

## **The Impact of the Jackson Reforms on Costs and Case Management**

### **Response by Police Actions Lawyers' Group to Consultation by Civil Justice Council March 2014**

1. The Police Actions Lawyers Group (PALG) is a national organisation of lawyers representing complainants against the police and other detaining authorities throughout England and Wales. PALG has a large and varied membership, including most of the leading practitioners in claimant police law listed in the Chambers Directory and Legal 500. PALG members act on behalf of victims of misconduct by police officers from virtually all police forces and have been involved in numerous notable cases in police law.
2. PALG members' experience is drawn from civil claims arising from deaths in custody, claims for assault, false imprisonment, malicious prosecution, misfeasance in public office, claims under the Equality Act 2010 and under the Human Rights Act 1998. PALG members also pursue judicial reviews of decisions and policies of bodies within the criminal justice system.

#### **Introduction**

3. Litigation through the civil courts is often the only means by which those who have suffered malpractice on the part of officers of the state are able to secure access to justice and thereby to defend their civil liberties. Such cases are of wider public importance as a means of holding the state to account for breach of fundamental rights and as a deterrent to the abuse of state powers.
4. The lack of recoverability of ATE insurance premiums from defendants in CFA cases introduced by LASPO<sup>1</sup> has created an insurmountable barrier to access to the courts for those claimants falling outside the QOCS regime, for the reasons set out below. For those claimants whose cases potentially come within QOCS a range of uncertainties makes it difficult to assess the risk of an enforceable adverse costs order, creating a significant obstacle to litigation in meritorious cases.
5. As a result claimants who do not qualify for legal aid are unable to vindicate constitutional and other fundamental rights, unless they are wealthy. Financial eligibility criteria for legal aid are extremely restrictive<sup>2</sup>. The majority of prospective claimants against the police who are ineligible for legal aid are of modest means. Such claimants cannot contemplate the risk of an enforceable costs order against them, inevitably running to tens of thousands of pounds. Pursuing litigation without ATE is not an option and such potential claimants have no available route to the courts.

#### **Cases without a personal injury falling outside QOCS**

6. Following the implementation of LASPO, ATE insurance premiums, no longer recoverable from defendants, fall to be paid out of damages. However in civil liberties cases, damages are relatively low despite the constitutional importance of the issues raised and insurance premiums are relatively high. Prior to LASPO a

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<sup>1</sup> LASPO section 46 (1)

<sup>2</sup> eg combined disposable income limit for claimant and partner is £733 per month, homeowners are excluded if equity in the home is over £100,000 after allowing up to £100,000 mortgage disregard

typical ATE premium for a claim to trial, in both private and public law, was in the region of £30,000 to £35,000. Therefore in the majority of cases ATE premiums would have been a very high proportion of damages, if not higher than damages (see examples below).

7. Claims for judicial review generally do not lead to damages and an ATE premium would be payable by claimants from their own resources where a claim is successful. ATE premiums are well outside the means of the majority of claimants.
8. As a result, insurance companies previously offering policies in cases against the police are no longer willing to offer ATE insurance in such claims and attempts by PALG member firms to explore solutions with insurers have proved fruitless.
9. Before The Event insurance is almost entirely unavailable for claims against the police<sup>3</sup>. Therefore, pre-LASPO, ATE insurance had been the primary means of pursuing litigation for those not eligible for legal aid.

#### Unviable claims following the implementation of LASPO

10. The following non-exhaustive list provides examples of claims where PALG members report a lack of access to justice arising post-LASPO as a result of lack of ATE policies:
  - a. **Claims for false imprisonment and malicious prosecution (when no personal injury arises).**
    - (i) Such claims frequently involve an abuse of power, typically police officers putting forward false accounts.
    - (ii) An average claim involving a detention of up to 12 hours and a prosecution lasting 6 months is likely to attract damages of between £10,000 and £30,000, ie less than or equal to a typical pre-1<sup>st</sup> April 2013 ATE premium.
    - (iii) For example, a PALG member reports turning away a man in his 60s with multiple sclerosis who has a very low income but was ineligible for legal aid as he owns his own property and exceeds the equity allowance. He had no prior adverse police contact until he was subjected to an unlawful arrest.
    - (iv) PALG members have advised a number of protestors that they are unable to litigate claims arising from unlawful arrests at peaceful protests. Such claims also involve breaches of the European Convention on Human Rights (ECHR) Article 5 (right to liberty), Article 10 (freedom of expression) and Article 11 (freedom of association). Damages would be modest but the vindication of constitutional rights is of paramount importance to claimants. The ATE premium would exceed damages considerably.

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<sup>3</sup> many policies exclude claims against public authorities, others will not cover relevant causes of action other than personal injury and many potential claimants do not have BTE insurance.

**b. Claims arising from deaths in custody.**

Where the deceased was unmarried and unemployed ordinarily no losses arise under the Fatal Accidents Act 1976 and the claim will not come within QOCS. Such claims are brought by family members as victims in their own right under Article 2 ECHR and are frequently valued in the region of £10,000 to £20,000. The unavailability of ATE deprives families of modest means of a route to establish accountability for a death of a loved one in state custody.

**c. Freestanding claims under the Human Rights Act 2010**

Such claims attract modest awards as “just satisfaction” alongside a declaration of a breach, falling far short of the cost of ATE insurance.

For example, a PALG member acted for a woman commencing a claim against the police and CPS in respect of failings in the investigation of numerous rapes and assaults by her violent ex-husband. She became ineligible for legal aid following a small increase in her income. Whilst she had suffered psychiatric damage as a result of her ex-husband’s actions there was no evidence that the distress she had suffered due to police failings had caused an exacerbation of her medical condition and therefore the claim would not attract QOCS.

**d. Claims brought under the Equality Act 2010**

Typical claims for race discrimination against the police include unjustified stop and search and arrests due to a description based on race alone. Claims for sex discrimination can arise when police officers engage in sexual relations with female members of the public in the course of their duties. Damages for discrimination are valued at up to £6,000 for one-off incidents and £6,000-£18,000 for more serious cases, well below the level of pre-1 April 2013 ATE premiums.

**e. Judicial reviews**

(i) Judicial review plays a constitutionally critical role in ensuring the lawful exercise of public powers by state bodies, including the police, Independent Police Complaints Commission (IPCC), CPS, Coroners and various bodies within the criminal justice system. Without access to judicial review individuals are powerless to hold state bodies to account for failures to comply with the rule of law.

(ii) Due to lack of ATE policies PALG members’ clients have been unable to challenge conclusions by the police and IPCC on the bringing of police misconduct proceedings. For example, in one case a claimant was granted permission acting in person but cannot take the risk of an adverse costs order at the substantive judicial review hearing and has been refused legal aid due to his income falling just outside the eligibility limits.

(iii) Unlawful police cautions prevent those who work with children or vulnerable adults from securing employment within their chosen profession. A PALG member acted for a PhD student who successfully

challenged a caution pre-LASPO for which the ATE premium following substantive hearing was £34,000. Even if available post-LASPO such a premium would be far beyond the claimant's means.

- (iv) A PALG member acts for the family of a man killed by a member of the public after police failed to respond to his requests for assistance. They are unable to bring a judicial review challenge to the refusal of the Coroner to hold an inquest following the criminal trial, at which police failings would be explored.
- (v) Challenges to policies which affect large numbers of individuals are best brought as public law claims. The client of a PALG member has been unable to bring a judicial review challenge to a local police policy on drugs searches outside licensed premises.

11. ***PALG seeks an extension of QOCS to cover all private and public law claims against the police and other detaining authorities.***

12. We note that in his original 2009 proposals Lord Jackson identified claims against the police and judicial reviews as categories of case which should attract QOCS on grounds of social policy, as the parties are generally in an asymmetric relationship with their opponents<sup>4</sup>. We note that he also identified claims for defamation and breach of privacy as being in a similar position and that a regime akin to QOCS is now proposed by the Civil Justice Council for such claims.

13. PALG notes that the functions of the Civil Justice Council include “considering how to make the civil justice system more accessible, fair and efficient”<sup>5</sup> (emphasis added) and urges the CJC to address the access gap that has opened up as a consequence of LASPO. By creating a costs framework which enables access to justice which is not theoretical but practical and effective, the CJC and Ministry of Justice, as public authorities for the purposes of the Human Rights Act, will be meeting their duties to act compatibly with the right of access to a court under Article 6 ECHR.

**Obstacles facing cases potentially within QOCS**

14. Uncertainties over the applicability of QOCS to claims against the police and other civil liberties cases make it difficult for potential claimants and their advisors to assess the risks of enforceable adverse costs orders being made at the conclusion of the litigation and create a barrier to litigation.

15. By way of example, the recent judgment against the Metropolitan Police arising from failures to investigate the serial rapist John Worboys<sup>6</sup> was obtained by claimants represented on CFAs. The PALG member who acts for the claimants would have advised of a significant risk that the claims would not benefit from QOCS so that it is highly unlikely that these important cases would have been brought post-LASPO.

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<sup>4</sup> Review of Civil Litigation Costs: Final Report December 2009 paragraph 5.11

<sup>5</sup> Civil Procedure Act 1997 section 6(3)(b)

<sup>6</sup> *DSD and NBV v Commissioner of Police* [2014] EWHC 436 (QB)

### Assessment of psychiatric damage

16. CPR 2.3 defines personal injuries as including “any disease and any impairment of a person’s physical or mental condition”.
17. In many claims against the police the viability of the litigation as a whole depends on whether emotional damage has been suffered which amounts to a psychiatric condition which meets medical diagnostic criteria. Claimants cannot establish whether they will come within QOCS until they have met the cost of obtaining a psychiatric report.
18. Obtaining a psychiatric report generally requires several months, to access medical records, await an appointment with an expert and the preparation of a report. In claims involving discrimination the time limit for issuing under the Equality Act 2010 is six months and in claims under the Human Rights Act twelve months. Claimants are often not in a position to proceed with litigation within these time limits where the availability of QOCS has not yet been established.
19. Where the circumstances giving rise to the claim consist of a number of causes of action (for example a discriminatory stop and search, followed by an assault, unlawful arrest and malicious prosecution) psychiatric damage may arise from one aspect of the events and not others. Considerable uncertainty may remain as to whether each cause of action includes a claim for personal injury, both in the mind of the expert and the legal advisor, so that the uncertainties in relation to mixed claims arise, see below.

### Mixed claims

20. QOCS applies under CPR 44.13(1) which states that “this Section applies to proceedings which include a claim for damages for personal injuries”. An exception to QOCS arises under CPR 44.16 (2)(b) which enables orders for costs made against the claimant to be enforced up to the full extent, with the permission of the court and to the extent that it considers just, where “a claim is made for the benefit of the claimant other than a claim to which this Section applies.” The meaning and applicability of this exception creates very considerable uncertainty.
21. As the relevant Section applies not to claims for damages for personal injuries but to proceedings which include such a claim, the meaning of the exception under CPR 44.16 (2)(b) is unclear. To the extent that it may open the door to the court having discretion to make enforceable costs orders against unsuccessful claimants, it provides a strong disincentive to litigation where a claim includes causes of action which give rise to personal injury (eg assault) alongside causes of action which do not (eg malicious prosecution). Claimants face uncertainty as to whether QOCS may attach to the entirety of such a claim or only to the PI element, despite the apparent clarity of CPR 44.13(1).
22. Furthermore, if such a discretion is created it could attach not simply to the costs associated with the non-PI element but potentially to “the full extent” of orders for costs made against the claimant. The principal controlling mechanism is that it must appear just to the court to enforce the order. The likely interpretation of this is currently unknown.
23. It is difficult for a claimant who seeks to rely on QOCS to establish whether, and if so the extent to which, s/he is exposed to a costs risk if the claim is unsuccessful in

its entirety, even where the PI and non-PI elements are closely bound together. For example, a claimant who is assaulted by a police officer and then maliciously prosecuted for assaulting the officer in the execution of his duty may have a PI claim in respect of the assault but no PI element within the malicious prosecution claim. The same findings of fact, ie who had assaulted who, would establish liability in respect of both causes of action. However potentially only the assault claim would fall within QOCS and not the malicious prosecution claim.

24. Where proceedings include both PI and non-PI elements within the same proceedings arising from a sequence of events in which the PI and non-PI elements are bound together to a lesser degree, even greater uncertainty arises for potential claimants and their advisors. For example, where a claimant is unlawfully arrested and then later assaulted in the police station, aspects of the PI and non-PI causes of action may be bound together, such as the credibility of the claimant and the officers, but the facts underlying the false imprisonment claim and the assault claim are different.
25. Uncertainty in relation to costs implications makes it extremely difficult for potential claimants and their advisors to assess the risks of an enforceable adverse costs order in mixed claims and acts as a strong disincentive to litigating meritorious claims.
26. We draw attention to the CJC response to the MoJ's Commissioning Note on implementation of Part 2 of LASPO dated June 2012 which addressed the question of mixed claims. The MoJ had indicated that in mixed claims, namely combined claims covering personal injury and non-personal injury, QOCS will only apply to the whole claim if the claimant has an interest in the non-personal injury element which is either integral or directly consequential to the personal injury claim. The CJC was asked to advise on what is integral or directly consequential to a claim. The CJC considered the situation where damages for personal injury are sought alongside a non-monetary remedy in the same action and expressed the view that where damages for personal injury and the other remedy are sought by and for the claimant him or herself QOCS would apply to all costs of a claim if QOCS is to be widely interpreted so as to provide broad protection, which the CJC considered to be the preferred approach. It was noted that such an action involves a genuine claim for personal injury and the same defendant is involved in both aspects so that the asymmetry of position between the parties exists, which is at the heart of the justification for QOCS generally. Any sham personal injury claims arising could be controlled effectively by the courts.
27. The same considerations apply to mixed claims against the police and other civil liberties claims involving a combination of PI and non-PI damages arising from the same set of circumstances and litigated within one set of proceedings. When the entirety of the claim arises from one set of circumstances the various causes of action are integral to one another. The asymmetry between the parties exists for the entirety of the proceedings and the exclusion from QOCS of the non-PI element would negate the protection that QOCS was intended to provide to claimants.
28. The lack of clarity created by CPR 44.16 (2)(b) runs counter to the intentions behind QOCS and creates an unjustified barrier to access to justice.

29. ***PALG seeks to have QOCS extended to all private and public law claims against the police and other detaining authorities, so that costs protection is not tied to the question of whether the proceedings include a claim for personal injury.***
30. ***In the short term PALG seeks clarification that QOCS applies to the entirety of the proceedings in mixed claims where a claimant pursues both PI and non-PI damages arising from a single set of circumstances which are litigated together against the same defendant.***