Building a Brighter Future
for Injured People

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Civil Legal Aid Review Call for Evidence

Enabling Access to Justice Division

Massey House

Stoney Road Belfast BT4 3SX

17 June 2024

By email only: CLAR@justiceni.gov.uk

Dear Sir/Madam,

Review of Civil Legal Aid – Call for Evidence (legal practitioners)

APIL welcomes the opportunity to provide comments to the Department for Justice's call for evidence for legal practitioners on the review of civil legal aid. We will provide general comments regarding Parts 2 and 5 of the call for evidence.

We note that the objective of the review is to evaluate the current provision of civil legal services and to consider opportunities to better enable access to civil legal services for those who are unable to afford representation. APIL has made representations on numerous consultations by the Department of Justice in the past regarding these issues. We maintain that legal aid should not be removed from personal injury cases, given the high success rate of these claims and the low cost of personal injury claims to the Northern Ireland Legal Services Agency.

In successful claims, costs are recovered from the other side through the "polluter pays" principle. Data obtained by APIL in a Freedom of Information (FOI) request to the Legal Services Agency Northern Ireland (LSANI) shows a 73 per cent success rate for legally aided personal injury cases[1]. This illustrates that legal aid is being used effectively to support valid claims, ensuring justice for those who might not otherwise afford it.

Further, for the financial year 2022-23, the provision of civil legal aid cost around £99 million to the Department of Justice[2]. The data obtained in our FOI request reveals that legal aid expenditure for personal injury claims and clinical negligence claims was only around £3 million.[3] Again, the figures illustrate APIL's argument that civil legal aid comes at a low cost for the LSANI while maintaining access to justice for injured people. It is essential that those on low incomes are able to access the compensation they require to put them back, as closely as possible, to the position they were in prior to their injury. Legal aid ensures there is a level playing field between the plaintiff and the well-resourced defendant, and plays a fundamental role in safeguarding access to justice.

APIL strongly believes that legal aid should continue to be provided for personal injury cases. However, if legal aid were to be removed for personal injury cases, a workable alternative funding mechanism must be put in place. At the very least, this new system should be implemented in tandem with the removal of legal aid. To remove legal aid before

[1] Freedom of Information request - Legal Services Agency Northern Ireland (reference FOI/23/11)
[2] Department of Justice, Annual Report and Accounts 2022-23, page 139 accessed online at https://www.justice-ni.gov.uk/publications/department-justice-annual-report-and-accounts
[3] Freedom of Information request - Legal Services Agency Northern Ireland (reference FOI/23/11)

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any alternative system is put in place will create a gap in funding and will result in a denial of access to justice for injured people.

APIL would welcome the introduction of conditional fee agreements with success fees recoverable from the defendant, as an alternative funding mechanism only if legal aid is removed. When legal aid for personal injury cases was cut in England and Wales, the Government instead put in place a structure which allowed solicitors to take on cases which had a good prospect of success. Conditional Fee Agreements (CFAs) coupled with After The Event (ATE) insurance (which protects plaintiffs from having to pay the defendant's costs if the plaintiff loses) and success fees (which allow the plaintiff solicitors to build up a fund to pay for those cases it took for plaintiffs which did not succeed), both of which were recoverable from the defendant, and ensured that in England and Wales, access to justice was maintained.

We do not agree that money should be taken from the plaintiff's damages. The function of damages is to put the plaintiff back, as closely as possible, to the position he would have been in had he not been injured. Members report that currently, deductions are being made from damages because successful plaintiffs have to pay back after-the-event (ATE) insurance premiums from their damages. Plaintiffs are seeing their damages unfairly reduced to cover ATE insurance due to the absence of a provision making those costs recoverable. This is particularly concerning given that the price of ATE insurance premiums in Northern Ireland is very high. There is no real competition in the market and often the policies offered are unaffordable and unwise to proceed with when a proper risk assessment of the case is taken. It is important that there is competition in the ATE market to ensure that premiums are competitive and that cover can be obtained where required. We believe that the model described above which operated in England and Wales before the 2013 reforms would lead to the development of an ATE market in Northern Ireland.

Given that the ATE market is not yet properly developed, consideration could be also given to introducing a system of qualified one way costs shifting (QOCS), which is then supplemented by ATE insurance. ATE premiums should be recoverable, or at the very least legal aid should remain for those who cannot afford to pay an ATE premium. In England and Wales, QOCS operates by providing that, if a claimant is unsuccessful with their claim, they will not be ordered to pay the defendant's costs. A defendant will, however, still be ordered to pay a successful claimant's costs. This is "qualified", because the claimant loses this protection if they fail to beat the defendant's Part 36 offer to settle; the claim is found on the balance of probabilities to be "fundamentally dishonest"; or the claim is struck out as disclosing no reasonable grounds for bringing the proceedings, or as an abuse of process, or for conduct likely to obstruct the just disposal of the proceedings. ATE insurance would be required to supplement QOCS, as QOCS does not cover disbursements.

If the option of QOCS supplemented by ATE insurance is considered, care must be taken to ensure that the system is robust and it must not lead to uncertainty or satellite litigation. There have been a number of pitfalls in the QOCS rules in place in England and Wales, particularly uncertainty around fundamental dishonesty and these issues should not be transferred to any model adopted in Northern Ireland.

APIL believes that whilst the model described with recoverable ATE is an alternative, it is not the same as legal aid. Recoverable success fees and ATE premiums are by far the best option to replace legal aid, as the system is based on polluter pays, and the successful plaintiff will be sure to retain 100 per cent of their damages. The difficulties experienced in England and Wales, which led to the Jackson review and a funding model with success fees and ATE taken from the claimant's damages, were unique to that jurisdiction. Spiralling and

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disproportionate legal costs are not an issue in Northern Ireland, because of scale costs. Scale costs are essentially fixed, and ensure that legal costs never go beyond damages awarded.

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We hope our comments prove useful.

Yours sincerely

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