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Consultation paper on enhancing consumer protection, reducing regulatory restrictions

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. 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. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has approximately 4,600 members in the UK and abroad who represent hundreds of thousands of injured people a year.

APIL agrees with the Legal Services Board's (LSB) comments in its consultation paper where it states that the current pattern of reserved and unreserved work is unsatisfactory¹, especially in terms of providing, or enhancing, protection of consumers in the legal marketplace. The structure of reserved activities that has been carried across, as a result of the Legal Services Act 2007 (the Act), has proven to be inadequate in respect of certain areas of law, and consumers have suffered as a result of this. For that reason, APIL proposes to the Legal Services Board that the conduct of personal injury claims in any way should be a reserved legal activity.

¹ *Enhancing consumer protection, reducing regulatory restrictions*, The Legal Services Board, September 2011, Page 8 Paragraph 4.

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. Will writing is an area of law that has recently suffered due to a lack of regulation; and it is the consumers that have suffered most as a result of this. We have grave concerns that personal injury activities will become another hugely criticised area of law for not adequately protecting personal injury claimants for the reasons we set out below.

If personal injury activities are to continue to remain as an unreserved activity then they will only become regulated when they are conducted by a person who is regulated in respect of their professional membership or once the conduct of litigation begins.

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

In light of the new legal landscape (see below), those who are not regulated in respect of their professional membership will be able to conduct personal injury claims up until the point of litigation, or the issuing of proceedings. The vast majority of personal injury claims settle prior to the conduct of litigation, 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”. This means that businesses such as claims management companies (CMCs) will be able to run personal injury claims, and settle them, which poses huge risks for the consumer.

It is important to remember that a personal injury claimant will usually be a lay client and one-time user of the system. Further, for the seriously injured, the successful outcome of their claim is vitally important to their future well-being and financial security. 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. At the present time, even though pre-issue conduct of personal injury claims is not a regulated activity, almost all claims are dealt with by firms of solicitors; and clients are protected by regulation of those firms.

There a number of changes about to take place that will have a very significant impact on the personal injury arena. The implementation of the Jackson reforms (expected in October 2012) will remove the currently almost universal standard (and market expectation) of clients receiving 100 per cent of their compensation. Those acting for personal injury claimants will be required to deduct up to 25 per cent of a client's compensation to cover legal costs. Damage Based Agreements (contingency fees) are to be permitted; again up to a limit of 25 per cent of the compensation. The government has announced its intention to abolish referral fees as part of the Legal Aid Sentencing and Punishment of Offenders Bill (LASPOB). Further, the coming in to being of Alternative Business Structures (ABSs), will make it less easy for injured people to identify precisely what sort of business (solicitors, ABS, or other) they are dealing with. There will be a much greater variety of provision of supply of such services.

The combined effect of these changes is to make it probable for businesses that currently do not conduct personal injury claims to do so in the future. For instance, a CMC, which currently refers cases it generates by marketing activity, will choose to conduct those cases, as it will be unable to refer them once a ban of referral fees is introduced. Unless they become a regulated ABS they could conduct personal injury claims without any regulation whatsoever, and their clients will therefore be unprotected. There will be commercial pressures on them to under settle cases as they will be unable to issue court proceedings, as this is a reserved legal activity. Indeed, if a business, which may have been a CMC, no longer refers cases, it may not even need to be regulated as a CMC. We further understand that the Claims Management Regulator (CMR) has decided not to insist on compulsory professional indemnity insurance for CMCs following their recent review of claims management regulation. Professional indemnity insurance offers consumers protection and the automatic right of redress from

the Legal Ombudsman where there might be a professional negligence claim against a solicitor.

Any business may set up and offer to resolve claims on a Damage Based Agreement basis. On the face of it, this may to the uninformed consumer be no different to what is being offered by a firm of solicitors or a fully regulated ABS. However, the level of consumer protection will be vastly different if the pre-issue conduct of personal claims remains an unreserved activity.

Clients deserve the protection and quality of service that regulation gives them over and above the professional indemnity insurance of those who are conducting their claims. For instance, regulation will ensure that actual or potential conflicts of interest are dealt with and that there are proper systems in place to ensure the proper conduct of their claim.

If personal injury activities continue to remain unreserved, CMCs and others are subject to a clear commercial incentive to settle claims prior to the conduct of litigation and possibly to the detriment to the injured person. The injured person would then have no consumer protection or form of redress should they become to suspect that their case was not dealt with as it should have been.

If personal injury activities were to become a reserved legal activity, then the running of these claims will be conducted by those qualified by professional membership. Personal injury activities are a professional service, which should be reserved for professionals that are regulated and that can offer consumers protection in the form of professional indemnity insurance, something which is not, and will not be, required of those who are unregulated.

APIL insists that these definitions within the Act currently leave a large hole through which commercial enterprises will be able to take advantage of injured people and recommend that the conduct of personal injury claims is a reserved legal activity and should be defined as such in the definition within the 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 need and deserve.

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

Yours sincerely

A handwritten signature in purple ink that reads "Katherine Elliott". The signature is written in a cursive, flowing style.

Katherine Elliott
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