20 June 2003

Mr Colin Stutt
Head of Funding Policy
Policy & Legal Department
Legal Services Commission
DX 328 London/Chancery Lane

Dear Colin

Consultation on amendments to the funding code guidance: multi-party actions

I am writing on behalf of the Association of Personal Injury Lawyers to highlight some particular concerns about the amended funding code guidance insofar as it relates to multi-party actions.

The funding code guidance states at paragraph 8 on page 6 that "The Commission will start from the presumption that the test case option… is generally the best option…". We are concerned that this presumption will be unworkable in the majority of situations because problems relating to the limitation of actions will arise and/or there will not be free-standing points of law or fact which will, by themselves, resolve the issues, as required. Claimant and defendant representatives are likely to seek to displace the presumption in the majority of cases and this will, in APIL's view, undermine the necessity and usefulness of the presumption. Moreover, the courts have historically shown themselves to be against this method of dealing with group actions.

APIL's second concern relates to the expectation that multi-party actions could, in part, be funded on a conditional fee basis with after-the-event insurance. In our members' experience it is extremely difficult to secure after-the-event insurance in multi-party actions and even where it can be secured it is prohibitively expensive.

For example, the victims of the Potters Bar incident, which many may view as a less than complex group action, have been unable to obtain insurance cover where their lawyer was prepared to act on a conditional fee basis. Nor indeed was it even possible to obtain cover in relation to quantum-only issues in the Ladbroke Grove group action.

In the group action relating to the second generation contraceptive pill, the defendant's costs were believed to be between £17 - £20 million. Having regard to the manner in which the after-the-event insurance market is pricing its premiums in non-personal injury claims, i.e., at around 25-40 per cent of the indemnity sought, this would equate to a premium of £4.25 – £8 million!

We also seek clarification of paragraph 16 and, in particular, paragraphs (c), (d) and (e) on page 8. It is suggested that a claimant has costs protection against the defendant despite the fact that he does not have an actual certificate. It is, of course, the costs protection that is so fundamentally important to the maintenance of a group action. At paragraph (d), however, you refer to the claimant being required to enter into a conditional fee agreement in relation to his individual costs, supported by insurance. As far as we are aware, all after-the-event insurance products expressly exclude group actions and we are unclear about the extent to which the Legal Services Commission has looked into this issue.

Whilst recognising the importance of a "non-eligible" claimant making a contribution towards costs and/or disbursements, it is the costs protection even on individual costs that remains paramount. Moreover, it seems unlikely that even a person of moderate means would be able to afford the contribution that you envisage together with the funding of disbursements and insurance products. As it is usually nearly impossible to advise a non-eligible claimant of the defendant's costs, even in the scenario where they are limited to the individual case costs, it makes it extremely unlikely that a non eligible claimant would be prepared to expose themselves to an unknown amount of adverse costs.

Whatever basis on which this new code is to proceed, it is imperative that the decision-making process in relation to the granting of funding for multi-party actions including, where appropriate, an appeal, is dealt with expeditiously to allow the dynamics of the group action to be managed quickly.

The amended funding code states that "[f]unding is also likely to be refused if it appears to the Commission that the issues **could** [emphasis added] be litigated on a private basis, whether under conditional fee agreements or otherwise." In view of the problems outlined above, the word "could" is far too loose a criterion and should instead be limited by reference to "adequate cover at reasonable expense".

Finally, in paragraph 18(b) on page 9, it is stated that "individual clients who are chosen as lead claimants in the multi-party action will not be permitted to settle their individual cases without the consent of the Commission." We think it would be extremely unfair to require a claimant to continue where there is a risk of an adverse costs order.

The amendments to the funding code do, of course, raise fundamental questions about the funding of multi-party actions which we have found difficult to discuss and address within the consultation period. It is now some time since APIL's group action working party met with your Special Cases Unit and I hope that we will be able to organise a meeting shortly to discuss these issues further.

Yours sincerely

Mark Harvey
Secretary, APIL