



**LEGAL SERVICES COMMISSION /
DEPARTMENT FOR CONSTITUTIONAL AFFAIRS**

LEGAL AID: A SUSTAINABLE FUTURE

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

OCTOBER 2006

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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Executive summary

- APIL is concerned about the impact proposed reforms will have on the legal aid system overall, and on the quality and availability of clinical negligence and other personal injury work in particular.
- As the LSC chooses to let go many, especially smaller, suppliers it may lose so significant a number of specialist firms in areas such as clinical negligence that the overall expertise under CLS contract may be notably reduced.
- Victims of violent crimes may be left without access to publicly funded specialist advice, as the LSC lets go specialist personal injury lawyers, and makes the conduct of compensation claims under legal help unviable for many more. The consequent losses to victims of crime could be so severe that APIL would recommend the retention of tailored fixed fees (TFFs) and tolerance work for criminal injuries compensation cases to maintain current levels of service.
- In light of higher overheads, and sometimes higher levels of specialist expertise and competition in metropolitan areas, APIL considers the second proposal for the replacement of TFFs, which maintains regional variations in fee levels, the fairer and more appropriate.
- The move to large-scale suppliers is likely to increase access difficulties and 'advice deserts', both in certain parts of the country and for the more specialised areas of law.
- Furthermore, the emphasis on volume in contracting and business models puts more experienced practitioners at a disadvantage, and encourages suppliers to reduce levels of expertise among their staff, thus reducing overall quality and expertise in legal aid.

- APIL welcomes the proposed emphasis on quality and professional standards, but would point out that the measuring and ranking of suppliers can be no substitute for retaining the best practitioners in legal aid.
- The introduction of greater uncertainties under new contracts at a time when economically fragile legal aid practices are asked to invest in restructuring might undermine many of the wider objectives of legal aid reform.

Introduction

1. As members of the legal profession, APIL's membership share the deep concerns many have expressed about the impact the pace of current reforms and extent of cuts might have on the future of legal aid.
2. Proposed further cuts in fees may lead practitioners to offer less publicly funded work, to provide a lower quality of service, and to turn away more complex cases.
3. The move towards large contracts with few suppliers is likely to increase access difficulties in some parts of the country, and in more specialised areas of law.
4. The envisaged restructuring of the market will require substantial investments for firms to adjust; investments for which neither current profit levels nor the LSC's adjustment funds provide sufficient resources.
5. While current proposals may succeed in reducing costs, through cuts focused almost exclusively on the legal profession, aspirations to do so while raising, or even retaining current standards appear difficult to achieve.
6. As personal injury specialists, APIL's members have some concerns about the potential loss of specialist expertise to legal aid clients these reform proposals are likely to cause.

Personal injury and clinical negligence perspective

7. Since much personal injury work is now excluded from public funding, APIL would wish to comment first and foremost on the effects proposed changes will have in the area of clinical negligence. In addition, a range of clients who currently receive legal help funding, most notably in the area of claims to the Criminal Injuries Compensation Authority will be affected. In both areas, APIL fears that reform proposals will lead to a loss of experienced practitioners available to publicly funded clients.

8. It is APIL's understanding that proposed changes will affect civil, non-family work less severely than most other areas of legal aid work. Partly as a result of the LSC's closer management of clinical negligence cases in terms of cost control and case planning in recent years, legal aid practice in this field has already achieved a very high level of efficiency. APIL would therefore submit that fewer efficiency gains can still be expected in these cases. This appears to be recognised in the fact that the area of clinical negligence has received less attention than most in current efforts to improve efficiency and reduce costs.
9. The association would, however, warn that proposed restructuring of the legal aid market might lead to the loss of much of the personal injury expertise currently available under legal aid.
10. Not all firms are likely to make or attempt the significant changes required to continue legal aid work. While the LSC is free to move contracts to other firms, highly qualified practitioners may not follow the CLS franchise. This will have a particular impact in smaller and more specialised categories of publicly funded law, such as clinical negligence. Whereas lost franchisees in larger disciplines, such as mainstream family law, may be replaced relatively easily, the loss of even a smaller number of specialist clinical negligence firms could signify the loss of an important share of expert practitioners.
11. APIL would therefore urge the LSC to reconsider expectations of scale or minimum income in relation to smaller, specialised areas of practice, before terminating contracts with specialist firms in areas such as clinical negligence law.
12. Although minimal in the scale of individual cases, clients in other areas of personal injury law may be affected even more severely by the loss of personal injury expertise under CLS contracts.

13. At present, it is not uncommon for personal injury lawyers to conduct a limited number of cases on a legal help basis. Restricted to the level of advice and assistance, and to modest fee levels, legal aid work is seen by many personal injury lawyers as a form of public service rather than a means of generating significant income for their practices. Consequently, personal injury specialists are possibly the least likely to invest in adjusting to a changing legal aid market, to retain a franchise that is of limited importance to their businesses.

14. Minor in costs to the LSC and fees for solicitors though they may be, these personal injury cases are far from insignificant to clients. The publicly funded support of an expert personal injury lawyer can, for instance, be vitally important to a victim of a crime in making an application to the Criminal Injuries Compensation Authority (CICA). Expert representation for such claims can make a very real difference to the outcome and long-term prospects for the injured victim. For this reason, APIL is very concerned about the prospect of legal aid effectively becoming unavailable for CICA claimants as a result of proposed changes.

15. In the long term, and as the LSC moves towards larger contracts with fewer firms, specialist personal injury lawyers may be lost to the LSC and its customers. As most personal injury work is now excluded from public funding, specialist personal injury firms are by definition unlikely to carry out a sufficient amount of legal aid work to qualify for large contracts. Those best qualified to help victims injured through violent crime may lose their ability to work on a publicly funded basis, irrespective of the high quality of service they may currently offer, and precisely because they specialise in the law relevant to criminal injury claimants. As a result, claimants will have to either be referred to legal aid firms who may have less expertise, or pay privately for a personal injury expert.

16. Even in the short term, proposed changes are likely to leave some claimants without access to legal aid lawyers, as substantial reductions in

payments for CICA cases in some parts of the country will lead practitioners to withdraw from legal aid work.

17. The replacement of tailored fixed fees (TFFs) may make the currently scarcely profitable conduct of personal injury advice and assistance, such as CICA cases, a loss-making activity for solicitors. At present, the average TFF for personal injury cases in the London Region is £330.27.¹ Set on the basis of what the LSC has, in the past, deemed to be the reasonable cost of conducting such cases in that region, any significant reduction of these fees is likely to make cases financially unviable. Notwithstanding, one current proposal is to reduce these fees by over a third, replacing them with a standard fee of £210.² It is therefore not unlikely that practitioners in those parts of the country where overheads are highest will cease to conduct CICA claims on a legal help basis.

18. As a result, criminal injury victims may increasingly have to pay privately for representation in compensation claims. While victims in some parts of the country may still be able to access publicly funded help in the transition period, claimants with similar injuries in other areas may not. Legal costs for victims of violent crimes on the lowest incomes which are currently paid for by the legal aid fund – at a very moderate cost – may in future have to come out of the compensation victims receive, not because claimants become ineligible for public funding, but because personal injury lawyers become ineligible or unable to offer publicly funded work.

19. APIL would consider this cost to victims of crime entirely disproportionate to the minimal benefit of savings to the legal aid fund in the area of fixed fees for personal injury work. This outcome appears to run counter to wider government policy in relation to victims of crime, and might, APIL suspects, be the product of insufficient consideration rather than design.

¹ http://www.legalservices.gov.uk/docs/cls_main/London/RegionalAv.pdf

² Under Option 1 for the replacement of TFFs, Consultation Document, p. 28

20. APIL would therefore strongly recommend that the LSC reduce adverse effects on injured people and victims of crime by excluding CICA claims, if not all personal injury matters, from the replacement of tailored fixed fees.
21. Legal help funding for criminal and other personal injury claims may be further undermined by moves to eliminate tolerance work. A number of franchised firms with personal injury departments currently offer CICA claims on a legal help basis as a tolerance matter. As tolerance work is being phased out, these firms, too, may abandon CICA work, thus further reducing publicly funded advice available to victims of crime.
22. Already in the transition period, proposals to reduce payments for tolerance matters would make the conduct of CICA claims even less viable.
23. APIL does not, in any event, consider the proposed 15 per cent reduction of fees for tolerance work to be fair. Whether or not a supplier holds a franchise for a particular area of law is immaterial to both the amount of work and effort a practitioner invests in a case, and the value their work has to the client.
24. The reduced payment for tolerance work is likely to immediately exacerbate the problem of 'advice deserts'. In those parts of the country where publicly funded advice is least accessible, the less common areas of law (including personal injury) are sometimes only available through solicitors working under tolerance. If the proposed disincentive to tolerance work were introduced, publicly funded advice in those practice areas might become entirely unavailable locally for some clients. It does not seem fair or appropriate to promote the LSC's strategic objectives (controlled work, preferred suppliers, CLS Direct) at the expense of putting publicly funded face-to-face advice out of the reach of some of the most vulnerable members of society.

25. While these opportunity costs lead APIL to disagree with the policy of reduced pay for tolerance work, the association appreciates the underlying logic in relation major areas of LSC franchising, including clinical negligence work. The same reasoning cannot, however, be extended to the remainder of personal injury law. As personal injury remains excluded work, personal injury will remain a peripheral practice area for any legal aid suppliers. The logic of promoting the use of major, properly quality controlled suppliers cannot apply to CICA or other personal injury claims in the same way.

26. Given the threat of a substantial drop of qualified franchised practitioners conducting CICA claims, APIL would therefore strongly recommend that a mechanism akin to tolerance work be retained for the somewhat exceptional situation of personal injury work.

Fees and payments

27. APIL would endorse warnings other parts of the legal profession have raised, that reductions in fees are too high, and too sudden to allow a sustainable future for the legal aid system.

28. Legal aid practitioners and practices have accepted continuous and very real reductions in their income for a number of years. APIL was concerned, although not surprised, to read LECG's findings about the economic fragility of legal aid practices³, and would comment that no proposals for the future of legal aid can be sustainable unless they are sustainable at the level of individual practices.

29. As indicated above, APIL would urge the LSC to exempt CICA claims, if not all areas of otherwise excluded personal injury law from the replacement of tailored fixed fees.

³ LECG Ltd (September 2006) *Legal Aid Reforms Proposed by the Carter Report – Analysis and Commentary*

30. From APIL members' experience in the area of clinical negligence, the second proposal for the replacement of TFFs seems to the association the fairer and more appropriate option by far.
31. Practitioners in the metropolitan areas should, in APIL's view, receive higher fees, in line with higher overheads in those regions. Failure to compensate practice for higher costs might force urban practitioners out of legal aid, thus introducing 'advice deserts' into parts of the country where fewer gaps in the legal aid net currently exist.
32. In addition, higher rates of pay for city firms reflect current geographies of legal professional expertise. Some of the country's leading specialist firms in practice areas such as clinical negligence are based in urban centres (including London and Manchester). As metropolitan practitioners conduct some of the most complex and challenging clinical negligence cases for clients from all regions, it could not be appropriate for their work to effectively attract a lower rate of net pay after costs.
33. At present, the quality of clinical negligence practitioners in legal aid remains very high. If rates of pay were reduced too far, however, the range of opportunities that the competitive market of legal practice in urban centres offers would draw more of these experienced practitioners away from legal aid. This, in turn, would notably drive down the overall standard of publicly funded clinical negligence work.
34. APIL does not believe that proposals for the payment of VAT will significantly affect clients or the quality of service. While long delays in the payment of VAT or other outlays might add to the financial constraints legal aid practices face, and which, taken together, might force practitioners to offer a lower quality of service, the association does not believe that arrangements for the payment of VAT in themselves will have a notable impact on outcomes.

Size and business structures of legal aid practices

35. APIL shares concerns expressed by various groups of practitioners that the policy of contracting fewer, much larger legal aid providers may be neither in the best interest of publicly funded clients, nor certain to increase value for taxpayers' money.
36. Under current proposals, only those who can access the new, large legal aid suppliers will enjoy the benefit of legal aid. APIL is not satisfied that these firms will be equally accessible to clients outside urban areas in the foreseeable future. Since legal aid services are, by definition, provided predominantly to those on the lowest incomes, and hence those least able to afford travel, obstacles to accessing justice could scarcely be more obvious than the widespread closure of small high street firms in rural communities.
37. Concerns that the preference for larger firms will have a detrimental effect on diversity equally remain. APIL wholly supports the regard for diversity and choice expressed in Lord Carter's recommendations 5.4 and 5.5. It is not, however, clear that the LSC's proposals to place equality duties on suppliers, and to monitor figures will adequately compensate the adverse effects on equality and diversity its reforms are likely to produce.
38. As indicated above, APIL believes the loss of small specialist franchisees might bring about a notable overall loss of expertise in the smaller specialisms for CLS. In addition, proposed business models effectively encourage the use of less experienced practitioners for legal aid work.
39. In order to meet proposed minimum income requirements, smaller and medium-sized suppliers will need to maximise the amount of legal aid work each practitioner carries out. The most experienced and skilled practitioners of the legal profession, however, traditionally dedicate a greater part of their working time to Law Society panels, specialist bodies and other means of sharing and promoting knowledge and best practice within the profession.

40. Similarly, Lord Carter's proposals to increase the ratio of fee earners to partners will, in practice, increase the proportion of less experienced practitioners in legal aid.

41. It cannot be in the interest of quality or benefit the LSC, its customers or taxpayers to discourage, as current reforms do, practitioners with the greatest expertise from remaining in legal aid practice.

42. APIL would therefore urge the LSC to move from quantity and size to quality and competency in the selection of suppliers.

Quality assurance

43. APIL supports the principle that the quality of suppliers' work should be monitored, and be a key criterion in the contracting of legal aid work.

44. The association would, however, submit that control and enforcement of quality standards can be no substitute for retaining the highest quality of practitioners under legal aid contracts, and is concerned that the overall effect of reforms may drive standards down rather than up.

45. APIL welcomes the move towards increased self-monitoring and peer review within the legal profession, as well as the recognition of quality standards outside the SQM.

46. APIL supports proposals for file review, but has serious reservations about the appropriateness of mystery shopping.

47. Limited resources and practitioners' time should, in APIL's view, be used fully to help vulnerable individuals with real problems, and not be taken up by solicitors attending on actors or mystery shoppers.

48. Legal practice is too complex a service to adequately be assessed by unqualified mystery shoppers. While random sampling of services may

work well in the evaluation of simple, brief, one-off services such as the manner of a firm's receptionist, involved and ongoing services or the complexities of advice cannot be judged adequately in this way.

49. Professional legal services can, in APIL's judgement, be adequately evaluated only by fellow professionals with comparable levels of knowledge and expertise. In specialised areas such as clinical negligence, mystery shopping by peers would, however, be made impossible by the fact that members of the relatively small circle of experts will know and recognise one another.

50. APIL feels extremely uncomfortable with the element of entrapment, which mystery shopping would introduce into the relationship between practitioners and the LSC. Unlike the mystery shopping of other areas of the service sector, mystery shopping of legal advice will almost inevitably consist of 'clients' purporting to be what they are not.

51. In the area of personal injury law, APIL, would remind the LSC that practitioners may have a statutory duty to report individuals to the authorities if they suspect clients of making false claims. Practitioners in certain areas of law may therefore report CLS mystery shoppers as potential fraudsters with some regularity. This might undermine the credibility of all involved as much as good working relationships.

52. While mystery shopping is therefore not a form of quality control APIL could support, the association would consider an audit-like peer review system one of the most appropriate ways of ensuring a consistently high quality of service.

53. APIL cannot comment on the suitability of the envisaged peer review scheme, because the association has not received sufficient detail on the proposed operation or review criteria. For the same reason, APIL cannot respond to proposals to remove payment for file review.

54. APIL agrees with proposals to increase transparency, including open book relationships between suppliers and the LSC, and the publication of information relevant to members of the public.
55. While the use and processing of information within the LSC is a management decision for the Commission to take, on which APIL does not hold any views, the association would point out the resource implications of requesting more detailed information from suppliers. Particularly small and medium-sized suppliers currently retain high levels of efficiency and financial viability by targeting their resources on the provision of legal advice. It would be unfortunate if these had to be diverted towards the gathering and handling of management information for the LSC's use.
56. APIL welcomes efforts to increase transparency for consumers, including the proposed publication of information on the performance of suppliers. In doing so, the association would urge the LSC to ensure that information published is not only fair and impartial, but also meaningful to clients.
57. Clients' priorities and needs are not always identical to those of the LSC. Any published summaries of supplier performance must be indicative of the quality of the service each firm offers to its clients, rather than the services firms offer to the LSC. It would, at best, be misleading to use published supplier rankings as a means of steering consumer choice towards firms who best meet LSC objectives. At worst, such rankings might be interpreted as another means of enforcing LSC policy and strategy through public naming and shaming, and, as such, alienate suppliers at a time when it is the LSC's avowed objective to improve its working relationship with the profession.
58. Whatever mechanisms for measuring and publishing supplier performance are used, APIL would reiterate that standards are best maintained by retaining high quality practitioners and practices under CLS contract.

Length and terms of unified contracts

59. APIL accepts the benefits of greater flexibility in contracting practices during the transition to a market-based legal aid system.
60. Notwithstanding, the removal of certainties seems counterproductive at a time when financially already insecure practices are faced with reductions in income and asked to invest in the restructuring of their businesses.
61. Medium-term certainty about legal aid contracts is not a matter of mere peace of mind for solicitors, it is vital for good planning and the provision of high quality services at the level of individual law firms.
62. Planning and business delivery at this level cannot be at their most cost-effective, if practices might be asked to take on or lay off staff or entire departments at short notice, and are unsure about future work for which to prepare, and expected income with which to budget.
63. The LSC's proposed powers to cut short existing contracts in order to re-allocate local funding to the creation of CLACs and CLANs, regardless of the quality of service or investments in sustainable legal aid business structures that firms may have shown, appear difficult to reconcile with declared objectives of working with suppliers to help them prepare for market-based tendering processes, and rewarding quality and efficiency.
64. APIL would therefore warn that the removal of contract certainties to hasten the implementation of envisaged market and business models poses a further threat to the quality of publicly funded advice, and might undermine longer-term objectives of current reform proposal.