

SCOTTISH EXECUTIVE

**ADVICE FOR ALL: PUBLICLY FUNDED LEGAL ASSISTANCE IN
SCOTLAND – THE WAY FORWARD**

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL12/05)**

SEPTEMBER 2005

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 members in preparing this response:

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ADVICE FOR ALL

Executive Summary

- While APIL appreciates there have been recent changes to the civil legal aid system we still feel these changes have not made the system any more attractive to lawyers doing publicly funded legal work.
- APIL believes that local authorities do not have a role to play in the provision of legal advice services concerning personal injury to pursuers due to the specialised nature of the subject.
- While APIL agrees there is a need for a single body to plan and co-ordinate the delivery of civil legal aid, we therefore suggest that rather than a new agency being established the current powers and duties of the Scottish Legal Aid Board (SLAB) should be extended and expanded.
- APIL believes that the funding of non-legally qualified providers should be undertaken where there is an unmet legal need - for example, in relation to housing, debt and/or benefits. In contrast, legal advice concerning personal injury is inappropriate for non-qualified providers as there is already specialist legal provision available.
- APIL feels the lack of appropriate remuneration, and frustration concerning the application process, may be causing legal professionals to abandon the publicly funded legal aid field. This is further exacerbated by the fact that newly qualified solicitors are choosing not to move into this type of work.
- APIL feels that direct employment of solicitors by SLAB will result in people failing to get the appropriate specialist legal advice – for example, specialist personal injury legal advice.

- APIL does not feel it is appropriate to have formal contracting of private practitioners as currently exists in England. We are, however, fully supportive of the use of specialist franchising for solicitor firms. This would mean only franchised solicitors firms would be able to conduct publicly funded personal injury litigation.
- APIL is concerned with the suggestion that legally assisted parties be asked to pay enhanced rates for civil legal assistance because it does not specify the exact circumstance where a legally assisted party would have to meet the full cost of his case.
- APIL fully supports the suggestion that there should be an enhanced rate for solicitors undertaking civil advice and assistance work, as well as full legal aid, which requires specialist skills, knowledge and experience. APIL also believes there should be a further level of payment enhancement which reflects the seniority of the specialist lawyer.
- APIL is against any two-step test for advice and assistance eligibility as it will add further delay and bureaucracy to the system.
- APIL believes that the clawback provisions in relation to legal aid should reflect those within legal advice and assistance.
- APIL fully supports the proposals that benefits should be disregarded in relation to the financial assessment for civil legal aid as they are in advice and assistance.
- APIL believes there is no valid reason why the courts should not be left to decide how the liability of the unsuccessful legally aided party should be determined.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Scottish Executive's consultation - '*Advice for All: Publicly funded legal assistance in Scotland – The Way Forward*'. Please note, however, that as APIL represents the interests of people injured through the negligence of others, our response will concentrate on publicly funded legal assistance on civil matters only.

Operation of the current system

2. While APIL appreciates there have been recent changes to the civil legal aid system – in particular the slight increase fees for such work – we still feel these changes have not made the system any more attractive to lawyers doing publicly funded legal work. The lack of appropriate remuneration within the current system is leading to large areas of unmet need developing within the country, with solicitors finding it increasingly difficult to provide publicly funded legal assistance to injured pursuers. This reduction in the number of solicitors willing to undertake publicly funded work will ultimately lead to fewer injured people being able to gain access to the legal aid system, and therefore being denied their appropriate and fair access to justice.
3. APIL is encouraged that there appears to be some political awareness of this issue, with Annabel Goldie¹ - Deputy Conservative Leader in Scotland and Party Spokesperson on Justice and Home Affairs - stating in a recent legal aid debate that "*it is not in the interests of the public or of justice as a whole if solicitors are walking away from legal aid practice. It is also not in the interests of the legal profession if good court lawyers have no interest in staying in that area of practice.*"² APIL believes the Government needs to recognise that failing to address the issue of

¹ Conservative MSP for the West of Scotland

² Scottish Parliament – Official Report 23 June 2005 – Debate – Col 18326 (see <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor0623-02.htm#Col18326> for details)

appropriate remuneration within the legal aid scheme will ultimately lead to many lawyers unable to take on the cases of the most disadvantaged people.

Consultation Questions

Q1. Do you agree with the proposed consensual approach to developing better planning and coordination of advice services by local authorities, without any formal duty on local authorities in respect of the provision of PFLA services in their area?

4. APIL believes that local authorities do not have a role to play in the provision of legal advice services concerning personal injury to pursuers due to the specialised nature of the subject. We feel that it is essential – in the interests of both efficiency and justice – that personal injury claims are dealt with by a specialist solicitor. There are, however, areas in which local authorities can still provide a valuable source of information, namely in relation to issues involving housing and debt.
5. In addition, APIL is concerned about local authorities having too much input into personal injury matters as they will often be the defenders in such cases. This could represent a conflict of interest for the local authority as it would be advising the pursuer about a legal action against itself as defender.

Q2. What support activity do you believe would need to be provided to assist local authorities in developing their planning and coordination of PFLA at a local level? Who should provide this?

6. APIL feels that this question is not directly applicable to its concerns.

Q3. Should a national body with a planning and coordination responsibility for the delivery of civil PFLA be established in Scotland?

7. While APIL agrees there is a need for a single body to plan and co-ordinate the delivery of civil legal aid, we are concerned that an additional agency will add a further layer of bureaucracy to a system which is already overburdened with it. We therefore suggest that rather than a new agency being established the current powers and duties of the Scottish Legal Aid Board (SLAB) should be extended and expanded. Such a move would generate considerable savings in terms of start-up costs and SLAB's considerable experience with administering civil legal aid would also make any transition easier.

Q4. What are your views on the suggested functions for a national coordinating body for civil PFLA (national planning and coordination; national development and research; responsibility to ensure provision of services where necessary, including second tier services such as training and information)?

8. APIL does not feel that any of the above suggested functions would be inappropriate for the new national co-ordinating organisation for civil PFLA. This view, however, is conditional on the operation of this national body – ideally an extended version of SLAB. In order to ensure that these functions are appropriate, APIL proposes that they should be reviewable at regular periods by an impartial body. This will allow any unnecessary functions to be removed, while more important functions could be included.

Q5. Should a national coordinating body be able to fund provision by non-legally qualified providers as well as solicitors and advocates?

9. APIL believes that the funding of non-legally qualified providers should be undertaken where there is an unmet legal need - for example, in relation to housing, debt and/or benefits. In contrast, legal advice

concerning personal injury is inappropriate for non-qualified providers as there is already specialist legal provision available. APIL would also suggest that the high level of complexity involved in personal injury cases make them eminently unsuitable for non-qualified providers to advise on.

Q6. *Should a national coordinating body have the ability to enter into match funding arrangements with other funders of PFLA?*

10. APIL believes match funding arrangements - as described in the question - are not suitable for personal injury cases as there are no other applicable funders which could be involved.

Q7. (a) *What are your views on the proposed outline planning framework for civil PFLA?*

11. APIL believes that the proposed outline planning framework simply represents another layer of expense and bureaucracy for the civil legal aid system. We suggest that this money could be better spent on improving payment rates for publicly funded legal assistance (PFLA) work, or relaxing eligibility criteria, both of which would lead to more solicitors taking on civil legal aid work and therefore more people using legal aid to enforce their civil rights.

(b) *How do you envisage the various elements of such a planning framework might work together to ensure better planning and coordination?*

12. APIL has no particular comments it wishes to make at the present time regarding this question.

Q8. In relation to the suggested non-remuneration based methods:

(a) Do you believe that the suggested non-remuneration based methods to encourage and maintain civil legal aid provision should be pursued?

13. APIL feels the lack of appropriate remuneration may be causing legal professionals to abandon the publicly funded legal aid field. For example, figures from SLAB show that the number of civil legal aid applications has fallen by five per cent between 2002/03 and 2003/04, while there has been a 14 per cent drop in the number of legal aid applications since 2000/01³. In addition the number of active outlets providing civil legal aid has fallen from 1,022 to 958 within the most recent Civil Legal Assistance Register⁴. These figures, combined with anecdotal evidence, suggests that it is becoming increasingly difficult to find solicitors actually prepared and willing to provide the full scale of publicly funded legal services previously provided. Consequently, we feel that it is this issue, rather than non-remuneration based methods, which needs to be urgently addressed. It is vital in the interests of justice that injured people are able to gain access to local and qualified solicitors in order to get their cases heard. The continuing reduction in the number of solicitors who are willing to do legal aid work means that it is becoming increasingly more difficult for injured people to find local solicitors to handle their cases on a legal aid basis. This may lead to many not being able to gain appropriate access to justice.

14. In addition to the general issue of remuneration, practitioners may also be leaving the PFLA field due to the frustrations surrounding applying for legal aid and advice and assistance. For instance, various APIL members are concerned about SLAB's application of the statutory test on prima facie cases and reasonableness. It appears that a significant number of cases are being refused on these grounds, yet the applications are subsequently being granted on review. This is resulting

³ Scottish Legal Aid Board (SLAB) Annual Report 2003/2004 and SLAB Annual report 2000/2001

⁴ Scottish Legal Aid Board (SLAB) – 'Distribution of the supply of legal aid in Scotland' (October 2002) (see http://www.slab.org.uk/about_us/policy/mapping/mapping_report.pdf for a copy) - Appendix V: Civil legal aid by council

in more time and money being spent by both solicitor and SLAB. For example the pursuer's solicitor has to re-submit the application for review, while SLAB has to reassess the application as well as its original decision to refuse it - processes which take time and manpower. APIL believes that if SLAB took a more uniform approach in the initial assessment, there will be fewer applications granted on review and this will lead to less time being wasted by both SLAB and the pursuer solicitor.

15. The lack of solicitors willing to continue providing a full PFLA service - due to the issue of remuneration and frustration over the application process - is further exacerbated by the fact that newly qualified solicitors are choosing not to move into this type of work. Annabel Goldie – a practising solicitor, a member of the Strathclyde University Court and an MSP – stated in the recent legal aid debate that *“clear evidence suggests that law graduates are increasingly opting not to do [publicly funded legal] work. Indeed, that view was declared to me during a recent visit to a university”*⁵. APIL feels that it is highly unlikely that newly qualified law students will be attracted to legal aid traineeships due to the lack of growth within this particular sector of the legal marketplace. The continued downward pressure on fees, coupled with the *“significant decrease in the volume of applications for civil legal aid”*⁶, ultimately means that there are going to be fewer and fewer practitioners operating in the legal aid field. In order to attract suitably qualified and motivated new students into the field of legal aid work the Government has to recognise that there needs to be changes made to the remuneration of such work, namely an increase in fees. (A full proposal concerning the basis of any increase in fees will be discussed later in this document).

area 2000/1 and Scottish Legal Aid Board Civil Legal Assistance Register (April 2005) (see http://www.slab.org.uk/getting_legal_help/register/civlarapril%2005.pdf for a copy)

⁵ Ibid

⁶ The Scottish Legal Aid Board – *‘Legal aid in a changing world: Research into the reduction in civil legal aid applications in Scotland between 1992 and 2001 – Research report summary’* (see http://www.slab.org.uk/about_us/policy/changing_world/legal_aid_in_a_changing_world_summary.pdf for a copy of document)

(b) *How effective do you think that such methods would be?*

16. APIL believes that there should be a focus on remuneration based methods, rather than non-remuneration based methods, to encourage and maintain civil legal aid provision. We therefore have no comments to make on this question at the present time. APIL considers that non-remuneration based changes are simply tinkering with far more deep rooted problems and will not solve these problems.

(c) *Do you have any alternative suggestions?*

17. As mentioned above, APIL believes that there should be a review of the fee structure for legal aid work in order to make it more attractive for both existing and new practitioners to engage in. While APIL advocates an increase in fees, we feel there should be an additional increase in order to reflect the specialist nature of certain legal aid practitioners. The reason for this additional increase is that legal aid practitioners operating in specialist fields will run a case more effectively and efficiently, therefore making it much more likely that the case will succeed. Consequently, the more cases which are won the less financial burden is placed on the civil legal aid fund. (The structure and requirements relating to the specialist uplift suggested will be discussed later in this document).

Q9. *In relation to securing the provision of civil PFLA services, do you believe that there should be:*

(a) *greater use of salaried or employed solicitors for civil PFLA?*

18. APIL feels that direct employment of solicitors by SLAB will result in people failing to get the appropriate specialist legal advice they need. In the context of reparation cases, this means specialist personal injury legal advice. In addition APIL believes that employed SLAB solicitors may either have no practice experience on which to draw in terms of advising clients or will lose this 'coal-face' knowledge once they have

entered the service. APIL members report that there is already a lack of personal injury expertise within SLAB, and we are therefore concerned that this situation may only be exacerbated with the direct employment by SLAB of non-specialist solicitors. This lack of specialist solicitors can be appropriately addressed, APIL believes, by requiring SLAB employed solicitors to have the same level of specialist accreditation as other practitioners in the field. In terms of personal injury, accreditation would be via APIL's current accreditation scheme – the College of Personal Injury Law (CPIL).

(b) contracting with private practitioners to provide legal aid services?

19. APIL does not feel it is appropriate to have formal contracting of private practitioners as currently exists in England. We are, however, fully supportive of the use of specialist franchising. This would mean that SLAB would only grant legal aid to franchised firms and individuals due to their specialist knowledge of, for example, personal injury practice. APIL believes that properly accredited personal injury lawyers will ensure that the quality of work being undertaken on publicly funded cases will be of an extremely high standard. With cases being run efficiently and effectively, it is likely that more cases will be won therefore leading to more money being recouped by SLAB. Within the English legal aid jurisdiction, the use of franchising has led to an increase in quality and consequently the system of public funding for specialist cases such as clinical negligence has become virtually cost neutral.

20. If such a franchise were to be established in relation to accredited personal injury lawyers, APIL envisions that these solicitors would be able to process a large portion of any legal aid application in-house. This would therefore cut down on the amount of bureaucracy which currently exists in the application process. Naturally such a system would have to be carefully monitored to ensure that the procedures were being followed correctly. SLAB would therefore have a duty to audit franchised solicitors. If a solicitor had not been doing so, SLAB would have the authority to

revoke the legal aid specialist franchise from that firm, thereby disqualifying it from taking on any more specialist legal aid cases.

Q10. *Should legally assisted parties who at the end of their case are able to meet the full cost, be asked to pay enhanced rates for civil legal assistance?*

21. APIL is concerned with this suggestion as it does not specify the exact circumstance where a legally assisted party would have to meet the full cost of his case. For instance, APIL would be opposed to any suggestion that a winning pursuer should have to pay enhanced rates for civil legal assistance out of his damages. APIL is therefore generally supportive of this proposition on the strict provision that no attempt would be made to use the final damages settlement as a means of getting people to pay an enhance rate for their legal assistance.

Q11. *Should the Scottish Legal Aid Board be able to fund provision by non-legally qualified advisers as well as solicitors and advocates?*

22. As previously discussed elsewhere in APIL's response, we are fully supportive of the provision of publicly funded legal services by non-legally qualified advisers in areas where there is an unmet need – e.g. housing, debt and/or welfare. In terms of personal injury advice though, there is already specialist legal provision available in the form of properly accredited and qualified personal injury solicitors and advocates.

Q12. *Should SLAB be able to administer an outlays fund that could be accessed by non-legally qualified providers?*

23. Please see the answer to question 11 and APIL's view concerning non-legally qualified providers.

Q13. Do you agree that an enhanced rate for solicitors undertaking civil A&A work which requires specialist skills, knowledge and experience should be introduced?

24. APIL fully supports the suggestion that there should be an enhanced rate for solicitors undertaking civil advice and assistance work, as well as full legal aid, which requires specialist skills, knowledge and experience. APIL also believes there should be a further level of payment enhancement which reflects the seniority of the specialist lawyer. For instance, APIL's accreditation scheme - run under the banner of the College of Personal Injury Law (CPIL) - specifies that all members of CPIL must undertake a specified amount of training each year in order to maintain their accredited status. The amount of training varies with the seniority of the accreditation status, ranging from 15 hours of CPIL training over three years to 50 hours of CPIL training over five years. In total there are currently five levels of accreditation available to members based on their experience within the personal injury field: associate; member; litigator; fellow; and senior fellow⁷. Each level of accreditation involves a different level of experience, from associates who will tend to be newly qualified with up to three years experience to senior fellows who will have over 15 years experience and have made a significant contribution to the field of personal injury law. APIL therefore believes that the remuneration system within publicly funded legal assistance should be based on the seniority and accredited expertise of the specialist practitioner.

Q14. Should a system of extended and tapered financial eligibility be introduced for civil legal assistance?

25. APIL is against any two-step test for advice and assistance eligibility as it will add further delay and bureaucracy to the system. In previous discussions with stakeholders it has been suggested that public legal

⁷ See <http://www.cpil.ac> for further details of CPIL's Accreditation scheme.

funding could be reviewed after a certain cost threshold was reached – for example £1,000. In reality it is likely that the more complex a case, the higher the costs are going to be due to items such as expert evidence. The re-assessment of civil legal assistance at this threshold stage may lead to more complex cases being refused funding. APIL believes that it would be manifestly unjust to refuse to continue to fund a case based its complexity, rather than the financial reality of the client's means.

Q15. *Assuming that an extended and tapered scheme was affordable, what should be its main features?*

26. APIL considers that an extended and tapered scheme of financial eligibility is inappropriate (see above), we therefore have no comments to make regarding this question.

Q16. *What detailed changes to the clawback arrangements might desirably be made?*

27. APIL believes that the clawback provisions in relation to legal aid should reflect those within legal advice and assistance. As it currently stands if a case is concluded with the help of legal advice and assistance funding, SLAB has the discretion to forego any additional amounts – i.e. the difference between the settlement amount and the amount of public funding - based on the test of 'grave hardship'. In contrast, however, if there are outstanding amounts after the conclusion of a legally funded case, SLAB are obliged to 'clawback' the difference from a client's damages irrespective of the 'grave hardship' test – there is no discretion. APIL proposes that SLAB should have the discretion to forego payment in instances of 'grave hardship' where advice and assistance *and/or* legal aid funding is used.

28. In terms of possible implications, this may adversely affect the amount of money SLAB recoups. APIL understands, however, that instances of

'clawback' by SLAB rarely happen in relation to personal injury cases therefore the amount of money lost will be negligible.

Q17. Do you agree that state benefits should be disregarded in the financial assessment for civil legal aid, as they are for Advice and Assistance?

29. APIL fully supports the proposals that benefits should be disregarded in relation to the financial assessment for civil legal aid as they are in advice and assistance. APIL would emphasise the fact that benefits are needed by people in order to survive and are a necessary living expense; they do not represent disposable income on which to base any type of financial assessment.

Q18. Do you agree that the Scottish Legal Aid Board should be able to:

(a) collect contributions over a longer period of time?

30. APIL supports this proposal on the provision there is no attempt to increase the level of the contribution itself.

(b) make flexible arrangements for the repayment of contributions, including the use of instalments for contributions from capital?

31. APIL again supports this proposition on the provision that the level of the contributions is kept the same and not increased in any way.

Q19. Do you agree that the legally assisted person should be required to inform the Board of changes in their financial circumstances over the lifetime of their civil case?

32. APIL agrees that it is reasonable to re-assess the ability of the client to contribute to the costs of their case if his circumstances change. APIL does feel, however, that what constitutes a 'change of financial circumstances' should be clearly and appropriately defined.

Q20. Do you agree that the test of 'severe financial hardship' in section 19 of the Legal Aid (Scotland) Act 1986 should be changed to one of 'financial hardship'?

33. APIL provisionally supports this suggestion, even though it is highly unlikely it would ever apply to personal injury cases. The proposal will lessen the 'severe financial hardship' test allowing defenders to reclaim money from the pursuers' side on the basis of just 'financial hardship'. As the majority of defenders which APIL members deal with are large wealthy insurance companies, it is unlikely they will be able to demonstrate 'financial hardship' in order to satisfy this test.

Q21. Would any further relaxation of the terms of section 19 of the Legal Aid (Scotland) Act 1986 be justified?

34. APIL does not want to comment on this proposal until the success of the above suggestion has been assessed.

Q22. Should regulations be introduced to specify how the courts should determine the liability of the unsuccessful legally aided party (Section 18 of the Legal Aid (Scotland) Act, 1986)?

35. APIL believes there is no valid reason why the courts should not be left to decide how the liability of the unsuccessful legally aided party should be determined. There is no evidence that existing judicial discretion in the matter is being unfairly or inappropriately applied, and there is no evidence of injustice in the existing application of the regulations.

Q23. In relation to a review of the number and types of proceedings or categories of cases under which ABWOR and civil legal aid are available:

(a) Should the number and types of proceedings or categories of cases under which ABWOR and civil legal aid are available, be reviewed?

(b) If so, what general criteria or principles should be applied to determine what proceedings or categories of case might be included?

Q24. *Would a provision allowing SLAB to fund individual cases which fell outside scope, where there were exceptional circumstances relating to the general importance of the case for public policy, be helpful?*

Q25. *How may publicly funded representation by non-lawyers best be taken account of when reconsidering the scope of ABWOR?*

36. APIL believes these questions (23 to 25) are not applicable to personal injury, and therefore beyond our remit to answer.