in a positive and constructive way to effect change on behalf of injured people, and we would welcome any opportunity to provide input and assistance, where appropriate, during the development of this legislative programme.