

30 June 2003

Mr Greg Lewis  
Legal Aid Unit  
The Law Society  
DX 56 London/Chancery Lane

Dear Mr Lewis

### **The Future of Publicly Funded Legal Services**

I am writing on behalf of the Association of Personal Injury Lawyers (APIL) in response to the Law Society's consultation on the above. Our response is, of course, limited to the public funding of personal injury cases.

In the 1990s, APIL rigorously defended the retention of legal aid for the injured and bereaved with potential claims for compensation. As you know, public funding was, however, retained for only a few types of personal injury claim and most personal injury cases are now funded on a conditional fee basis.

We share the Law Society's concerns about the likely future of publicly funded legal services. The Government seems increasingly keen, for example, for clinical negligence claims and multi-party actions to be funded on a conditional fee basis despite our concerns about the capacity of the after-the-event insurance market. Our members continue to grapple with conditional fee agreements and we remain extremely concerned about the extent to which the injured and bereaved will be able to achieve access to justice in the future. Indeed, we are unclear about the impact the Access to Justice Act reforms have already had. Whilst we are doing our best to ensure that conditional fees work, the public funding of personal injury cases raises different, but equally important, issues. We were, therefore, extremely interested to see the Law Society's suggestions for alternative approaches.

We do not feel, however, that the alternative approaches outlined in the consultation paper would be viable for those personal injury claims that remain within the scope of public funding. For example, we support the promotion of legal education and the increased use of technology as a means of increasing access to justice. Injured victims would, however, still require publicly funded legal representation in pursuing a clinical negligence claim or a multi-party action because of the complex nature of the issues involved. In addition, whilst the not-for-profit sector is invaluable, we doubt that it could provide the specialist legal services required for a clinical negligence claim or a claim involving a public interest issue. We also doubt whether business models, such as the “Law for All” model, or salaried services could attract the specialist practitioners who currently conduct this type of work.

The Law Society also considers the role of before-the-event (BTE) legal expenses insurance. Many personal injury cases are now pursued through BTE insurance but it is suggested in the consultation paper that it could be made compulsory. Whilst BTE insurance is certainly an important source of funding, we doubt that it can adequately replace public funding. We do not believe that the public can rely on companies with commercial, rather than social, objectives to provide comprehensive legal cover. In addition, there is a significant risk that the most vulnerable members of our society, who need the protection of public funding most, would fail to purchase BTE insurance, despite compulsory provisions.

The one suggestion that continues to be attractive to APIL is the contingency legal aid fund (CLAF). APIL considered the introduction of a CLAF in England and Wales in the 1990s and actively supported the introduction of such a scheme in Northern Ireland. There are various ways in which a CLAF could operate and not all of them are either attractive or viable. It may, for example, be difficult to successfully operate a CLAF alongside CFAs. There is a risk, for example, that solicitors would ‘cherry pick’ strong claims to conduct on a conditional fee basis but refer the high risk cases to the CLAF. It may be possible, however, to resolve these issues and APIL would like to take this opportunity to reconsider and discuss this option again.

In conclusion, therefore, we believe that of the alternative approaches outlined in your paper, it is only the CLAF that could potentially ensure the adequate provision of publicly funded legal services in the personal injury sector. This does not mean, of course, that the other alternatives discussed would not be suitable for other areas of work, but we are unable to comment on that. The current system of public funding is certainly flawed and, as we have stated, we share your concerns about its future. For the time being, however, we feel the Government must continue to act as a funder of last resort.

Please do not hesitate to contact me if you would like any further information in relation to our position or if you would like to discuss any of the above further.

Yours sincerely

David Marshall  
President, APIL