

10 October 2014



Mr Mark McGuckin
Department of Justice
Access to Justice Directorate
Massey House
Stormont Estate, Belfast
BT4 3SX

Dear Mr McGuckin

Consultation on Draft Civil Legal Services (Appeal) Regulations (Northern Ireland)

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 membership comprises principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has around 4,000 members in the UK and abroad, representing hundreds of thousands of injured people a year.

APIL welcomes the opportunity to respond to this consultation, having previously responded to the Department of Justice consultation *Safeguards to protect the individual decisions on the granting of civil legal aid*, and having submitted both oral and written evidence on the Legal Aid and Coroners' Courts Bill. The future of civil legal aid for personal injury cases in Northern Ireland is currently uncertain, and although this particular issue is not covered by the Bill or the subsequent regulations, we would like to take this opportunity to support the continued availability of legal aid for those who have suffered personal injury. Legal aid is a lynchpin in ensuring that vulnerable people can obtain access to justice, guaranteeing a level playing field between the claimant and the well-resourced defendant insurance company.

Part 3: Constitution of appeal panels

Whilst we welcome the decision to have appeals heard by three people instead of one (as provided for by regulation 15), we are concerned that the safeguards included in Part 3 of the regulations are not robust enough. All three members of the appeals panel – not just the presiding member – should be legally trained and have proper knowledge and experience of the legal issues involved in legal aid.

Draft regulation 12 provides that the presiding member of the appeals panel must be a barrister or solicitor of not less than seven years' standing holding a current practising certificate. This is welcomed, but we have concerns regarding the method by which the other two members of the panel are to be selected. Regulation 16 provides that the Director (of Legal Aid Casework) shall have regard to the desirability of securing that the panel members between them have sufficient experience in or knowledge of the types of cases which are liable to be brought by way of appeals. We do not believe that this safeguard is sufficiently robust. Instead there should be an explicit requirement that all members of the panel should be legally trained, in addition to having sufficient experience in or knowledge of the types of cases which are liable to be brought by way of appeals. There are likely to be complex legal issues at stake when appeals are to be determined, and it is important that all three members understand those issues to come to the correct decision. This is especially important given that the Director of Legal Aid Casework – who decides in the first instance whether legal aid should be given – will not be legally qualified, instead only receiving “the necessary training to discharge the function effectively and...recourse to independent legal advice if, and when, required”. If the Director’s decision is appealed, it is essential that whoever reviews it is legally qualified and aware of the complex issues, so that if the Director has made an incorrect decision, this can be rectified. This is necessary to safeguard access to justice. Having one legally qualified member on a panel of three is not sufficient.

Unavailability of panel member

We are concerned with the possible implications of regulation 18(2), which states that where the presiding member selected for an appeal panel in accordance with this Part is not available; the Director shall select one of the other panel members to be the acting presiding member for that panel. In these circumstances, therefore, it would be possible that none of the members of the appeal panel would be legally trained and qualified. It is important that those making decisions on appeal should be aware of and fully understand the legal issues involved. This cannot be guaranteed unless the member is legally qualified. There should be a requirement that the acting presiding member is *as qualified as* the unavailable presiding member. There may be a risk, otherwise, of inconsistent decisions.

Disqualification for membership of an appeal panel – individual appeals

In the interests of ensuring that decisions on appeal are not affected by bias, we welcome that regulation 20 provides that a person shall be disqualified for membership of an appeal panel, in relation to its determination of any individual appeal if that person (or in the case of a solicitor, that person’s firm) has at any time advised or prepared a report in respect of the appellant; any other person who is (or is liable to be) a party to the relevant proceedings; or any other person who is liable to be called as a witness in those proceedings.

Oral hearings

We believe that the appeal system should be paper based, but there should be a filter in place to ensure that those appeals that require an oral hearing will get one. There should be a right to a hearing if the case is complex or borderline. Anecdotal evidence suggests that a hearing will be required in around 50 per cent of cases. We are pleased, therefore, that the threshold for an oral hearing – as set out in draft regulation 26 - has been reduced from “exceptional” to include cases which (according to regulation 26(3)(c)), “in terms of their complexity and expected duration, are distinct from other cases”.

There is a risk, however, that regulation 26(3)(c) will be interpreted too strictly, which will lead to cases being denied an oral hearing when they require one. It should be appreciated that around half of appeals will require an oral hearing to ensure that a proper decision can be reached, and there should be a flexible approach to allow such a hearing if necessary.

Decisions of appeal panels

We are pleased that regulation 28 will provide that every decision of an appeal panel shall be recorded by the presiding member, together with the reasons for that decision. This will ensure a more transparent process, leading to increased procedural fairness. The Director of Legal Aid Casework will be alerted to any diversity of approach or contradictory decisions. Cases with the same facts should be treated consistently, but at the moment this is not the case, and this leads to unnecessary uncertainty. Currently, the decision as to whether a case is granted legal aid very much depends on the panel that hears the case at the time, and as such there is not a consistent approach to decision making. Noting and keeping of a record of the decision will ensure that consistency is improved and fairness is achieved.

We hope that our comments prove useful to you. If you have any queries, please do not hesitate to contact us.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alice Warren', written in a cursive style.

Alice Warren

Legal Policy Officer

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