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Consultation on the architecture of change part 2: the SRA's new handbook – feedback and further consultation

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

APIL welcomes the opportunity to provide further written comment relating to the new SRA handbook. APIL has previously expressed several concerns regarding the move towards principles-based regulation, most notably that regulation of the legal profession should be based on clear rules with professional sanctions so that members of the profession instantly know what they can and cannot do. We remain of that view.

The main purpose of regulation of the legal profession is for the protection and benefit of clients. APIL is concerned to ensure that injured people when they become clients are fully protected by the regulatory regime, whoever is dealing with their personal injury claim. It is also important to consider that the injured person themselves will expect the organisation dealing with their claim to be fully regulated to equal standards and thus offering them equal protection.

We have grave concerns that the proposed regulatory regime will not adequately protect personal injury claimants for the reasons we set out below.

It is important to consider that a personal injury claimant will usually be a lay client and one-time user of the system. It is also important to consider the regulatory regime in the light of how the personal injury system currently operates and how it might operate in the future. Any regulatory regime must anticipate those changes to ensure adequate protection of all personal injury clients.

A key issue and area of concern for APIL is that of the definition of "reserved legal services".

At paragraph 34 of the consultation paper[1] it states that,

> *one major area for discussion that remains outstanding is the definition of reserved legal services*.

According to the glossary of terms in the Legal Services Act (LSA), reserved legal services is defined as,

> *at present, certain legal services (litigation, advocacy, conveyancing, probate, etc.) are reserved to solicitors, barristers and certain other persons under the Solicitors Act 1974 and/or the Courts and Legal Services Act 1990; once the LSB is up and running (probably about 2010), such activities, as well as work reserved to notaries and some work reserved to certain persons under the Immigration and Asylum Act 1999, will be re-defined under the Act, re-designated as reserved legal activities and reserved to various categories of authorised person.*

Reserved legal activities is then defined as,

> *specified in section 12 of the Act as the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.*

Conduct of litigation is defined within Schedule 2 of the Act as,

> *(a) the issuing of proceedings before any court in England and Wales,*
>
> *(b) the commencement, prosecution and defence of such proceedings, and*

[1] *The Architecture of change Part 2 – the new SRA Handbook – feedback and further consultation*, Solicitors Regulation Authority, Page 5 paragraph 34.

(c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions).

Paragraph 34 continues to state that,

> *Entities that provide legal services will only be able to be regulated as ABSs under the LSA if they undertake one or more reserved activities, as defined above. If they provide only unreserved legal activities, such as will-writing, legal advice and mediation services, they will be able to do so, as they can at present, on an unregulated basis and with no client protection in place.*

We further note that mediation services are stated to be an unregulated legal activity. Mediation is about the resolution of disputes. We can see how an organisation that wishes to deal with personal injury claims could do so on an unregulated basis by describing their service as mediation.

It is important to note that in only a small minority of personal injury cases are proceedings issued. Indeed, there is pressure from the courts and the operation of pre-action protocols to treat the issue of court proceedings as a "last resort".

As an organisation, APIL believes that the definitions above have the ability to create a loophole whereby individuals or organisations, such as claims management companies (CMCs) will be able to run personal injury cases all the way up to the issue of court proceedings whilst being completely unregulated. This leaves the injured person in a completely inadequate situation with no client protection.

It may be that under the current regulatory regime, unregulated individuals or organisations could deal with personal injury claims up to the point of issuing of proceedings. However, the current costs structure makes it difficult for any person or organisation doing so to get paid for undertaking such work. This is particularly so when most regulated firms, namely solicitors, are able to act for personal injury claimants whilst offering to ensure that they receive 100% of any compensation received. Furthermore, solicitors are able to do this whilst acting for a client under the terms of a Conditional Fee Agreement together with the benefit and protection of After the Event Insurance (ATE). Other clients may be members of trade unions, whose legal services also provide for full recovery of compensation for the client. Whilst not all personal injury clients will be aware of what all solicitors' firms offer, there is a general market expectation to obtain full recovery of damages for personal injury clients.

However, Lord Justice Jackson's report[2] recommended the extension of damages based agreements (DBAs) across the board of civil litigation (they are already permitted in relation to employment tribunal related cases) and this subject is currently being consulted on by the Ministry of Justice[3]. If DBAs are permitted in relation to personal injury claims, it may be open for anyone to act for an injured person on that basis. If they settle the claim without issuing proceedings, they would have settled the claim without carrying out a regulated activity, as per the definition above, and without protection for the consumer.

This would offer a clear commercial incentive on an unregulated organisation conducting personal injury claims to settle the claim before and without the issuing of proceedings. That pressure is likely to lead to claims conducted by unregulated organisations being under settled. But the injured people whose claims are undersettled would have no consumer protection because the organisation dealing with their claim would be unregulated.

Compare this with the current costs regime where it is difficult for any unregulated person or organisation conducting personal injury claims to get paid for undertaking such work. There would be no such difficulty if DBAs became commonplace within the personal injury market generally.

Furthermore, there are other recommendations of Lord Jackson, also currently being consulted upon by the Ministry of Justice, including the abolition of recoverability of success fees, and the abolition of the recoverability of the cost of ATE. If such proposals were implemented, it would no longer be possible for solicitors to offer, or for clients to expect to receive, 100% of their compensation.

Lord Jackson has proposed that referral fees be banned. Therefore, if this proposal were implemented, Claims Management Companies would not be able to receive referral fees. The combined effect of the above proposed changes would be to radically alter the personal injury system and not only allow, but encourage unregulated individuals and organisations, such as Claims Management Companies, to conduct personal injury claims themselves. The CMC would be free to decide upon the level of fee that is to be deducted as a percentage of the claimant's damages. As stated previously, the claimant is usually a one- time user of the system and is likely to

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[2] *Review of Civil Litigation Costs: Final Report*, Lord Justice Jackson, Published January 2010.
[3] *Proposals for reform of civil litigation funding and costs in England and Wales,* Ministry of Justice, Published November 2010.

be unaware that other more favourable funding options might be available to them. Those who are regulated have a professional and regulatory obligation to advise their clients about the available funding options. Those who are unregulated would have no such obligation.

The conduct of personal injury claims by unregulated organisations is likely to lead to unqualified, inexperienced and unsupervised staff dealing with such claims. We, at APIL, believe that this poses a very serious risk to injured people.

As stated in our previous response, APIL understands that from October 2011 the legal landscape will change and new organisations (alternative business structures (ABSs) and legal disciplinary practices (LDPs)) will come into being and we want to ensure that these new organisations are regulated to the same standard as traditional practices have been.

We also wish to ensure that all those who conduct personal injury claims are regulated to the same standard, to ensure adequate protection for injured people. In the absence of such regulation we can foresee that many injured people will have their claims dealt with poorly in a bid to settle the claim early and without the issuing of proceedings, as described above, for the purpose of profit.

Those who are regulated will be obliged to have suitable professional indemnity insurance in place. There will be no such protection for clients whose claims have been dealt with by an unregulated organisation.

APIL agrees with the SRA at paragraph 24 of the consultation paper[4] when it states that the SRA

> *continue to believe that it is both in the public interest generally and specifically in consumers' interests that we achieve a common standard of consumer protection.*

That statement of intent will fail to be delivered for personal injury clients if the current definitions of legal activity and reserved legal services remain unchanged.

APIL would suggest that these definitions currently leave a large hole through which commercial enterprises will be able to take advantage of injured people and

[4] *The Architecture of change Part 2 – the new SRA Handbook – feedback and further consultation*, Solicitors Regulation Authority, Page 4 paragraph 24.

recommend that the conduct of personal injury claims is a legal activity and should be defined as such in the definition within the Legal Services Act. Thus the conduct of personal injury claims will be a reserved legal service and, therefore, a regulated activity, offering the client the protection they necessitate.

We hope that our comments prove helpful to the committee and look forward to engaging with you further in the future.

Yours sincerely

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