apil association of personal injury lawyers

THE LEGAL SERVICES COMMISSION (LSC)

A NEW FOCUS FOR CIVIL LEGAL AID

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS (APIL20/04)

OCTOBER 2004

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

Colin Ettinger	President, APIL
Mark Harvey	Secretary, APIL
David Marshall	Immediate Past President, APIL
Frances Swaine	Executive committee member, APIL
Jane Williams	Executive committee member, APIL
Muiris Lyons	Executive committee member, APIL
Kevin Grealis	Clinical Negligence Special Interest Group (SIG) Co-ordinator, APIL
Richard Scorer	Child Abuse Special Interest Group (SIG) Co-ordinator, APIL
Sarah Stewart	Child Abuse Special Interest Group (SIG) Secretary, APIL
John Pickering	Member, APIL
Tracy Storey	Member, APIL
Paul Balen	Member, APIL
Martyn Day	Member, APIL
Mark Mildred	Member, APIL

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

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

A NEW FOCUS FOR CIVIL LEGAL AID

Executive Summary

- APIL believes that the current legal aid system meets the Legal Services Commission's (LSC) aims of *"encouraging early resolution"* and *"discouraging unnecessary litigation"*, and that the suggested reforms will simply restrict claimants' access to justice further.

- APIL considers that the LSC's proposal that a Conditional Fee Agreement (CFA) should be used instead of legal aid – *"whether or not insurance is in practice available"* - is in breach of the 'equality of arms' doctrine enshrined within Article 6 of the Human Rights Act.

- APIL proposes that the upper limits for eligibility for legal help and legal representation should be aligned to the higher of the two figures – that of legal representation – rather than downwards to the lower figure of legal help.

- The abolishment of the current £100,000 equity disregard, APIL contends, would effectively exclude the majority of home owners from legal aid eligibility. As such we feel this is a direct shackle on injured claimants' access to justice, and therefore the equity disregard should be retained and even increased.

- APIL considers that it is premature and unrealistic for the LSC to presume that all cases should initially go through a complaints system prior to public funding being considered and granted. For example, the NHS complaints system has recently been revamped, yet there has been no indication that this has made the system more effective or efficient. Until the complaints system can be seen to work well APIL believes it is too early for the LSC to base funding decisions on progress through it.

- APIL is encouraged by the LSC's acceptance of the formation of the NHS Redress scheme, but feel that it is still too early for there to be a presumption that all cases should initially progress through it. APIL feels that until we have seen the full details of the proposed NHS Redress Scheme it would be inappropriate to comment further at this time.

- APIL contends that the use of Conditional Fee Agreements (CFAs) within personal injury related actions - such as clinical negligence, group actions and child abuse litigation - will cause considerable difficulties for both claimants and defendants.

- These difficulties will include: whether or not the courts will accept the use of a CFA instead of legal aid; the lack of a properly functioning After-the-Event (ATE) insurance market, with the ATE policies that are available being prohibitively expensive; the increased level of success needed to qualify for CFA funding; the reluctance of solicitors to take on high risk cases due to the potential negative economic consequences; and the reduction of positive case outcomes as more non-specialised clinical negligence practitioners enter the market.

- While APIL is interested by the suggestion concerning the combination of public and private funding – typically a CFA – for the litigation of a case, we reiterate our opposition to the use of CFAs for currently legally-aided PI-related cases due to the difficulties detailed above.

- These above mentioned difficulties should therefore be explored in a provisional pilot scheme prior to the replacement of any legal aid funding with CFA funding.

- APIL considers that the use of Before-the-Event (BTE) insurance is unlikely to greatly affect any of the PI-related areas of litigation funded via legal aid due to the low-level of indemnity on such policies and the numerous case-type exemptions included within them.

- We are, however, opposed to the restriction of claimant choice in relation to legal representation that many BTE policies insist upon. APIL believes that the claimant should have freedom of choice to choose their own solicitor.

- APIL disagrees with the LSC's proposal for unsuccessful funded clients to pay the first £200 of any costs order. Legal aided clients represent the most vulnerable members of society, and it is doubtful whether they would be able to afford any part of a costs order.

- APIL considers that the LSC's proposal to raise the cost benefit ratios for clinical negligence – in line with other types of litigation – fails to fully appreciate the hugely complex nature of this type of work and would inevitably lead to further restrictions on eligibility. We feel that any such restriction would not be in the best interests of claimants' access to justice.

- APIL believes that the lack of take up of support funding is due to the difficulties involved with qualifying for eligibility. For example, the scheme is overly bureaucratic and uneconomic and few firms are willing to put their legal aid franchise at risk in attempting to use it.

- APIL is of the opinion that within clinical negligence litigation the further promotion of mediation is unnecessary as the majority of cases do not go before a judge and settle outside of court, either through roundtable discussion or another settlement mechanism.

- APIL considers that CFAs are not an appropriate funding mechanism for group actions. The potential consequence of running a group action on a CFA, without insurance, is that well-financed defendants may attempt to drive up the costs of a case, making it uneconomical for a firm to continue with the litigation; a war of attrition.

- Funding is already highly restrictive in granting legal aid to group actions, and any further tightening of the eligibility criteria will leave many injured claimants without the means to pursue meritorious litigation against well-financed defendants. APIL feels that this is in direct conflict with the 'equality of arms' doctrine within Article 6 of the Human Rights act.

- APIL suggests that cost savings could be achieved by allowing the court to decide, and rule, on generic issues. In addition, the current administrative framework surrounding group actions is highly inefficient. If this administration was made more efficient, there would be considerable cost savings.

- APIL feels that the recently introduced system of extending cost protection to generic work has not yet had the time and opportunity to develop to its fullest potential. We are therefore concerned that it is being abandoned prior to a full and proper evaluation

- APIL believes that the use of CFAs within child abuse litigation is simply not viable due to the complete lack of ATE insurance within this area of litigation. In addition, possible funding via BTE policies for these cases is unlikely as they will often include exemptions for child abuse litigation.

- Child abuse litigation is a continually developing area of law, and APIL considers that its further development will be severally hindered by further restrictions on accessing funding for such cases.

- APIL members report that informal mediation and Alternative Dispute Resolution (ADR) is already used within child abuse cases, and often leads to successful settlements.

Introduction

1. While APIL is sympathetic to the aims of the Legal Services Commission (LSC) consultation in *"encouraging early resolution"* and *"discouraging unnecessary litigation"*, we believe that these aims are already being met within the present legal aid system, in relation to clinical negligence work at least, and that the suggested reforms will simply restrict claimants' access to justice further.

2. APIL feels that access to justice is a basic human right. Yet in 2003-04 the civil legal aid system helped approximately 12 per cent fewer people then in the preceding year. It is clear that there is a *"significant unmet demand for legal aid … in certain … specific fields of law. The consequence is that, increasingly, the legal system is being restricted to those with very substantial wealth or no means at all. There is a substantial risk that many people of modest means but who are homeowners, for example, will fall out of the ambit of legal aid. This may amount to a serious denial of justice.[1]"*

3. APIL considers that the *"civil legal aid system was originally designed to support the most vulnerable in society"[2].* Yet the current system *"falls far short"[3]* of that envisaged by the post-war Attlee Government where financial eligibility stood at 80 per cent of households being able to get legal aid, either free or on payment of a contribution. In 2001 that figure had decreased by almost half with only 47 per cent of households now being eligible. APIL contends that the real outcome of the current proposed reforms by the LSC is to place a further unnecessary restriction on the ability of injured claimants to gain access to legal aid.

[1] House of Commons: Constitutional Affairs Committee – Civil legal aid: adequacy of provision – Fourth Report of Session 2003-04 Volume 1 – paragraph 105, page 30
[2] *"Civil legal aid – in crisis"* Rt Hon Alan Beith MP, chair of the Constitutional Affairs Select Committee in the House of Commons - New Law Journal (NLJ) Volume 154 Number 7142 (3rd September 2004) page 1273
[3] House of Commons: Constitutional Affairs Committee – Civil legal aid: adequacy of provision – Fourth Report of Session 2003-04 Volume 1 – paragraph 102, page 30

4. Furthermore, APIL believes that the continuing constriction of the legal aid budget, in particular with reference to the current suggestion that Conditional Fee Agreements (CFAs) should be used without insurance, brings it into direct conflict with Article 6 of the Human Rights act[4]. Article 6 states that *"In determination of his civil rights and obligations, … , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".* From various cases decided by the European Court, the right to a fair trial includes the necessity to comply with the principle of "equality of arms". The European Court of Human Rights has held that for there to be a fair trial an individual must have *"a reasonable opportunity of presenting his case to the Court under conditions which do not place him at a substantial disadvantage"*[5].

5. APIL considers that running a case on a CFA without the necessary After-the-Event (ATE) insurance places a claimant at a significant *"disadvantage"* due to the possible adverse costs order that may be levied against him. This possible threat is even more significant if, as APIL has recently learned, defendants intend to start using CFAs to defend claims. This will inevitably lead to defendants claiming a success fee, often in the region of 100 per cent if the case goes to trial. Such an uplift will ultimately result in the doubling of defendants' legal costs. As the losing party, the injured claimant will ultimately be liable for these costs. APIL believes that it is completely iniquitous that claimants should be in a position where they have no cost protection against large well financed defendants; APIL feels this represents inequality of arms and is therefore contrary to Article 6 of the Human Rights Act[6].

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[4] Human Rights Act 1998 (Chapter 42)
[5] *Kaufman –v- Belgium 50DR98*
[6] APIL accepts that the LSC provides for legal aid to be granted by the Lord Chancellor in exceptional cases where *"without public funding for representation it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings".* Yet by its very nature this funding in only available in exceptional circumstances, and even though APIL considers that the current funding arrangement mean that it is *"practically impossible"* to proceed with a meritorious case, such funding is unlikely to be granted in the majority of cases falling outside of the eligibility criteria.

6. APIL would contend that the real reasons for the LSC's proposed reforms are budgetary in nature. Admittedly APIL concedes that the legal aid budget is under considerable pressure, but we believe that the proposed reforms will not save the Government a considerable amount of money. Rather the costs burden will be relocated to the National Health Service Litigation Authority (NHSLA) – the defendant in the majority of clinical negligence actions – and subsequently the National Health Service (NHS) itself.

7. In addition, APIL firmly supports the belief that the use of legal aid in clinical negligence litigation – upon which APIL's response is predominantly centred – works efficiently and effectively. We would actually note that there is case for suggesting that more cases of clinical negligence should be encouraged due to the fact that less than one per cent of adverse incidents eventually become actual claims[7]. Regardless, the success of clinical negligence litigation can be seen to be illustrated by the fact that there has been no increase in the number of certificates issued in recent years. Indeed there has been a steady decrease in the volumes of certificates, with 6,064 certificates issued in 2003/04 down 3.9 per cent from 2002/03. In total there has been a 50 per cent decrease in the number of certificates from 1995/96. The long duration of many clinical negligence cases has meant it takes years for decreasing volumes of new cases to be reflected in the cost burden of closed cases both to the LSC and the NHS. Last year, however, even the number of cases closed showed a downturn of 11.6 per cent. In terms of case outcomes, the figures have steadily improved over the last few years. In cases where proceedings were issued only 16 per cent proceeded to a final hearing with the remaining 84 per cent being settled prior to issue. This indicates the level of "*early resolution*" that occurs within the current legal aid system. Furthermore, of these cases that proceeded to a final hearing, there was a 74 per cent success rate. Finally, in specific

[7] In NHS hospitals, an adverse event in which harm is caused to patients occurs in around 10 per cent of admissions – about 850,000 patients a year. (Department of Health: *'An organisation with a memory'* 2000). In comparison the Compensation Recovery Unit (CRU) report that in 2003/04 there were 7121 claims for clinical negligence. This represents 0.84 per cent of the supposed number of adverse incidents per year.

reference to high-cost clinical negligence litigation, in 84 per cent of cases the full amounts of claimants' costs are recovered. APIL feels this indicates the success with which clinical negligence is run using legal aid.

Financial Eligibility[8]

Income Limits

8. While APIL concedes that there is logic to aligning the upper limits of eligibility for legal help and legal representation, we are disappointed to note that the consultation has proposed that the lowest limit – that of legal help – be adopted. We believe that the criteria necessary for qualifying for legal aid is already significantly strict and only a small minority of the population is currently able to gain access to legal aid. Reducing the eligibility limit further would simply exclude a larger group of people from the scope of legal aid. APIL suggests that if there is to be an alignment between legal help and legal representation it should be upwards, towards the legal representation level.

Assessment of Capital – The £100,000 Equity Disregard

9. APIL disagrees with the LSC proposal to remove the £100,000 home equity disregard as this will virtually exclude all home-owners from being eligible for legal aid, and therefore deny some of the most vulnerable members of society access to justice. In addition, we feel that it patently unfair for injured claimants to have to rely on the vagaries of the housing market in order to fund their claims. APIL considers that the number of people who can effectively gain access to legal aid is already restricted – as evidenced by the above quote from the recent select committee report – and the removal of the equity disregard would simply narrow people's ability to gain access to appropriate legal advice further. With the current

[8] See Section 2 (page 13) of the consultation document

average house price being above £160,000[9], APIL envisages that the majority of homeowners will exceed the capital threshold for legal aid assistance making it extremely difficult to pursue a meritorious case without significant financial risk to themselves. Indeed APIL believes there is an argument for not only retaining the current equity disregard, but extending it to adequately reflect the current rise in house prices.

10. APIL feels that simply because someone is a homeowner it does not mean that they should put his home at risk in order to fund justified litigation against the person who injured him. Indeed APIL considers that there are considerable practical problems with such an assumption, with many people not having the ability to easily gain access to the capital within their homes. For example, people may have existing mortgage commitments which will not allow them to borrow further against the property. Also, particularly if there is a lack of income, lenders may be wary about lending money against a property.

11. Furthermore, APIL notes that there is a distinct lack of products available in relation to equity release; and the products that are available usually include prohibitive interest rates. There is also little sign that the market for this type of product is set to expand, with the Council of Mortgage Lenders (CML) stating that "[a]*ll indications are that lenders and intermediaries are taking a cautious … approach to opening up the equity release market"*[10]*.*

Discouraging Unnecessary Publicly Funded Litigation[11]

Clinical Negligence Complaints

12. APIL feels that the LSC's suggestion that there should be a presumption in the funding code that *"all cases should pursue a complaint before*

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[9] Halifax figures – 3 September 2004
[10] The Scotsman – *"Slowdown in equity release loans"* – 12 August 2004
[11] See Section 4 (page 31) of the consultation document

funding for litigation is considered"[12] is premature and unrealistic. While APIL accepts that a new, and supposedly improved, NHS complaints system is currently being introduced, the effectiveness of this system has yet been tested sufficiently to determine if it satisfies the needs of injured claimants. The Chief Medical Officer's (CMO) report – "Making Amends"[13] – readily identified that the NHS complaint process was viewed by patients and their representatives as lacking *"transparency, is insufficiently independent and too frequently fails to yield an apology or explanation for what went wrong"*[14]*.* APIL considers that any new complaints system needs to fulfil these patient needs fully before it is appropriate to consider whether all cases should progress through it.

13. While APIL disagrees with the LSC's proposal that there should be a *presumption* to proceed through the complaints procedure prior to litigation, we do recognise that there will be instances where, in the best interest of the injured claimant, it may be appropriate to proceed through the complaint system. This decision, however, should be left to experienced legal clinical negligence practitioners[15]. A possible advantage of using the complaints system is that evidence uncovered during the investigation may be of use in any ongoing litigation. APIL agrees that any findings, or evidence, produced via a complaint being pursued should be made available to the LSC for consideration.

14. APIL believes that the complaints process should work concurrently with the litigation process and that one should not be dependent on the other. This view is shared by the CMO who recognised that the NHS system should in no-way take precedence over the litigation process *"even in the larger value cases, if patients subsequently decide to pursue the litigation route, the complaints process should continue to provide the explanation*

[12] Consultation document – point 16, page 4
[13] Department of Health: Making Amends – A consultation paper setting out proposal for reforming the approach to clinical negligence in the NHS: A report by the Chief Medical Officer (June 2003) (can be found at: http://www.dh.gov.uk/assetRoot/04/06/09/45/04060945.pdf)
See http://www.apil.com/pdf/ConsultationDocuments/107.pdf for APIL's response to consultation.
[14] Ibid – paragraph 12, page 78
[15] For example, College of Personal Injury Law (CPIL) members - of 'litigator' level and above - will have over 5 years worth of specialist legal experience in personal injury cases and have completed over 30 hours of CPIL training over a 3 year period. (See http://www.cpil.ac/ for further information on the College of Personal Injury Law).

which patients and families seek"[16]. A significant criticism of the NHS complaints procedure has been the fact that there is a necessity for a complaint to cease once an injured person has indicated that he is going to litigate. Often this choice to litigate is as a result of injured claimants' *"frustration with the complaints system"*[17]. APIL is, therefore, disappointed to note that the newly proposed complaints procedure still retains this necessity. Difficulties arise – both for claimant solicitors and defendants' solicitors – when the patient consults a lawyer after his complaint has been dealt with unsatisfactorily. By this time any evidential trail has grown cold, and there may be issues of limitation concerning the case.

The NHS Redress Scheme

15. APIL is encouraged by the LSC's recognition that the creation of an NHS Redress scheme – as recommended in the CMO's Making Amends report – would significantly affect the provision of legal advice to clinical negligence claimants. At present there has been no official announcement about whether such a scheme will be introduced at all and, if it is to be introduced, when. Indeed there is still no indication of exactly which of the CMO recommendations will be implemented. It has been indicated to APIL, however, that various aspects of the CMO's recommendations are being considered and actively researched, with any eventual scheme being targeted for a 2007/08 start date.

16. APIL considers that the most important factor of any eventual scheme must be that the patient, or client, should continue to have the ability to gain full access to the litigation process. While the LSC implies that claims should in the first instance pass through the NHS Redress scheme, it does not detail the specific ramifications of doing so. For example, if your case progresses through the Redress scheme, but the eventual award is considered too low, will this adversely affect the

[16] Ibid – Recommendation 8 – page 124
[17] Ibid

claimant's ability to gain legal aid in order to proceed with litigation? APIL feels that, as with the complaints procedure, the information gained via the Redress investigation may be useful and any evidence found should be considered by the LSC if the claimant decides to proceed with litigation after unsuccessfully progressing through the scheme. APIL feels that it would be inappropriate and premature at this time to comment further on the Redress scheme until the exact details of it are known.

Conditional Fee Agreements

17. APIL believes there are considerable difficulties in attempting to use CFAs within previously legally aided areas such as clinical negligence. APIL considers that one of the primary problems within such a proposal is whether the courts are likely to accept the use of a CFA instead of legal aid. For example in a recent housing case[18] it was suggested that a claimant should have applied for legal aid instead of using a CFA to run the case; "[the claimant] *should have been told to seek legal aid, but there was no evidence that* [the claimant's solicitors] *had done so, and this had a materially adverse effect"*. This decision seems to suggest that legal aid should be used instead of CFAs due to the higher case costs incurred under the CFA agreement. As discussed elsewhere, CFA case costs will almost always exceed legal aid case costs due to recoupment of success fees and insurance premiums. APIL feels that it would be unjust if claimant solicitors were penalised for using a CFA when there was little chance of being granting legal aid due to the further eligibility restrictions.

18. APIL is more deeply concerned, however, with the LSC suggestion that legal aid could be refused for cases where there might be suitability for a Conditional Fee Agreement (CFA) *"whether or not insurance is in practice available".* We believe if CFAs are to be used in clinical negligence, either as a replacement for legal aid – which we would

strongly resist and which the LSC has reassured us is not the case – or as an additional funding mechanism, there needs to be a fully operating and buoyant after-the-event (ATE) insurance market to support it. It should be noted that the majority – approximately 90 per cent according to anecdotal evidence from APIL members – of clinical negligence work is conducted using legal aid funds. This leaves only ten per cent of clinical negligence work which is funded via CFAs and other means. The lack of clinical negligence actions involving CFAs means that the ATE market will have little, if no, experience within this area. This has led to a relative deficiency of supporting ATE products for clinical negligence. This lack of experience will also inevitably lead to reluctance by insurers to finance clinical negligence actions; and those actions which are financed will have to pay inflated premiums to compensate for the absence of reliable risk data available to the insurers.

19. A further disincentive for insurers to provide ATE products for clinical negligence actions is the high cost of such cases. In the event that a case was lost, the ATE insurer would have to pay the legal costs of both the claimants and defendants. While this is currently a considerable amount, it has been suggested to APIL that if the system were to change so that claimants use CFAs to run cases, defendants would follow suit. Therefore if a case was lost it is foreseeable that defendants would request a CFA success fee of 100 per cent, essentially doubling the amount that the insurer is liable for. This increased financial burden on the insurer would have a hugely detrimental effect, with either the amount of ATE premiums being driven up or the market further contracting. Furthermore, in absence of ATE insurance, if a clinical negligence case was run and lost on a CFA then the claimant themselves would be liable for the legal costs incurred. While a large insurance company may be able to bear the burden of such an adverse costs order, it is highly unlikely that an injured claimant would be able to bear such a cost. This potential financial burden would be enough to

[18] *Nicola Bowen & 10ORS v Bridgend County Borough Council* (SCCO – Master O'Hare – 25/03/2004)

discourage the majority of injured claimants from undertaking litigation and gaining their appropriate access to justice.

20. APIL contends that any money the Government saves via reducing eligibility within legal aid will be offset against the increased cost of CFAs to the NHS – the main defendant in the majority of clinical negligence cases. Currently, under a legal aid certificate, the NHS has to pay the local guideline hourly rates for costs incurred by the claimant solicitor in any case which the NHS loses. With the introduction of CFAs, the NHS will have to pay, in addition to the claimant's base costs, the resultant success fee and ATE insurance premium. Due to the complex, and risky, nature of clinical negligence work it is highly likely that the success fee in such cases will be set at 100 per cent. This will effectively mean that the amount of legal costs which the NHS has to pay will double from those under the current scheme. In respect of the amount of the ATE insurance, as mentioned earlier, clinical negligence cases usually attract extremely high premiums – it is not unusual for a five figure sum to be quoted for £100,000 of indemnity cover – due to the lack of products available, the complexity of clinical negligence and the uncertainty of success. Added to the high cost of recovering the ATE insurance premium would be a success fee which reflected the high rate of attrition and the high risk involved in clinical negligence litigation. It is frequently the case that for clinical negligence cases the success fee is stated as 100 per cent. Certainly if a clinical negligence case proceeded to trial a 100 per cent uplift would need to be recovered.

21. APIL believes that the use of CFAs would further restrict an injured claimant's access to justice as it would be more difficult to satisfy the requirements needed to justify funding a CFA – most insurers quoting a threshold of success at 60 per cent and often significantly more – than the current eligibility criteria required by the LSC – usually seen as a 'reasonable chance of success' or over the 50 per cent threshold. This difficulty will inevitably lead to fewer injured people being able to gain access to funding for meritorious claims.

22. In addition, due to the 'no-win, no-fee' nature of CFAs, solicitor firms will be more reluctant to consider cases on a CFA basis because of the potentially dire financial impact on the firm if the case is lost. While large solicitor firms are able to bear the burden of such cases – but even then only to certain limits – smaller firms will not have the financial resources to consider more difficult cases which may have a lower chance of success. This will lead to the 'cherry-picking' of clinical negligence cases, with only the most straightforward of claims being pursued. In real terms, this will lead to a further erosion of claimants' access to justice.

23. APIL views the introduction of franchising of specialist panels for legal aid work – for example clinical negligence – to have been a success for the LSC. This success can be seen by the increased number of cases being won by specialist solicitors and, anecdotally, the NHSLA noting the rise in standards of claimant's legal representation. APIL envisages the introduction of CFA funding for clinical negligence potentially leading to decreasing, and poorer, outcomes as less specialised and competent practitioners enter, or re-enter, the field of clinical negligence. This will ultimately lead to strong and meritorious cases being poorly run by practitioners within little, or no, experience in this highly specialised area.

CFAs in Clinical Negligence Cases

24. While APIL is interested by the suggestion concerning the use of public funding for the investigative stage of a case and then moving onto alternative funding – typically a CFA – for the litigation of a case, we feel that our above comments regarding CFAs are equally pertinent. APIL is also concerned that the introduction of CFA may introduce elements of conflict between a client and adviser. As already detailed, the use of a CFA places a significant financial burden on a legal practice. This pressure takes the form of balancing the best interests of the client with the best interests of the firm. This conflict could be seen to emerge where, for example, a legal adviser is in the position of considering an

offer from a defendant. If the offer, which is below what the adviser thinks is appropriate, is accepted then the firm recoups its expenses and does not incur further cost. If the offer is rejected in the best interests of the client, then there is the possibility that further expense will be incurred prior to potentially losing the case and being unable to retrieve any costs.

25. APIL suggests that the LSC should pilot a provisional scheme in which CFAs are included in the funding process for clinical negligence prior to any changes being made to the current legal aid scheme. Such a pilot scheme would help to determine exactly what the current state of the ATE market is, and whether it would be able to sustain the inclusion of clinical negligence litigation. APIL firmly believes that there needs to be sufficient support and capacity within the ATE market prior to any alteration to the current legal aid funding scheme.

Group Actions – Conditional Fee Agreements

26. APIL considers the implications of the LSC proposals and the use of CFAs in relation to group actions later in this response – please see paragraphs 37 - 47.

Before-the-Event Insurance (BTE)

27. APIL considers that the use of Before-the-Event (BTE) insurance is unlikely to greatly affect clinical negligence litigation as most policies include exclusions for both clinical negligence and group actions. In addition, the indemnity levels set within the policies are often too low to fully finance a case until court. For example, the limits of indemnity for many BTE policies are £15,000 - £50,000. APIL is more concerned that BTE insurers often do not have, or use, recognised clinical negligence panel members to conduct litigation. As already described, the use of specialist clinical negligence panels has ensured that waste and unmeritorious claims within the system have been significantly reduced. By allowing non-clinical negligence specialist solicitors to handle complex

and difficult litigation, APIL envisages incompetent advice being given and success rates dropping.

28. APIL also reiterates its opposition to the restriction of a claimant's ability to freely choose any solicitor which many BTE policies impose. We believe that freedom of choice to choose a solicitor is a vital component to achieving effective access to justice. For example, there have been occasions where BTE insurance panel solicitors have been appointed but their office is located no-where near the injured claimant. Naturally this makes it difficult for the injured claimant, who may have mobility problems to contend with, to see and communicate with his legal representative. It is therefore vital, in the best interests of the claimant, to ensure that freedom of choice is maintained in relation to receiving impartial legal advice.

Cost Protection

29. APIL disagrees with the LSC's proposal that there may be "*a case for reducing the full extent of cost protection by providing that unsuccessful funded clients should be liable for a certain part of any costs, say the first £200".* By the LSC's own admission there is not a 'compensation culture' prevalent within clinical negligence cases, or indeed elsewhere in personal injury litigation, therefore APIL does not understand the need to introduce such a measure in order to disincentive weaker claims. Within the current system of specialised clinical negligence practitioners, weaker or vexatious claims are removed from the litigation process early on. Any introduction of a cost penalty would simply penalise meritorious claims, many of whom come from the most vulnerable parts of society; £200 is a lot of money for someone who has qualified for legal aid.

30. APIL considers that by setting a precedent with the introduction of a £200 fee, it is unlikely that this figure will drop. In APIL's experience such figures inevitably rise as funding considerations become more stringent.

The General Cost Benefit Test

31. APIL considers that the LSC's proposal to raise the cost benefit ratios for clinical negligence – in line with other types of litigation – fails to fully appreciate the hugely complex nature of this type of work. In general terms, more work is required in order to pursue clinical negligence litigation than in other areas. Consequently the high level of costs required in clinical negligence cases will always mean that there will be a lower level of ratio in terms of the proportion of costs to damages. APIL contends that the current levels are already stringent. Further tightening of the cost benefit ratio would lead to more injured claimants falling outside the eligibility criteria. In order to illustrate the current difficulties, if it is assumed that pursuing a clinical negligence case to trial costs approximately £30,000 - £40,000, using the cost benefit ratio on a case which has a 79 per cent chance of success, the amount of damages which would be needed to justify initial and continued legal aid funding would £80,000. This is a considerable amount of money. Furthermore, if the chance of success on a case was 59 per cent – still considered a reasonable chance of success – the amount of damages which would need to be won is £180,000. It should be noted that APIL members report that, in general, the chance of success on a clinical negligence case is between 55–70 per cent, at best.

Other Changes[19]

Support Funding

32. APIL believes that the lack of take up of support funding – only 28 certificates in 2002/03 - is due to the difficulties involved with qualifying for eligibility. We feel that the necessary requirements to gain access to support funding are hugely restrictive, with a considerable amount of money needing to be spent on a case before it comes into the scope of

[19] See Section 5 (page 48) of the consultation document

support funding. By the stage this monetary requirement is met, application is considered redundant. The scheme is also overly bureaucratic and uneconomic, and due to the high number of compliance issues involved, most firms are reluctant to put their legal aid franchise at risk by using it.

Specific Issues

Non-family Mediation and other forms of ADR

33. APIL is supportive of any attempts to introduce meditation into the otherwise adversarial area of litigation, but feels that within clinical negligence such moves are unnecessary. According to the NHSLA less than two per cent of cases which they deal with – i.e. the majority of clinical negligence cases – go before a judge, and in only half of these cases is it in a contested trial; the majority of cases are otherwise settled outside of court either through round table discussion or other settlement mechanisms. Indeed the NHSLA is now prepared, more than ever, to engage in mediation and actively promote the use of such techniques in settlement meetings and conferences.

34. APIL questions whether the LSC is promoting mediation for budgetary interests, as the costs associated with mediation are not considerably less than that of litigation. Indeed APIL feels that within small low value clinical negligence cases, the use of meditation may well increase costs.

35. APIL's concern is that mediation is a consensual process where both parties need to agree. While the LSC currently requires claimants' solicitors to report offers of mediation to them, this information is not explored further. APIL proposes that the LSC should seek to find explanations from defendants about why offers of mediation have been declined.

36. APIL is also of the opinion that granting a legal aid certificate should not in any way be dependent on, or compel one to, engage in mediation. APIL believes that any restriction of a legal aid certificate to meditation would be an infringement of a person's access to justice.

Group Actions

37. In considering the effects of the LSC's proposals on personal injury group actions, APIL re-iterates its concern over the proposal that CFAs should be used instead of legal aid, *"whether or not insurance is in practice available".* APIL believes that such a presumption will severely restrict people's access to justice as, in common with clinical negligence cases, there is no active After-the-Event (ATE) insurance market and/or insurance products to support multi-party litigation. Furthermore, where insurance is available it tends to be hugely and prohibitively expensive. The lack of effective ATE insurance products for group actions therefore necessitates solicitor firms, and to lesser extent individual claimants, becoming liable for the costs incurred in the litigation process. APIL feels that this financial burden will result in fewer cases being accepted by solicitors and fewer claimants undertaking litigation.

38. APIL also believes that the huge costs risks involved in taking on a group action case on a non-insured CFA basis will place the solicitor under an inordinate amount of pressure – i.e. loss of all potential income, and the possible need to pay for the defendant's costs. In particular, we are concerned that there will be a conflict of interest between ensuring that the claimant receives a fair and just settlement, and the financial pressure of sustaining a business. Using a previous example, what happens when an offer is received from the defendant – does the solicitor accept the offer for the best interests of the client or the best interests of the business? APIL contends that within group actions this pressure is further exacerbated due to the high costs that such cases accrue.

39. APIL feels that this financial conflict may be further used by defendants to have litigation withdrawn via a 'war of attrition'. Indeed, a well-financed defendant could drive up the cost of the case in order to make it less and less viable for the opposing claimant solicitors to continue. In the case of group actions, which are ready one of the more expensive types of litigation, this may lead to claimants solicitors withdrawing from the litigation or more susceptible to accept a low settlement offer in order to restrict any further costs. For example, the recent tobacco litigation within the United States resulted in the cigarette companies engaging in such a tactic. This involved the claimant solicitor's costs being driven up to such a level that it was not financially viable for many of them to continue with the litigation. APIL is concerned that a similar tactic could be employed by large multi-national conglomerates within English group litigation. In particular, in relation to product liability, the defendant will often be a large pharmaceutical company.

40. APIL believes that there are already considerable difficulties in gaining access to legal advice within group actions, and that the new LSC proposals will cause further difficulties. For example, in the recent MMR/MR vaccine litigation, the Honourable Mr Justice Keith stated that he thought *"it would have made everyone's task easier if funding had been available to enable advice to be given to ensure that the litigation was brought to an orderly conclusion for many of the claimants who have decided that enough is enough.[20]"* He concludes that it is *"hardly an advertisement for access to justice that such advice as the claimants' parents have received has had to be given on a piecemeal and wholly unremunerated basis[21]".* These comments seem to indicate that problems already exist within the group action legal aid scheme and further restriction would simply aggravate them further.

41. APIL believes that by restricting people's access to litigation via essentially removing all viable means of funding, the basic tenet of

[20] *Sayers v Smithkline Beecham plc* ('MMR/MR vaccine litigation') [2004] EWHC 1899 (QB), paragraph 43
[21] Ibid

'equality of arms' as enshrined in Article 6 of the Human Rights act is undermined. Article 6 allows for a person to present their case to the court *"under conditions which do not place him at a substantial disadvantage"*[22]. APIL contends that most claimants would be unwilling, and many unable, to incur an adverse cost order if their litigation failed. This fact places them at a distinct disadvantage compared to well financed defendants. It should be noted that group actions, more so than other personal injury litigation, are conducted against large multi-national conglomerates where there is a huge disparity in the 'equality of arms' at each party's disposal. By allowing 'Goliaths' to undermine the ability of 'Davids' to pursue meritorious litigation, APIL considers that the LSC proposals to be in direct conflict with Article 6.

42. Within the consultation document the LSC state that for "[t]*he most expensive cases of all, typically major group litigation, funding should only be available in cases with exceptional public interest where clients stand to receive life changing levels of damages."* APIL believes these requirements place an overly restrictive burden on claimants applying for legal aid within group actions. The use of such exemptions – i.e. funding only provided for *"exceptional public interest"* cases and where there is *"life changing levels of damages"* - will result in the exclusion of hundreds, if not thousands, of people from being able to gain access to justice. APIL believes that such a situation is in direct opposition to the intention of numerous laws, such as the Consumer Protection act, intended to provide the public with protection against faulty products and goods.

43. APIL questions what is exactly meant by the *"most expensive cases"* within the above LSC quote. The LSC consultation details case cost figures of £100,000 to disposal or over £250,000 if they proceed to trial as being indicative of the *"most expensive litigation"*. Yet in APIL's members experience the majority of group actions will significantly exceed these cost levels. So by the LSC's definition virtually all group

[22] Kaufman v Belgium (50 DR 98)

actions will need to indicate that they meet the *"exceptional public interest"* test as well as illustrating that *"life changing levels of damages"* will be awarded.

44. Furthermore, in relation to the description of group litigation as being "[t]*he most expensive cases of all*", APIL members have suggested that this conclusion may be based on perceptions of the previous funding system. Within the previous system legal representatives were paid as per their normal hourly rates with a large proportion of costs being caused by the necessity to handle each case individually. This inevitably led to high case costs, often into the millions of pounds. The current system, however, allows for generic work to be dealt with as a single issue. Naturally this significantly reduces the amount of work, and invariably cost, needed for each case. This fact, combined with tight budgetary controls and the use of contracts and risk rates, means that many group action cases now run on a £70 legal aid charge rate. For example, in order for a case to cost more than £1 million within today's legal aid system, a solicitor would have to bill more than 14,000 hours, which is highly unlikely.

45. APIL also questions what is meant by *"life changing level of damages"* within the definition. Does "*life-changing"* refer only to claimants who have suffered catastrophic injuries? If so, this will unfairly discriminate against people who may have suffered injuries that are significant, but not catastrophic.

46. In relation to possible cost savings within group actions – although, as illustrated above, the cost of group actions are now tightly controlled – APIL believes that the courts should allow for generic issues to be decided and ruled upon. With the generic issue decided, the court would then be able to deal with the individual issues as it saw necessary, so reducing the cost associated with appearing in court – i.e. court charges, counsel fees, expert fees, etc. APIL believes a further cost saving could be made in the general administration of group actions as the case

management within this area of litigation is still inefficient. This lack of efficiently is further exacerbated by the difficulties within the CPR processes for handling multi-party actions.

47. APIL is concerned that the LSC are acting in haste in relation to group actions, especially as the recently introduced system of extending cost protection to generic work have yet to be fully used and evaluated. Indeed APIL believes that prior to any new mechanism be introduced, this system should be allowed to develop further. Group actions tend to be relatively rare, and as such few have had the opportunity to be run via this system. Introducing new systems, while previous systems have yet to be fully used and evaluated, will simply lead to further confusion and denial of access to justice for many.

Child Abuse cases

48. APIL members report that, similar to previous comments made about clinical negligence and group actions, After-the-Event (ATE) Insurance is simply not readily available for child abuse litigation, making the use of CFAs as a funding alternative unworkable. Insurance providers are deterred from insuring these cases because of limitation defences and high generic costs. In addition, the majority of Before-the-Event Insurance policies do not allow for child abuse or group actions. This has access to justice implications as a claimant is left with a choice of either litigating themselves with no insurance, at great personal expense and risk, or to take no action at all. Even in the event that the insurance market were to provide insurance for child abuse claims, and solicitors acted under a CFA, the costs savings that can be seen to be the primary driver behind the LSC proposals, would become a fallacy; solicitors would attempt to recover 100% success fees, so doubling their fees, and recover the cost of the insurance premium itself. Naturally the defendants would have to meet these increased costs, and where the defendant is a local authority or other public body, there will be no costs savings at all, but instead, a likely increase in Governmental costs.

49. APIL notes that child abuse litigation is a continually developing area of law. Without the support of public funding, APIL can envisage that the boundaries and scope of this litigation would not have developed as it has to date and its future development will be seriously curbed. There appears to be a failure by the LSC to recognise that the changes made by the Civil Procedure Rules (CPR), and the use of franchised and audited specialist lawyers experienced in this field, have made a huge difference to how claims are run and the attitude of solicitors themselves. Indeed, this is reflected in the decrease of cases.

50. APIL is fully supportive of the LSC's aim to discourage unnecessary litigation, but in relation to the argument for excluding weaker cases from group actions in practice this is often harder said than done. Some claimants are suffering from severe psychiatric illnesses, and it is only after disclosure that it becomes clear that the worse abuse suffered was either pre-care or elsewhere and not within the Group Litigation Order. Weak cases often appear strong at the outset and vice versa. By the very nature of these cases and our typical claimants, the whole truth is not apparent at the outset. These types of cases involve a very vulnerable client group.

51. APIL members within child abuse litigation report that they do tend to use informal mediation and Alternative Dispute Resolution (ADR) to achieve settlement in their cases. The use of mediation helps to quantify the case and to investigate the limitation discount. To negotiate successfully, however, takes time and money. Nor does attending mediation rule out the need to prepare the case. APIL members are still expected to act in the client's best interests and this means it still necessary to enter the mediation properly prepared.