

**The Law Society of Scotland**

**Legal Assistance in Scotland – Fit for the 21<sup>st</sup> Century**



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

**January 2015**

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 25year history of working to help injured people gain access to justice they need and deserve. We have around 3,800 members across the UK and abroad, committed to supporting the association's aims and all of which 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:

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## **Introduction**

Though no longer extensively used in personal injury cases at the litigation stage, legal aid remains for some claimants an essential public service, and should be retained. Legal aid helps to ensure access to justice by providing an equality of arms between the pursuer and defender, and it also represents good value for money. The Scottish Government acknowledges that eighty five per cent of legally aided personal injury cases are successful<sup>1</sup>, and when the case is successful, the defender must pay the other side's costs, resulting in no claim on the legal aid fund.

Whilst we are willing to provide our comments on the proposals outlined in the discussion document, we are conscious that the consultation, despite labelled as a Law Society of Scotland discussion paper, has been put together by the Legal Aid Committee of the Law Society – and the proposals therefore do not, at this stage, have the support of the Law Society as a whole.

APIL is committed to supporting improvements of the legal aid system in Scotland, and has an on-going dialogue with the Scottish Legal Aid Board (SLAB) to this end. Within the last two years, APIL has worked with SLAB on the introduction of the template increase scheme, a protocol for sanction for expert witnesses, and amendments to the legal aid handbook. We agree with the approach outlined in SLAB's 2013/2014 annual report, that there is scope for simplifying and reforming aspects of legal aid – but reforms must be done in the context of wider reforms of the justice system, and should not jeopardise access to justice for those that need it.

## **Lack of statistical evidence**

The proposals within the discussion paper are being put forward without any evidence of an impact assessment on the potentially affected parties. According to SLAB's annual report, there were 3837 grants of advice and assistance for personal injury claims in 2012/2013<sup>2</sup>. If the proposals within the discussion document were to go ahead, and advice and assistance was removed for personal injury claims, these 3837 people would be denied access to justice.

Further, there is no attempt within the consultation document to indicate the nature of any savings to be made by exclusion of personal injury from the legal aid scheme. We do have

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<sup>1</sup> Courts Reform (Scotland) Bill, Financial Memorandum, Paragraph 95

<sup>2</sup> [http://www.slab.org.uk/common/documents/Annual\\_Report\\_2012\\_13/Appendix\\_3\\_-\\_Civil\\_legal\\_assistance.pdf](http://www.slab.org.uk/common/documents/Annual_Report_2012_13/Appendix_3_-_Civil_legal_assistance.pdf)

to comment that this is a serious omission in a report which purports to re-arrange the legal aid budget. It is well known that civil legal aid for personal injury work is more or less self-financing, with an 85 per cent recovery rate from successful cases where judicial expenses have been recovered. In this 85 per cent of cases, no claim is made by the pursuer on the legal aid fund, as the defender pays the costs, and the providers of medical treatment can recoup their costs, too. Not only is legal aid in personal injury claims excellent value for money for the public, it is doubtful if its exclusion will lead to much in the way of savings.

### **Advice and Assistance**

Many of our members use the Advice and Assistance scheme for preliminary investigations of cases which would otherwise not be taken on. In many types of industrial disease case, involving for example deafness, vibration white finger or industrial asthma, a significant amount of preliminary work and initial medical investigation must be carried out, before the claim can begin. The costs involved in this initial investigation are beyond the means of the legally aided applicant, and these cases are unlikely to be taken on a speculative basis by the profession. The vague assurance within the consultation document that the advice network could accommodate these cases betrays a level of ignorance about the realities of this kind of work. There is neither the appetite nor the expertise within the advice sector to deal with these cases. Without the advice and assistance framework in place, those who require legal aid will likely be denied access to justice.

As above – there is no evidence put forward in the consultation document that there is a financial need to remove the provision of advice and assistance for personal injury claims. The number of applications for advice and assistance has actually been falling over the past few years. Between 2011/2012 and 2012/2013, the number of applications for advice and assistance for personal injury claims fell by 7 per cent<sup>3</sup>.

### **Courts Reform (Scotland) Act 2014**

Changes brought about by the Courts Reform (Scotland) Act 2014 are also predicted to save money for the Legal Aid Fund in the future. As a result of the Act, cases which were previously heard in the Court of Session will now be heard in the Sheriff Court, and the Government and the Board have provided various estimates of savings between £500,000 and £1.2m. While the provenance of these figures is uncertain, a combination of these

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<sup>3</sup> SLAB annual report 2012/13

[http://www.slab.org.uk/common/documents/Annual\\_Report\\_2012\\_13/Appendix\\_3\\_-\\_Civil\\_legal\\_assistance.pdf](http://www.slab.org.uk/common/documents/Annual_Report_2012_13/Appendix_3_-_Civil_legal_assistance.pdf)

savings, together with personal injury cases already being good value for money; and a continuing downward trend in the number of applications for civil legal assistance – it is clear that there is little to no financial justification for removing personal injury from the scope of legal aid.

### **Efficiency/streamlining**

#### ***Single continuing grant and single test of financial eligibility***

No one can be opposed to these ideas in principle. In practice, the current system whereby cases initially proceed under Advice and Assistance on a template increase works reasonably well. Practitioners are fully aware of the evidential requirements for a civil legal aid application. The Scottish Legal Aid Board handbook provides detailed and extensive guidance on this. Stage reporting requirements now ensure on-going scrutiny of legal aid cases. It is difficult to see in practical terms what real benefits the “harmonisation” proposed by the legal aid committee would provide.

### **Scope of civil legal assistance**

#### ***Removing personal injury claims from the scope of civil legal assistance***

We do not believe that personal injury claims should be removed from the scope of civil legal assistance. Legal aid provides access to justice to those who have insufficient resources to be able to obtain legal representation. In personal injury claims, legal aid ensures a level playing field between the pursuer – who will most likely be a one-time user of the system – and the well-resourced defender insurance company. There must be equality of arms between the parties to ensure a fair hearing, and those who cannot afford to fund a legal representative themselves should not be disadvantaged.

Access to a legal representative is vital to providing access to justice for all. Legal aid is one way to ensure that those with low means are able to access help and advice to obtain the remuneration they deserve, and to be put back, as closely as possible, to the position that they were in before the accident.

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