NORTHERN IRELAND COURT SERVICE CONSULTATION

DRAFT ACCESS TO JUSTICE (NORTHERN IRELAND) ORDER 2002

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

JULY 2002

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Introduction

1. The Association of Personal Injury Lawyers (APIL) was formed in 1990 by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has over 4800 members in the UK and abroad. Membership comprises barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL does not generate business on behalf of its members.

2. APIL currently has 106 members in Northern Ireland and due to the cross-jurisdictional nature of our organisation, members in Northern Ireland have had the opportunity to discuss the issues arising from the proposed draft Order with members based in England and Wales, who are already working with similar funding arrangements. Our response is limited to those issues arising in relation to the pursuit of personal injury claims and the ability of injured victims to achieve access to justice.

3. We should stress at the outset that APIL believes legal aid should continue to be available in personal injury cases. It is imperative that injured victims are able to achieve redress against those responsible for their injuries and obtain the compensation they need to meet, for example, care and medical expenses. We are surprised that despite strong opposition in Northern Ireland, the Government is continuing with the introduction of conditional fee agreements (CFAs). We are also concerned that the Government is attempting to transpose the funding system of England and Wales on Northern Ireland, when it has previously committed itself to "Northern Ireland solutions to Northern Ireland problems". If the Government is determined to introduce a system of CFAs in Northern Ireland and it is to be a viable system, it must be tailored to suit the Northern Irish jurisdiction.

4. In response to the Government's perceived determination to remove traditional legal aid for personal injury claims, we supported fully the introduction of a

Contingency Legal Aid Fund in our submissions to the Lord Chancellor's Legal Aid Advisory Committee. We worked with the committee to develop a financially viable CLAF model and we are extremely disappointed that the Government has rejected the committee's recommendations, without any explanation at all. We continue to believe that a CLAF would allow injured victims to achieve access to justice and yet achieve the Government's reform objectives.

5. APIL has found it very difficult to respond to this consultation. The draft Order puts in place a general framework for funding in Northern Ireland. We can understand why it is necessary to do this, but the Government has failed to explain how it envisages the Lord Chancellor and Legal Services Commission will use the vague and extensive powers with which they will be vested and/or when. For example, no explanation appears in the consultation as to how it is proposed the funding arrangements will be introduced. As outlined below, we believe this is fundamental and will affect the extent to which the reforms will enable injured victims to achieve access to justice. The vague nature of the draft Order is particularly worrying in view of the fact that the funding arrangements are to be introduced by way of Order in Council. When similar funding arrangements were introduced in England and Wales, they were introduced by Act of Parliament. The proposals were, therefore, subject to both close parliamentary scrutiny and amendment, as the Bill progressed through both parliamentary Houses.

6. In expanding on the above paragraph, we have, for example, found it difficult to decipher how the Government intends personal injury claims to be funded. In England and Wales, the Government's policy was that most personal injury claims should be conducted on a CFA basis with only certain claims, involving, for example, clinical negligence, attracting public funding where appropriate. In its consultation paper "Public Benefit and the Public Purse", the Government indicated its intention to take the same approach in Northern Ireland. The draft Order does not appear to expressly exclude personal injury cases, but we have reason to believe that within a capped and prioritised civil budget, injured victims will not feature highly. Our submissions are based on the presumption that legal aid would not be available for personal injury claims except in limited

circumstances. Whilst we are aware that the funding code is still to be developed, we seek clarification on this point.

Public Funding

7. APIL has no particular objection to the establishment of a Legal Services Commission to administer public funding. We are concerned, however, about the introduction of a capped civil budget. As we have stated above, we believe that public funding should continue to be available for injured victims who wish to achieve redress against a negligent party and recover the compensation they need to cope with their injuries. At the very least, however, public funding must be available in the following types of personal injury claims:

   - Complex claims, such as those involving clinical negligence or employers' liability;
   - Personal injury claims involving one or more issues of public interest;
   - Claims against the state;
   - Claims involving assault and battery;
   - High cost claims, which again, solicitors and barristers may be unable or unwilling to pursue on a conditional fee basis;
   - Claims that will be difficult and expensive to investigate;

   This is vital because legal practitioners will be unable or unwilling to take on the financial risk of running such cases on a conditional fee basis.

8. Whilst we can appreciate that the budget must have boundaries, we fear that necessary funds will not be available as they should be. For example, if a major train crash occurs and there are several fatalities and injuries as a result, any public inquiry or claim for compensation will raise issues of public interest. It is vital that the relevant injured victims or the families of the bereaved receive the public funding they need. We are confused, however, as to how the need for

public funding after such large-scale and unpredictable events will be met within a capped civil budget.

9. We are also concerned that injured victims will face an extended period of uncertainty as to whether they will be able to pursue a claim for compensation. When legal aid was available for personal injury cases in England and Wales, a solicitor would be able to advise a client within about half an hour as to whether he would pursue the case and whether this could be done through legal aid. Now, a solicitor is unable to assure that client that he will be able to help. He can only say that he thinks he may be able to take the case on a CFA basis, but that he will have to check with his partners and investigate the ATE insurance options. The situation in Northern Ireland will be even worse. A solicitor may believe that a client is eligible for public funding but will be unable to confirm this with the client, as he will not know whether funds are available within the budget. There will, therefore, be an extended period of doubt. This will cause much concern for clients who, for example, are unable to work as a result of their injury and are concerned about how they will cope financially.

10. If the budget is to be capped, it is imperative that the Government consults on the funding code, which will outline the priorities for funding. We stress that this must follow, as noted by the Northern Ireland Assembly, quantitative and qualitative research into the need for civil legal services. Without such research, we cannot see how the Government, or indeed the Commission, will be able to determine the appropriate level of the cap.

11. We are also disappointed to see that public funding will not be available to bereaved families to allow their representation at an inquest. Where an insurance company believes that an insured may have been negligent or may be accused of being so, the insured is provided with legal representation at any inquest. The same occurs in inquests involving hospitals and doctors. To allow equality of arms, bereaved families should also have access to representation.

Conditional Fee Agreements

12. We are extremely disappointed that despite substantial opposition, the Government still intends to introduce CFAs in Northern Ireland. In its explanatory document, at paragraph 152, the Northern Ireland Court Service states:

"Conditional fee agreements (CFAs) and litigation insurance have improved access to justice in England and Wales. People who could not afford to litigate privately can now do so and public funds have been focused on other priority needs. The expansion of private litigation funding has shown that market led alternatives can work and benefit not only litigants with good cases, but insurers and businesses by better excluding weak cases. CFAs and after the event litigation insurance are widely used in general personal injury litigation and are also developing in clinical negligence, commercial disputes, insolvency and libel. The courts have the responsibility to ensure that costs awards covering success fees and insurance are transparent and reasonable. The parameters of the law in this area continue to be tested but the regime is enabling many more people to uphold their rights and achieve access to justice."

13. We fear that the NICS may be portraying the system in England and Wales in too positive a light. The insurance industry has found it difficult to come to grips with the new funding system in England and Wales and resents the fact that it is now funding personal injury cases, instead of the Government. As a result it is taking every technical issue it can to avoid making payments. This has caused havoc and claimants have been left with uncertainty in the meantime while appeals have progressed to the Court of Appeal and House of Lords. Further issues for resolution in the courts may arise as the system develops, with the resulting disruption and confusion to injured victims who are seeking justice. CFAs have been in operation in England and Wales for seven years, and the concept of recoverability was introduced two years ago. General guidelines have only just emerged, however, for low-value road traffic accident claims.

14. APIL has seen no evidence to suggest that access to justice in England and Wales has actually improved with the introduction of CFAs, as suggested in the paragraph quoted above. In fact, we are extremely concerned that a serious funding gap is developing, whereby those injured victims with meritorious, but less than certain, complex claims, are unable to secure representation on a CFA basis. The same funding gap would, in all likelihood, also arise in Northern Ireland. It is vital, therefore, that public funding is available in such cases to ensure that access to justice is achieved.

15. Problems are also emerging within the ATE market. Premiums are rising and in Scotland, the Law Society backed ATE scheme, Compensure, has collapsed completely. A stable and confident ATE market is, of course, vital for the satisfactory operation of CFAs.

The Viability of CFAs in Northern Ireland

16. In our previous submissions to the Lord Chancellor's Legal Aid Advisory Committee of Northern Ireland, we outlined our concerns about the viability of CFAs in Northern Ireland due to, for example, the small size of solicitors' firms and the costs system in place. We fear that practitioners may find it difficult to survive financially if their firms conduct a reasonable amount of personal injury claims and are required to do so on a CFA basis. It appears that the Government is attempting to introduce the same system of conditional fees in Northern Ireland as operates in England and Wales. In its 'Decisions Paper', the Government stressed that it intended to find Northern Irish solutions to Northern Irish problems. We can, however, see no evidence of this. If CFAs are introduced and are to have any chance of success, they must be tailored to suit the Northern Irish jurisdiction.

17. CFAs require solicitors to take on the financial risks of losing cases and in doing so are required to operate in a similar way to insurance companies. This was referred to in Callery v Gray as the 'global' approach, whereby success fees recovered in winning cases must compensate for the fact that no costs are

recovered in the losing cases. A success fee in any one case does not only reflect the financial risk taken in that case, but the risks being taken on the profile of cases being handled by the firm as a whole. Both the Government and the Court of Appeal have accepted that a system of CFAs must operate on this basis. In practice it means that solicitors' firms must develop what is sometimes referred to as a 'war chest' from the winning cases, to enable them to absorb the costs of losing cases. It can be extremely difficult to build and sustain such a war chest because it can take only two or three losing cases to clear the 'chest'. Building the 'war chest' is made easier if the risk of losing cases is spread widely across a large firm. This accords with normal insurance principles. The problem in Northern Ireland is that solicitors' firms are characteristically small and will, therefore, find it difficult to spread the risk. Barristers would also find it difficult to build the required 'war chest' because they are instructed much later in a claim when there are more likely to be complexities and difficulties. The risk of losing cases and not recovering the required success fees would, therefore, be great.

18. Secondly, in England and Wales, practitioners are able to recover a success fee on their actual costs. The majority of personal injury claims in Northern Ireland are dealt with by the County Court. Under the scale costs system in operation in that court, however, practitioners would only be able to recover a success fee on a part of their actual costs. This is because costs are generally awarded on the basis of the amount of damages awarded (not including Compensation Recovery Unit recoupment, hospital charges or any interim payments). This will make it extremely difficult for practitioners to recover high enough success fees on their winning cases to cover the costs of the losing cases, i.e. to build the necessary 'war chest'. This problem will be exacerbated by the fact that the costs allowed through the current scales are extremely low and also by arbitrary rules such as the 'half costs rule', which applies where judgment is given for less than £5,000 where full County Court proceedings have been issued. Nor will the limited costs recoverable allow for the increased administrative burden imposed by CFAs. It is not uncommon for practitioners in England and Wales to spend up to three hours explaining CFAs to their injured clients. This will continue for so long as the indemnity principle remains. APIL would like to take this opportunity to call for the expeditious removal of the indemnity principle once again.

19. If practitioners are not able to build the 'war chest' they need to take the financial pressure of losing cases, they are likely to stop offering their services on a CFA basis. As a result, unless injured victims can secure public funding, which appears unlikely, access to justice will be adversely affected.

20. If a system of CFAs is to be introduced in the Northern Ireland jurisdiction, it must be tailored to suit that jurisdiction. To do this we suggest as a starting point that either:

- County Court scale costs should not be applied in CFA cases and practitioners should be able to recover success fees on the basis of their actual costs, as in England and Wales; or alternatively

- Practitioners should be able to recover a success fee of up to 200% on the limited scale costs recoverable in the County Court.

21. A further point is that local judges must be fully trained on all issues relating to CFAs, such as risk assessments and success fees, so that they do not unnecessarily reduce success fees and hinder the operation of the system. We should stress that our submissions do not seek to increase the profit margins of practitioners but seek to ensure that injured victims are able to gain access to justice as necessary.

<u>The Introduction of CFAs</u>

22. The Government does not in any way explain how CFAs would be introduced in Northern Ireland. We hope that it is appreciated, however, that the way in which they are introduced is likely to affect profoundly the ability of the system to deliver access to justice. In England and Wales, CFAs were piloted in 1995 in personal injury, insolvency and human rights cases, alongside a legal aid system which continued to provide financial assistance to injured victims as was appropriate. Consequently there was some experience of their operation before they were introduced as the normal way of funding for personal injury cases.

23. If CFAs are to be introduced, practitioners in Northern Ireland must have the same opportunity to acquaint themselves with this complex system of funding. CFAs should, therefore, be introduced first alongside the current legal aid system, which clearly allows financial assistance in personal injury cases subject to eligibility and merits tests. Once practitioners have had time to adjust to CFAs and to develop the required skills, the new public funding arrangements could then be introduced. As noted above, we fear that injured victims will have difficulty in obtaining public funding within the proposed prioritised and capped civil budget, even though personal injury cases may not specifically be excluded in Schedule 2 of the draft Order. Introducing both CFAs and the new public funding arrangements at the same time is likely, in our submission, to lead to difficulties which could threaten the operation of the whole system. The Government must also ensure that ATE insurance companies are able and willing to enter the Northern Irish market. Injured victims must be able to gain costs protection though ATE insurance, as otherwise, access to justice will be denied.

24. The Lord Chancellor's Legal Aid Advisory Committee also recommended a pilot phase for CFAs, which we also support. In its 'Decisions Paper', the Government accepted "that, in practice, there is a long way to go before CFAs can be developed for Northern Ireland. In particular the Government recognises that the large number of small solicitors' practices providing a general service does provide a very different background for the introduction of CFAs than that in England and Wales." It further stated that to "progress this issue the Government will establish a working group to look into the establishment of financially viable and attractive legal based solutions to provide an alternative to private or public funding of litigation for cases seeking financial damages. This will include further examination of the use of CFAs or a CLAF."

25. The Lord Chancellor's Legal Aid Advisory Committee, referred to above, was charged with this task. It concluded, however, that "[t]here has been no testing of CFAs in Northern Ireland and the Committee would strongly counsel against any widespread introduction here before some rigorous testing is undertaken…The decisions paper promised Northern Ireland solutions for Northern Ireland problems, so research and prior testing must be the way to seek those solutions."

We urge the Government, therefore, to heed the advice of the Committee and to ensure that CFAs can operate satisfactorily against the "very different background" it identified itself some time ago.

26. APIL would also like to stress the importance of the relationship between the civil justice reforms to be introduced in Northern Ireland and conditional fee agreements and, in particular, the pre-action protocols. The protocol allows a practitioner to control and reduce his exposure to risk, as it requires the defendants to provide a reasoned response to a claim at an early stage. Without the protocol, a claim could continue for some time before the practitioner discovered it was weak, and by that time, exposed himself to a large financial risk. As noted above, we are concerned that a funding gap may be emerging in more complex claims. Without the protocols, practitioners are even more likely to pursue only the most certain of cases. We urge the Government to introduce the intended civil justice reforms in full before introducing conditional fee agreements.

The Level of Insurance Premiums

27. The level of insurance premiums has caused considerable debate and difficulty in England and Wales. The problem is that injured claimants need to protect themselves against an adverse costs order with ATE insurance but neither injured victims nor their legal representatives have any control over the premiums charged. Although both the Court of Appeal and the House of Lords have settled some of the general principles in Callery v Gray, which will apply in Northern Ireland, debate on the reasonableness of insurance premiums more generally is likely to continue. To avoid some of the problems that have been experienced in England and Wales from the outset, APIL suggests that a committee should be charged with the responsibility of determining a cap or monitoring the levels of premiums.

Collective Conditional Fee Agreements

28. Draft section 44 would pave the way for the introduction of collective conditional fee agreements. In England and Wales, the legality of such funding arrangements has been called into question, as they are alleged to be in breach of the indemnity principle. We do not believe that the Northern Ireland Court Service should introduce collective CFAs in Northern Ireland, unless the indemnity principle is abolished before, or at the same time as, collective CFAs are introduced.

Litigation Funding Agreements

29. The consultation seeks to introduce 'litigation funding agreements'. Such agreements are also mentioned in the Access to Justice Act 1999. They have not been taken up in England and Wales and we see no reason why they would be taken up in Northern Ireland. The litigation funding agreement appears to be what could be described as a 'private CLAF'. As noted above, APIL is extremely disappointed that the Government has chosen to reject a publicly funded CLAF and especially without explaining its reasons for doing so. The work carried out by the Legal Services Research Centre, on behalf of the Legal Aid Advisory Committee, suggested that a CLAF, operating as suggested by the Committee, would have reasonable prospects of success.

30. We agree with the conclusion expressed by the Legal Aid Advisory Committee in its submissions on the draft Order. The Committee states:

"This brings us to articles 41-42 of the Draft Order, dealing with litigation funding agreements. These further enabling provisions appear to be the nearest equivalent in the draft Order to CLAF, but shorn of those features of the CLAF necessary to make it viable. As the Committee said in their CLAF report, a CLAF would require substantial seed funding from the Government, would have to operate by way of an accretion to costs paid by defendants and not a deduction from damages and should not meet the costs of successful defendants on a routine basis."

In essence, we do not believe that litigation funding agreements are viable and we do not believe that they should be introduced in Northern Ireland.

Conclusion

31. APIL does not believe that legal aid should have been removed for personal injury claims in England and Wales and we do not believe it should be removed in Northern Ireland. We are extremely disappointed that the Government has rejected other funding options, such as a publicly funded Contingency Legal Aid Fund and is, instead, continuing with the introduction of CFAs, despite strong opposition. If the Government does introduce a system of CFAs, and it is to have any chance of success in enabling injured victims to gain access to justice, we believe it must be tailored to suit the Northern Ireland jurisdiction, as suggested in this paper.