

Civil Legal Aid Scope Consultation  
Public Legal Services Division  
Department of Justice  
Massey House  
Stormont Estate  
Belfast  
BT4 3SX



22 January 2015

Dear Sirs

### **Scope of Civil Legal Aid**

The Association of Personal Injury Lawyers (APIL) was formed by plaintiff 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 of practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured plaintiffs. APIL currently has approximately 3,900 members in the UK and abroad who represent hundreds of thousands of injured people a year.

### **Removal of personal injury from the scope of civil legal aid**

APIL has responded to numerous consultations on legal aid in Northern Ireland over the past year. Our concerns about the removal of personal injury claims from the scope of legal aid are set out in our most recent response to the second Access to Justice review. This response has been appended for your information, and outlines our concerns about the removal of personal injury claims from the scope of civil legal aid. In short, legal aid plays a vital part in ensuring access to justice for victims of personal injury, and an equality of arms between the experienced defendant and the plaintiff who is most likely a one-time user of the system. Legal aid for personal injury claims achieves these aims at a fraction of the total legal aid budget. Successful cases take no money from the legal aid fund, because the losing side is responsible for the costs. Winning cases also allow recoupment of ambulance and treatment costs.

## **A lack of joined up thinking**

We would like to take this opportunity to voice our concern about the lack of joined up approach between the piecemeal implementation of the recommendations from the first review and the commencement of the second review of access to justice. With several overlapping consultations taking place either in tandem or within a very short time period of each other, it is difficult to be clear on which recommendations are being put forward, which ones are in place or will shortly be in place, and how all of the consultations fit together.

We question the illogical approach to this review and the second review of access to justice, and feel that it would have been better to complete the first review, and implement recommendations from that before proceeding to undertake any further review or reform. Our main concern is that the piecemeal approach to the reform of legal aid could lead to legal aid for personal injury claims being removed before a suitable alternative funding mechanism is put in place. This will mean that vulnerable injured people will not have access to the funds to allow them to take their claim to court, and will not receive the compensation that they require and deserve. For example, the current consultation, at paragraph 5.1 and 5.2, alludes to personal injury claims being removed from the scope of legal aid and being funded by alternative mechanisms. We do not yet know the outcome of the *Alternative Funding for Money Damages Claims* consultation. As a consequence, we do not know if or what kind of alternative funding for personal injury claims will be available, so are unable to comment on whether this would be a suitable replacement to ensure access to justice for the victims of personal injury who are unable to afford to fund their own case. There must be a joined up, clear and consistent approach to the reform of legal aid, to ensure that reductions in the budget are not implemented at the cost of access to justice. More care must be taken.

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

Yours faithfully

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

Alice Warren  
Legal Policy Officer

**Department of Justice for Northern Ireland  
Access to Justice Review (2) – Agenda setting document**



**A response by the Association of Personal Injury Lawyers  
November 2014**

## Appendix A

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,700 members, 84 of those in Northern Ireland, committed to supporting the association's aims and all of whom sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, Governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

Alice Warren, Legal Policy Officer

APIL

3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

Tel: 0115 9435428; Fax: 0115 958 0885

e-mail: [alice.warren@apil.org.uk](mailto:alice.warren@apil.org.uk)

## **Introduction**

APIL welcomes the opportunity to respond to the Department of Justice's agenda setting document on the second Access to Justice Review. We understand that the Department is looking to make significant reductions to the legal aid budget and are extremely disappointed that, as part of this, there appears to be a drive to take money damages cases outside of the scope of legal aid. Legal aid ensures that there is a level playing field between the claimant and the well-resourced defendant, and it helps to safeguard access to justice. At the same time, most legally aided money damages claims are successful, which results in very little money being taken out of the legal aid fund.

## **Executive Summary**

APIL believes that

- Money damages should be kept within the scope of legal aid. Legal aid is vital in providing access to justice to injured people in Northern Ireland; ensuring equality of arms between the claimant and well-resourced defendant, and providing a safety net for funding if the person is unable to pay for legal advice from their own pocket.
- Legal aid for money damages is "working" because most cases are successful, which results in little money being taken out of the legal aid fund. Legal aid also results in more successful cases on the whole, and more money being recouped back to the NHS etc, for ambulances and treatment.
- Cases involving children, particularly babies injured at birth or shortly after birth, asbestos related illnesses and catastrophic injuries should be awarded a higher priority in this review, to ensure that even if legal aid is removed for personal injury, it is still available in these circumstances. These cases, by their nature, are lengthy, complex and expensive to run. Without financial support, the vulnerable injured person or their families would be unable to access the court, and the compensation that they require and deserve.
- If, despite our concerns, personal injury is removed from the scope of legal aid, an alternative structure must be put in place before this occurs, to ensure that vulnerable claimants do not fall between the gap and receive no financial support in running their case. This alternative structure must continue to safeguard access to justice by ensuring a level playing field between the claimant and defendant.
- Conditional fee agreements, when coupled with insurance, would be the preferable replacement to legal aid, and would ensure access to justice for all.

### **Q1 Are there any comments on, or is there anything to add to, the high level case for access to justice, the human rights considerations and the criteria for assessing priorities set out in the previous paragraphs**

Legal aid is extremely important in helping injured people to access justice. Personal injury claimants fall under a number of the criteria in paragraph 3.10, to be taken into account when considering the priority to attach to each particular area of law. For example, there will be potential power imbalances between the injured individual and the defendant insurance company, and legal aid helps to address these. Further, someone who has suffered a catastrophic injury, and who now has a diminished quality of life as a result, should feature on the list in their own right, or at least come under the category of "vulnerable party in the

dispute". It is extremely important that the help is there to ensure that someone who has suffered injury as a result of someone else's negligence can be put back, as closely as possible, to the position they were in before the accident.

**Q21 If money damages cases in general are to be afforded a lower priority for inclusion within the scope of legal aid, do different considerations apply to the more serious cases where substantial special damages might be at issue or particular types of case which might not be so amenable to alternative funding models? If so, at what point, in terms of quantum or type of case, would those considerations apply?**

*Legal aid for personal injury claims should remain*

We do not believe that money damages cases should be afforded a lower priority for inclusion within the scope of legal aid. As mentioned in the consultation document itself at paragraph 6.1, legal aid for personal injury cases costs very little compared to other categories of case— there tends to be a 95 per cent success rate for these cases. If the case is successful, there is no claim on the legal aid fund as the losing side pays the costs. Providing legal aid for cases also ensures that money is recouped back to the hospital and other services that may have been involved with the treatment of the injured person.

*Legal aid is necessary to ensure proper access to justice*

An injured person wants to get their life back on track as quickly as possible, and should not be prohibited from doing so because they do not have the money to bring a case. Legal aid ensures that the injured person receives proper advice and is properly represented. It ensures equality of arms between the well-resourced defendant and claimant. Without financial support in place, the claimant would be forced to represent themselves as they would be unable to afford proper legal representation. Personal injury claims are far too complex to enable the claimant to represent themselves without the help of a legal professional. The inexperienced claimant would be unaware of how much their claim is worth and will be unaware of how to obtain proper medical evidence. This will lead to under valuing of the injuries and under-compensation for the victim. Delays in the process will be rife as judges have to take a more inquisitorial role to help the claimant.

*Higher priority cases*

As mentioned in answer to question one, all personal injury cases should be awarded higher priority as the injured person would fall under a number of the headings in paragraph 3.10. If most personal injury claims *are* removed from the scope of legal aid, however, we believe that asbestos disease cases, cases where there is a catastrophic and life-changing injury, and cases involving children, particularly where a baby has suffered injury at or around birth should be awarded high priority. These cases should remain within the scope of legal aid as they are complex, lengthy and expensive to run. The plaintiff must be properly supported financially to ensure that they have access to justice and receive the compensation that they desperately require to pay for things such as adapted accommodation and rehabilitation.

*Alternatives to legal aid*

If, despite our concerns, some or all personal injury cases are removed from the scope of legal aid, it is important that an alternative funding model is in place. The agenda document

identifies that there is deliberation underway regarding which alternative method should be adopted. This must be in place before legal aid is removed, to ensure that no one is left without the financial support that they require to bring a case.

We suggest that pre-Jackson Conditional Fee Agreements (CFAs) are a way to continue to ensure access to justice for all. When legal aid for personal injury cases was cut in England and Wales, the Government instead put in place a structure which allowed solicitors to take on cases which had a good prospect of success. CFAs coupled with After The Event (ATE) insurance (which protects plaintiffs from having to pay the defendants' costs if the plaintiff loses) and success fees (which allow the plaintiff solicitors to build up a fund to pay for those cases it took for plaintiffs which did not succeed), both of which were recoverable from the defendant, ensured that in England and Wales, access to justice was maintained. The system and accompanying regulations were not without fault but the majority of problems were resolved, and the system eventually worked well. The law in Northern Ireland would not permit such agreements at present and it would be necessary to reform this area of the law before the safety net of legal aid is removed.

It is important that success fees and ATE are regulated; and it is also important that there are a number of ATE providers in the market so that premia are competitive.

Other options, including contingency fee agreements, are far less preferable because the point of damages is to restore the person back to the position they were in before the accident. This is outlined by Lord Blackburn in *Livingstone v Rawyards Coal Co*<sup>1</sup>. Lord Blackburn stated that the compensation should be "that sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation". Damages are calculated on this exact basis, and if a sum is then deducted to pay for legal advice, this eats in to the compensation and leaves the claimant out of pocket. If contingency fees or similar are adopted, it is important to ensure that the claimant continues to receive full compensation for their injuries, to put them as closely as possible back to the position they were in before the accident.

### **Efficiency and structural issues relating to money damages**

#### **Q22 What benefits might accrue from further increases in county court and small claims jurisdictional limits in Northern Ireland, or from the creation of a single point of entry into the county court for all but the most complex cases?**

We support any reforms which will lead to early admission of liability by defendants and a fair predictable procedure for obtaining the appropriate level of damages for the injured person. As all county courts can already deal with any claim in tort, the suggestion that there should be a single point of entry into the county court would, hopefully, be simpler and far more efficient than the current model. Additionally, we believe that having a single point of entry into the county court will result in judges being ticketed to deal with cases in which they have the most experience and training. Therefore cases will be dealt with by specialists, which will hopefully lead to a more efficient process and fair, consistent outcomes. However,

---

<sup>1</sup> (1880) 5 App Cas 25, 39

the claimant must still have the right to have their claim heard in their local court. There must be local access to justice.

**What disadvantages might there be to such changes?**

We are firmly against any increase in the small claims limit. Personal injury claims are very ill-suited to the small claims process. Because the losing side does not pay costs in the small claims court, most people who take their case to the small claims court do so without the help of a legal professional. APIL has consistently argued that the small claims court is no place for the injured person. Up against a well-resourced defendant insurance company, experienced in how to conduct a claim, the personal litigant would be at risk of under-compensation. They would be unaware of complex legal issues such as causation, and will not be able to understand how much their claim is worth.

Personal litigants would also cause delays due to their inexperience of court procedures and the removal of a “professional buffer” between themselves and the court. Judges would have to take a more inquisitorial role, intervening more in the case, which would mean the case would take longer to resolve. In England and Wales, delays are already being reported following cuts to legal aid in family law as judges struggle to deal with the increased number of people representing themselves.

**What further improvements could be made to processes, especially at the pre-action stage that would facilitate timely resolution of money damages cases?**

We would support IT efficiencies to streamline the process and resolve disputes more quickly, as long as the client continues to obtain proper damages. Should proposals to bring in an electronic “Portal” be introduced, lessons could be learnt from the implementation of the Portal in England and Wales. There must be a proper pilot scheme and evidence gathering to ensure that the system is fit for purpose. Additionally, the process must not be overly bureaucratic, and thought must be given to who will pay for the cost of implementation and maintenance of any IT system.

Additionally, whilst there have already been some procedural improvements – for example, plaintiff solicitors are now able to serve their own notice of particulars, and defendants reply and provide some information (albeit often in very general terms), further procedural improvements should be made. Issues remain with defendants not providing the necessary documents to the plaintiff before the time limit, and also with defendants changing their defence on the morning of the hearing. Sanctions for non-compliance with the pre-action protocols should have “more teeth”, so that defendants are compelled to provide the necessary level of information within the time limits.

**Q28 Are there any views on the priority that should be attached to including any of the items listed above within the scope of legal aid in Northern Ireland? Taking account of the criteria at paragraphs 3.8 – 3.11 above, which should be regarded as part of the irreducible minimum category of legal aid provision and why?**

Taking account of the criteria at paragraphs 3.8 – 3.11, cases involving children, particularly where there were problems at birth or shortly after birth, and cases involving catastrophic injuries, should be regarded as part of the irreducible minimum category of legal aid provision. Cases involving birth injuries in particular are complex and lengthy, and without



the assistance of legal aid, the families seeking justice would be extremely unlikely to have the financial resources to ever take the case to court. They would be denied the access to compensation that they desperately deserve.

**Q32 Do older people or people with physical or mental disabilities have particular legal needs or issues over access to legal advice and information that are not currently being addressed adequately? Are there other categories of people who should receive particular consideration in this review?**

We believe that cases involving children should receive particular consideration in this review.

**Q34 Should the green form scheme be retained? If not, how might it be replaced by a mix of the mechanisms identified in paragraph 7.5 above? Are there matters listed in Table 5 where immediate direct access to a solicitor for advice and assistance, supported by legal aid, should be regarded as of high priority?**

We believe that the green form scheme is essential, and is the right and proportionate approach. The cost of providing the scheme in relation to money damages cases is minimal, and proper advice at an early stage can prevent litigation and further costs down the line. The green form scheme is a cost-effective way to ensure that there is a level playing field between the claimant and defendant, and that access to justice is retained.

**Q39 How could insurance play a greater role in supporting access to justice?**

We believe that insurance could play a greater role in supporting access to justice, but that currently there are no suitable insurance products on the market. There needs to be greater knowledge and access to legal expenses insurance in Northern Ireland, and the market should be competitive, to ensure that the cost of premia is kept down. As set out above in answer to question 21, After the Event insurance in tandem with Conditional Fee Agreements could be a workable alternative to legal aid which would provide access to justice for all.

**Q40 How can pro bono work be further supported and enhanced? What sources of funds can be accessed from the private, public and charitable sectors to support organisations of delivering free legal assistance and representation for vulnerable clients outside the legal aid system?**

Most solicitors already carry out pro bono work on a day to day basis, fielding calls from the local community seeking advice about disputes, wills, conveyancing or general legal advice.

**Q42 What strategic approach could be adopted if funding did not enable the provision of legally aided services as currently organised across high priority areas?**

We do not agree with the alternative strategic approach set out at paragraph 8.18. It is far too confusing, and unworkable, to provide a system where certain people will be eligible for legal aid for certain parts of the process, but not others. Those who are eligible would then have to organise alternative funding for the parts of the cases that they will not receive legal aid for – or have to pay for those parts themselves, which they will not be able to do. This in turn would cause delays in the process, whilst alternative funding is sought for those parts that legal aid would not cover.

If legal aid is removed for all or most money damages cases, it is preferable that it is removed for the whole process, and an alternative structure is put in place to help people fund their case. This alternative structure should be Conditional Fee Agreements coupled with ATE insurance and recoverable success fees.

**Q44 In what areas of Northern Ireland's justice system could efficiencies reduce costs, including the cost of legal aid, while sustaining quality of provision? What efficiencies could make significant improvements in terms of cost and service provision?**

There are a number of areas within the justice system where efficiencies could be introduced to reduce costs. We suggest that technology should play a large part in improving efficiency. Procedures that at the moment require in person attendance could be dealt with via email, for example solicitors are required to go to the court every Monday morning to review their cases and report on progress. This could all be done via email which would save time and money.

