**Proposals for Reform of Civil Litigation Funding and Costs in England and Wales**

# Consultation Response by the Police Action Lawyers Group

## Introduction to the Police Action Lawyers Group (PALG)

PALG is comprised of solicitors, barristers and legal executives who represent complainants against the police throughout England and Wales. PALG members are concerned first and foremost with the principal objectives of the complainants we represent: to ensure that the police are held accountable for their conduct through all available avenues, including the police complaints system, judicial review and compensation claims.

We were established in 1991 and meet bi-monthly. We are London based, with a sub-group in South Yorkshire.

PALG grew out of a desire to share information & expertise, and to ensure that complainant lawyers did not feel they were working in isolation. This was achieved by establishing regular meetings to discuss complainants' concerns and developments in police law & practice.

Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of complainants against virtually every force in England and Wales. Membership is contingent on lawyers only acting for complainants, to ensure that we provide a wholly independent space to discuss complainants' concerns.

All of our work as an organisation is voluntary and we receive no funding of any kind. The group is motivated by a desire to achieve the best possible outcome

for our clients, many of whom have suffered the most serious abuse at the hands of the police.

PALG members have been involved with numerous notable police complaint cases and inquiries. A high proportion of PALG lawyers represent members of the public in external complaints against police forces. These cases typically involve allegations of false imprisonment, assault and malicious prosecution, often aggravated by discrimination. A significant number of our clients are diagnosed with Post-Traumatic Stress Disorder. Some of the most distressing cases we deal with are on behalf of families whose relatives have died in police custody. Many of our members are also active within the INQUEST Lawyers Group.

**Conditional Fee Agreements in actions against the police**

PALG's primary position is that public funding should continue to be to the way the majority of our clients cases are funded as this reflects the public interest inherent in our work. There are however an increasing number of people with viable claims who despite being impecunious are unable to obtain public funding for a variety of reasons including a narrowing of the rules on financial eligibility and over reliance on an overly simplistic test that equates the likely cost to the likely damages. To plug this funding gap PALG practitioners have begun to offer conditional fee agreements but their use in our work is in its infancy.

Actions against the police are not obvious candidates for CFAs not least because they are notoriously difficult to predict. These claims are wholly different to straightforward personal injury claims where issues of liability are relatively easy to foresee, where quantum is subject to judicial determination in accordance with set guidelines, and where "success" is relatively simple to define. These difficulties are reflected by the fact that historically insurers have proven extremely wary of funding actions against the police. If insurers are willing to

provide cover, they will often only do so at very high premiums given the particularly risky nature of police actions alternatively, they will only provide a lower rate of cover than is necessary to sufficiently protect a Claimant from the risk of an adverse costs order against them (and police claims, largely being jury trials, are much more expensive than the average personal injury trial).

Notwithstanding these difficulties CFAs are becoming more widely offered to our clients but we can only afford to do so if the status quo in relation to the recoverability of success fees and insurance premiums is maintained.

PALG is also responding to the Green Paper for the Reform of Legal Aid, and notes that the proposals therein cannot be considered separately from this consultation. In particular, the Government is proposing to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for an alternative form of funding, such as a Conditional Fee Agreement. We are opposed to this proposal in any case for the reasons set out in our response to the Legal Aid Green Paper, and because of our view that legal aid should remain the primary source of funding for actions against the police. However, such proposals will be completely unworkable if the changes put forward in this consultation paper are implemented. PALG also supports the submissions of ILG on the Green Paper.

Whilst PALG recognises some of the issues raised by Lord Jackson's report in relation to personal injury litigation these do not apply to our area of work. In our area of law cases are pursued by responsible and experienced litigators applying a realistic success fee and ultimately decided by cost judges taking a sensible view on the rates and success fees claimed. The developing approach of staged success fees and staged ATE premiums appears to be working well and is achieving the original aims of CFAs.

Our clients' cases are rarely primarily about securing financial compensation. Damages, when awarded are notoriously low, especially in claims brought under the Human Rights Act. For this reason any proposal that involves costs being met from our clients damages is unworkable in our area of law. Other problems identified by Jackson – such as the fact that anyone, including commercial entities, can enter into CFAs – are not relevant to our area of work.

PALG members have a great deal of experience of representing publicly funded clients who benefit from the costs protection offered. Assuming the same degree of certainty can be offered by qualified one way costs shifting then we would welcome it.

We will now address some of the recommendations not covered by this consultation and will then answer each of the questions posed in turn.

**Section 3.4 Costs and Case Management**

We note that judiciary led costs and case management work has been continuing since Lord Jackson's report was published. Sadly we have noticed no improvement in our day to day dealings with the courts. Telephones are not answered. Allocation Questionnaires are not acted upon for over 5 months. Documents filed at court in advance of significant court hearings do not find their way to the judge. These are but a few examples, all of which lead to increased costs for both Claimants and Defendants.

**Section 3.5: Before the Event Insurance**

It is currently a condition of public funding that enquiries are made to ensure that no BTE insurance policy exists which would include the claim for which funding is sought. As such PALG members have significant knowledge of what is

available. The only "before the event" insurance policies which cover police claims are for negligently caused personal injuries which given the police's immunity in negligence in practice limits this to situations such as road traffic accidents which, absent any misfeasance are usually undertaken by PI specialists. Indeed we understand that one major insurer will not fund any claim against a public authority. We do not expect this to change.

**Section 3.6: Third Party Funding**

Although this consultation does not pose specific questions on this issue, we have carried out some limited investigations to see if third party litigation funding might provide a realistic alternative source of funding for AAP cases.

We have concluded that it is unlikely to be a viable replacement for the vast majority of publicly funded cases, in particular AAP cases, for the following reasons.

First, our research indicates that third party litigation companies generally only fund very high value claims, often from the commercial field (one provider we investigated would only accept claims worth at least £3 million). This is the business model on which they operate, and there is no evidence we could find that they would be willing or able to fund claims in the under £100,000 category, where our experience dictates the vast majority of publicly funded cases, certainly in the AAP field, fall [the vast majority in fact being worth substantially less than £100,000]: in real terms, even a currently publicly funded claim worth as much £100,000 (and so one very much at the higher end of the quantum spectrum in that field) presents just over 3% of the value of the claims that third party litigation funders currently regard as the minimum value they are interested in, and so such claims would not seem immediately attractive to them.

Second, we understand that much of the capital raised by third party litigation companies is used to fund litigation in the US, even if it derives from UK-based investors, due to certain aspects of the US legal system that make it more attractive (such as the availability of large representative class actions, the speed with which litigation is conducted and the availability of very large damages awards). It is not at all clear that the government would be willing or able to make such drastic alterations to the UK legal system to align it more closely with the US.

Third, even if certain aspects of the legal environment in this country were changed to make it more attractive to third party litigation funders, by aligning it more closely with the US system, there are certain aspects of AAP work that are likely to make it unattractive to third party funders: for example, police defendants can be particularly robust in defending claims and do not always engage in discussions around commercial settlement figures, and the outcome of jury trials is notoriously hard to predict.

Fourthly, third party litigation companies will only fund cases with high prospects of success, normally in the region of 70% plus. Actions against the police cases rarely have prospects of success this high. Many of our cases hinge of the Claimants and Defendants' credibility as there is often little independent evidence. The Claimant is often an individual versus a public authority and it is most unlikely that third party litigation companies would often cover due to the specialised nature of the work PALG undertake, the potentially low financial value of the claims and the litigation risks involved.

### 2.1 Success Fees

### Q1 Do you agree that CFA success fess should no longer be recoverable from the losing party in any case?

No –

The level of the success fee in an individual case reflects the risks of taking on the case and the possibility of losing and not being paid. When success fees were introduced it was recognised that solicitors would take on a high proportion of cases that would not be successful. The success fee therefore does not just reflect the level of risk on an individual case but compensates firms for taking on cases that will they will not be paid for. This remains the case in our area of work and it enables firms to offer CFA knowing that a significant number of cases will not succeed.

PALG considers that CFAs in their present form are an effective and fair means by which claimants, who are ineligible for public funding but can not afford to pay privately, may obtain access to justice. Lord Jackson's Final Report ['the Report'], based substantially on opaque anecdotal evidence, offers no viable or fair alternative to CFA success fees such that would properly achieve this aim.

The present system, the product of substantial evidence based discussions, is still in its relative infancy. The Access to Justice Act first introduced CFAs with success fees and ATE in 2000, replacing a system that looked very much like that which it is now proposed to revert to. This entirely new concept predictably took time to settle and in itself gave rise to a great deal of satellite litigation. The situation has however evolved substantially. Both claimant and defendant representatives are now well used to the issues.

The Courts have not been slow to disallow or reduce success fees where they are deemed unreasonable, and have become increasingly sophisticated in their approach. They have for instance actively encouraged the use of staged success fees. This is a role which they are well placed and suitably

empowered to perform, and which PALG considers they should be allowed to continue to perform.

It should be borne in mind that many cases which will have passed through the courts in recent years will have been started around or shortly after the success fees and ATE were introduced, and so do not reflect the substantial progress that has been made.

The Report fails to point out that the present rules on recoverability are available to both claimants and defendants. Defendants however fail to utilise this fact- to the serious detriment of the public purse. If defendant solicitors (panel firms) were to operate under CFAs/ CCFAs then they would be equally encouraged to deal with cases properly and to settle meritorious cases expeditiously.

The following are some of our concerns with the proposals and observations regarding CFAs, specifically regarding civil actions against the police:

i. Claims involving actions against the police are often high profile and usually involve matters of wider public interest. Whilst damages are often relatively low, the complexity is great and the difficulties of challenging well funded and sophisticated public bodies are substantial. Often the goal of litigation is not, or not only damages, but other non-monetary remedies such as an apology, or declaratory relief under the HRA and/or Equality Act. As a result, civil actions against the police are entirely unsuited to the alternative methods of funding proposed within the Report.

ii. The Report suggests that claimants whose cases are funded by CFAs

with success fees and ATE may act however unreasonably they wish as they have no financial interest in the costs being incurred. Lord Jackson within his Preliminary Report, states [at para 4.1]:

> "Claimants can now litigate at no cost and at no personal risk. If successful, they retain the entirety of the damages awarded or agreed. If unsuccessful, they walk away with no liability."

This is however to fundamentally misunderstand the role of the claimant in such cases. Lawyers will not run unmeritorious cases or advise clients to reject reasonable offers as they ultimately stand not to be paid if they do.

If a client rejects their advice to accept an offer then the solicitor can opt out of the CFA and switch to a conventional retainer.

ATE providers will not support unmeritorious cases. They require that they be informed of any settlement offers made and will not continue to support a case if a reasonable offer is rejected as they will not ultimately recover their premium.

It is also untrue to say that claimants have no interest in the costs being incurred on their case. Where, for instance, they breach the terms of their CFA, they could fall to be liable for all or part of those costs.

Lawyers offering CFAs with success fees and ATE providers are Essentially financially interested experts. A claimant's ability to act unreasonably under a CFA with ATE is only equal to the willingness of

the parties providing those services to allow it- something which is simply not in their financial interests to do.

iii. The proposals set out within the Report plainly offend the overriding objective of the CPR, where it requires that 'the parties [be] on an equal footing'.

A claimant who stands to lose up to 25% (or more, subject to the outcome of this consultation) of any damages in addition to an ATE premium will need to give significant consideration to any defendant offer, even where that offer is plainly inadequate. Thus, those deductions will be being made from an already inadequate damages award, reducing still further a purely compensatory sum which contained no element of windfall.

iv. The Report fails to properly consider procedural reform and, for instance, staged success fees, as opposed to simply abolishing the present system. Staged success fees reward reasonable conduct on the part of both parties. A claimant lawyer can expect to obtain a success fee proportionate to the actual risks involved in the case. Defendants need only meet a lower success fee where meritorious claims are settled early, and can hope to recover their costs if they successfully fight those which are unmeritorious.

Parties are required to give their opponents early notification where a case is funded by way of a CFA with success fee and/ or ATE and the parties may therefore conduct themselves accordingly. A defendant lawyer at a firm dealing with claims against the police has expressed a liking for CFAs because there is the real possibility of recovering his

costs from the claimant in the event of a successful defence, which there is not when a claimant is publicly funded.

v. The Report suggests [at para 50]:

> "...recoverable costs represent a burden on the losing party and inhibit their access to justice."

The MoJ Consultation Paper states [at para 58] that

> "the fear of costs can have a "chilling effect" which can drive opposing parties to settle cases even though they may have good prospects of success. It also covers the ability of defendants to be able to resist properly those claims which should not succeed and to do so at proportionate cost."

It simply is not the experience of PALG members that defendants behave in this way. Indeed, it is our experience that defendant forces behave in entirely the opposite fashion despite the fact that in publically funded cases they will recover nothing even if they succeed. It is extremely rare for them to admit liability. Further, they will often force claimant lawyers to issue proceedings before settling even the most meritorious cases, presumably to test the claimant's ability to secure funding to do so.

For example instead of filing a defence the police have opted to make a financial offer of compensation, without any admission of liability. The case in question concerns a claim for race discrimination. The police have had knowledge of the claim for over nearly two years. In

response to both a complaint and letter before claim the police denied any wrongdoing and confirmed their intention to defend the claim.

vi. The MoJ Consultation Paper makes reference to claimant lawyers 'cherry picking' cases [at para 59]:

> "Sir Rupert believes that the recoverability regime presents an opportunity for lawyers to increase their earnings substantially by "cherry picking", that is selecting cases which are almost guaranteed to succeed. The success fee of up to 100% was intended to reward lawyers for carrying the risk of not being paid on that case but also to cover the cost of cases which they lose. However, Sir Rupert reports that some claimant lawyers "cherry pick": "they generally conduct winning cases on CFAs, they reject or drop at an early stage less promising cases and thus generate extremely healthy profits."

As well however as conflicting with the suggestion elsewhere within the report that lawyers are deliberately pursuing unmeritorious cases in the hope that the "chilling effect" of costs will force defendants to settle rather than fight on, this appears to imply criticism of claimant lawyers for investigating a claim and thereafter advising a client if that case is unlikely to succeed. Such conduct is surely correct, and it cannot be right that those solicitors should be encouraged to continue to pursue unmeritorious cases simply in order to justify larger success fees.

The suggestion that cases may easily be 'cherry picked' implies that merits are easily assessed. If this is so then defendants receiving

expert advice equally have the opportunity of identifying those cases and minimising their exposure by reaching early settlement.

vii. Contradicting what is said at para 59 [above], para 60 states:

> "In theory CFAs are thought to discourage weak claims as lawyers carry the risk of not being paid if the case is lost… CFAs have been blamed for fuelling a 'compensation culture' by encouraging people to pursue weaker claims at absolutely no cost to them in the hope that a defendant may make a commercial decision to pay the claimant off by settling rather than defending the claim…"

As well as contradicting the argument that cases are 'cherry picked', this suggestion appears fanciful. As discussed earlier, an individual claimant cannot simply of his or her own volition decide to pursue an unmeritorious claim under a CFA. A claimant lawyer who believes a case is weak will simply not proceed to trial under a CFA as it is likely that the case will be unsuccessful and the lawyer will not be paid for the substantial work undertaken. Where a case proceeds to trial and the claimant is successful then that case was not, by virtue, unmeritorious. This argument cannot succeed.

viii. It is suggested [at para 64] that the proposals will encourage claimants to 'shop around' for the 'best deal'. In a niche area such as civil actions against the police however this is simply not realistic. There are very few firms specialising in this work, especially outside of the largest metropolitan areas and not all of them offer CFAs.

**Q2 If your answer to Q1 is no, do you consider that success fees should remain recoverable from the losing party in those categories of case (road traffic accident and employer's liability) where the recoverable success fee has been fixed?**

For the reasons set out above success fees should remain recoverable in our area of law. Consideration should be given to extending the categories of case with fixed success fees as an alternative to success fees becoming unrecoverable.

**Q3 Do you consider that success fees should remain recoverable from the losing party in cases where damages are not sought eg judicial review housing disrepair (where the primary remedy is specific performance rather than damages)?**

**Q4 Do you consider that if success fees remain recoverable from the losing party in cases where damages are not sought a maximum recoverable success fee of 25% (with any success fee above 25% being paid by the client) would provide a workable model?**

PALG considers that success fees should remain recoverable in cases where damages are not sought. We further consider that a maximum recoverable success fee of 25% should not apply.

CFAs facilitate access to justice. 'Justice' is not limited to the payment of damages and there appears no justification for denying individuals access to the courts simply because the remedy that they are seeking is other than purely monetary. The implication is that a declaration under HRA 1998 is somehow inferior to or of less important than, for instance, a modest personal injury claim.

Judicial Review claims are fundamentally important in dealing with the exercise of power by public authorities over the lives of individuals. As Lord Bingham encapsulated in R v Ministry of Defence, ex p Smith [1996] QB 517,

556D-E:

> "[the court] has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people'."

The rule of law requires judicial scrutiny over the executive. This is at the heart of our democracy. To limit Judicial Review would be to limit the judicial function of the court to ensure that the executive is exercising its powers fairly.

In focussing seemingly on cost-cutting alone, Lord Jackson appears to have neglected the role of the courts and the central function of Judicial Reviews. Judicial Review claims do in any event incorporate the not inconsiderable 'filter' of unmeritorious claims, that is, the 'permission stage'.

If poorly funded legal aid lawyers are prepared to take on such complex cases involving executive abuses of power, against the state and their well resourced legal departments, then they are taking a substantial risk. It is not unreasonable for them to claim a success fee for that work, and one which is proportionate to the risks of the case.

There appears no logical basis for a claimant in such proceedings to meet any success fee in excess of 25%, notwithstanding the fact that few, if any of our clients would be able to meet those fees.

**Q5 Do you consider that success fees should remain recoverable from the losing party in certain categories of case where damages are sought eg complex clinical negligence cases? Please explain how the categories of case should be defined.**

**Q6 If success fees remain recoverable from the losing party in certain categories of case where damages are sought (I) what should the maximum recoverable success fee be and (ii) should it be different in different categories of case?**

The position of PALG is that the Report does not present a persuasive argument for the abolition of success fees and ATE, and that this is especially so with regard to civil actions against the police. We are not placed to comment specifically with regard to different categories.

**Q7 Do you agree that the maximum success fee that lawyers can charge a claimant should remain at 100%?**

For the avoidance of doubt we are answering this question on the basis that all the success fee will be recovered from the losing defendant.

The courts on the whole presently take the view that a 100% success fee is only allowable where a case proceeds to trial or if the claimants legal representatives have taken on a particularly complex or risky claim, and as part of a staged success fee.

The solicitor's risk is of course greatest where a case proceeds to trial, and this is particularly so in civil actions against the police where many will be by jury trial, such trials being unpredictable. There is no reason why the maximum success fee should not remain at 100% for those relatively few cases where it is appropriate.

**Q8 Do you agree that there should be a cap on the amount of damages which may be charged as a success fee in personal injury claims, excluding any damages relating to future care or future losses?**

Members of PALG are not in the majority personal injury specialists but it is our fundamental view that a claimant should receive 100% of the damages awarded to him/ her and that no portion of this sum should be payable as a success fee. Success fees were introduced to reflect the fact that not every CFA case would succeed. Success fees must remain linked to costs and not claimant's damages. Damages are intended to compensate deserving claimants, not to meet legal fees.

Notwithstanding the above if the proposals were followed through then we consider that a cap should undoubtedly apply to the amount of damages which may be charged as a success fee.

**Q9 If your answer to Q8 is yes should the cap be (I) 25% or (ii) some other figure (please state with reasons)?**

n/a

**Q10 If you answer to 8 is yes then should such a cap be binding in all personal injury cases or should there be exceptions and if so what and how should they operate?**

n/a

**2.2 After the Event Insurance Premiums**

**Q11 Do you agree that ATE insurance premiums should no longer be recoverable from the losing party across all categories of civil litigation?**

No.

The primary impact of any proposal- that ATE insurance premiums should no longer be recoverable from the losing party- would be to deter claimants with meritorious cases from pursuing them by adding increased risk and uncertainty. Removing the recovery of ATE insurance premiums from culpable defendants will increase the litigation costs for successful claimants and further reduce damages. This is not the same as 'access to justice at proportionate cost'.

As discussed elsewhere in our submissions, we do not consider the alternatives to the existing system to be viable. As with CFAs, the alternative proposals are especially unsuited to often lower value civil actions against the police.

**Q12 If your answer to Q11 is no please state in which categories of case ATE insurance premiums should remain recoverable and why.**

Notwithstanding the views of PALG that ATE insurance premiums should remain recoverable across the board, we consider that they should certainly remain available in civil actions against the police. This is because of the particular factors which exist in such cases, as cited earlier within our submissions.

**Q13 If your answer to Q11 is no should recoverability of ATE insurance premiums be limited to circumstances where the successful party can show that no other form of funding is available?**

No.

**Q14 Do you consider that ATE insurance premiums relating to disbursements only should remain recoverable in any categories of civil litigation? If so which?**

Yes.

The proposals say the following [at para 89]:

> "Provided ATE insurance products remain available, claimants should be able to continue to insure against the risk of having to meet their disbursement costs in cases in which they are unsuccessful, but would have to pay the premium themselves."

The indication from ATE providers however is that such a product would not be sufficiently profitable or sustainable in isolation. If it were however then it is the view of PALG that such premiums should remain recoverable, and certainly in civil actions against the police for the reasons previously given.

The proposals go on to say:

> "Alternatively, claimants may choose to meet the disbursement costs themselves if they can afford to do so or the claimant's solicitor might agree to fund disbursements in exchange for an increased success fee, provided this would not take the success fee above the proposed 25% damages cap in personal injury cases."

In our experience however most of our clients would be unable to meet the costs of disbursements. Nor is it reasonable to expect our members- mostly high street Legal Aid firms- to be able to fund clients' disbursements.

**Q15 If you answer to Q14 is yes, should recoverability of ATE insurance premiums be limited to non-legal representation costs such as expert reports?**

Yes.

**Q16 If your answer to Q14 or Q15 is yes, should recoverability of ATE insurance premiums relating to disbursements be limited to circumstances where the successful party can show that no other form or funding is available?**

No.

**Q17 How could disbursements be funded if the recoverability of ATE insurance premiums is abolished?**

PALG believes that there is no viable alternative to the present system, and certainly none that is details within the Report.

**Q18 Do you agree that, if recoverability of ATE insurance premiums is abolished the recoverability of the self-insurance element by membership organisations provided for under section 30 of the Access to Justice Act 1999 should similarly be abolished?**

No.

### 2.3 10% Increase in General Damages

**Q 19 – Do you agree that, in principle, successful claimants should secure an increase in general damages for civil wrongs of 10%?**

As stated above, PALG does not consider that recoverability of success fees and ATE premiums should be abolished.

PALG would however wholeheartedly support an increase in damages generally in our area where damages are notoriously low.

Without prejudice to our position on success fess and ATE premiums PALG would support an increase in damages to compensate claimants for deductions from their damages if proposals in the consultation paper are implemented in whole or part.

We are, however, concerned that an increase of only 10% of general damages will be inadequate to compensate for costs of ATE premiums and the success fee particularly so if "general damages" is taken to mean only basic compensatory damages, which is the presumption in the consultation document.

PALG notes that the proposals appear to have been written bearing in mind only

the more straightforward of personal injury claims for negligence, and many of the justifications do not apply to actions against the police. Paragraph 96 states that “Sir Rupert considers that personal injury claimants would generally benefit from his package of reforms,” suggesting that little consideration has been given to the effects on other claimants such as the small but growing number of CFA-funded litigants against the police.

The following are some of our particular areas of concern with regards to the impact of these proposals on claimants in civil actions against the police.

First, it is incorrect to assume that the seriousness of a claim against the police correlates with the amount of general damages awarded. The majority of successful civil actions against the police which involve serious wrongdoing will result in the award of aggravated and sometimes exemplary damages, as well as general damages for injuries and special damages for any financial loss.

The leading authority on damages in action against the police sets out guideline rates for basic damages for the torts of false imprisonment (£4250 for 24 hours) and malicious prosecution (starting at £2800). It also deals with aggravated and exemplary damages. Aggravated damages usually range between £1400 and twice basic damages. They are commonly awarded in successful police actions involving intentional torts and the abuse of power by police officers to reflect factors such as the humiliation of being arrested and assaulted, and any insulting or high handed behaviour by officers. In addition, exemplary damages are also awarded in some cases to punish police forces for arbitrary and unconstitutional actions. Where exemplary damages are appropriate they will not be less than £7,100.

The types of cases in which a claimant has been caused very serious physical

and/or psychiatric injuries as a result of police officers' actions are by no means uncommon, but they are not necessarily a typical case. There are many examples in which a claimant suffers only relatively minor or moderate injuries, attracting basic damages in the region of £2,000- £3,000, but where the surrounding circumstances involve an unlawful arrest, insulting or high-handed behaviour by officers, and a prolonged period of false imprisonment, bringing the total award to a much higher figure in the region of £10,000 - £25,000.

The proposals, if implemented, would only lead to an increase of £200 - £300 in the claimant's damages in such scenarios – despite the serious nature of their claim overall. This small sum will be nowhere near enough to compensate them for the cost of the success fee and ATE premium (particularly bearing in mind the points discussed below).

As discussed above, many actions against the police also include remedies that are primarily or entirely non-financial. This makes it even more difficult for Claimants to benefit from a 10% increase in general damages.

Secondly, the deductions for success fees are likely to be higher in actions against the police because of reluctance to admit liability by Defendants. The experience of PALG members shows that it is necessary to issue court proceedings in the majority of claims against the police, particularly where these involve allegations of abuse of power, and that this is much more pronounced than in areas such as personal injury.

The reasons for this include the fact that the beginning of a civil claim is often delayed by following the police complaints procedure and thereafter appealing to the IPCC; the short limitation periods for claims under discrimination legislation (6 months less a day) and the Human Rights Act 1998 (one year less a day)

meaning proceedings must be issued to protect the claimant's position; and the reluctance of Defendant police forces in very many cases to admit liability and / or enter into meaningful settlement negotiations without proceedings having been issued.

Bearing in mind these points, we are concerned that the "possible refinement" suggested at paragraph 100 would not be workable in police actions. Calculating a success fee as 10% of basic damages would, in many cases, produce figures of only a few hundred pounds for the same reasons discussed above. In some cases where remedies are entirely non-financial, it would not produce any sum at all. Meanwhile the costs involved are generally high. Indeed the consultation paper notes at paragraph 101 that it is not clear whether this adjustment would be sufficient to bring claims in "certain circumstances" where there are likely to be high costs and expenses relative to general damages, such as catastrophic injuries. We would add most civil claims against the police to those types of claims where claimants would lose out as a result of this refined suggestion.

Thirdly, ATE premiums in this area of law are generally very costly – thousands rather than hundreds of pounds. This reflects the risky nature of claims against the police, which if go to trial will usually involve jury trials which are difficult to predict. Their outcomes can be hugely influenced by, for example, the claimant's reaction to cross examination and the officers' performance in the witness box, both of which are difficult to foresee. While it is possible that there may be some lowering of the premiums offered by insurance companies if the proposals are implemented, this is unlikely to make any substantial difference because insurers will still be mindful of the risks involved in these types of cases, and will want to maintain their profit margins.

PALG also notes that some ATE providers offer "staged premiums" where the

premium increases at a number of stages in the case. There will be a lower premium if the case settles without the issue of proceedings and the premium chargeable will increase at a number of key events such as the issue of proceedings, allocation to a "track", with the highest premium payable if the case goes to a full trial. Again, the need to issue proceedings in most claims against the police leads to higher premiums for claimants in this area.

PALG is therefore concerned that claimants in AAPs will be disadvantaged by these proposals as they will generally have to pay much higher ATE premiums. We are also mindful of the fact that defendant police forces usually will not make reasonable offers until after the issue of proceedings and, in some cases, shortly before a trial. If the proposals are implemented, they will have the unfair consequence of creating pressure on claimants to settle their case too early and for sums that are too low, because they are unable to pay the increased ATE premium involved with continuing.

Other ATE insurers calculate their premiums with reference to the total costs of the Defendant plus the disbursements of both parties. Again, this will lead to greater deductions from damages for AAP claimants as a result of matters beyond their control.

While ATE premiums are costly in this area, they are absolutely necessary given the high legal costs of Defendant police forces. It is therefore important that, if claimants are to pay the premiums, the adjustments to damages are sufficient to compensate them.

PALG notes the concerns raised in paragraphs 97 and 98, and agrees that the assessment of general damages has generally been considered a matter for the courts, to be calculated based on the claimant's loss and not on compensating

them for funding arrangements. This is a clear argument in favour of maintaining recoverability of success fees. However, if recoverability is ended then we consider this principle will have to be departed from, in order to partly mitigate the effects on claimants.

PALG notes with concern that this section of the consultation paper concludes at paragraph 108 with the sentence "Of course the current arrangements are working well for claimants' access to justice but they impact disproportionately on defendants' access to justice." We consider this is generally a problematic statement in a discussion of cases where most defendants are either public bodies or large insured corporations, both of which will generally be able to access legal representation without difficulty. It is palpably untrue for Defendant police forces, who, far from being pressured into settling unmeritorious cases because of success fees, often continue to deny liability and defend the claim until a late stage in proceedings with the assistance of expert in house legal teams and / or external solicitors firms. In many cases, costs are unnecessarily increased by the conduct of defendants and we are concerned that, as a result of these proposals, claimants will be prejudiced as a result of these matters beyond their control.

PALG considers that a 10% increase in general damages will not be adequate to compensate claimants in civil actions against the police for deductions to pay for success fees and ATE premiums for the reasons set out above. If the proposal to abolish recoverability of success fees and ATE premiums is implemented, we consider the following would be required to assist in compensating the claimant:

a. The increase to be applicable to aggravated and exemplary damages as well as basic damages
b. A higher increase of 25% to reflect the success fees that will have to

be deducted in AAP cases and the higher premiums in these cases.

Even with these improvements, there is still likely to be a loss to the claimants because of the high costs involved with these types of claims, resulting from the behaviour of defendants. We therefore repeat our view that it would be preferable for the recoverability of success fees and ATE premiums to remain.

**Q 20 – Do you consider that any increase in general damages should be limited to CFA claimants and legal aid claimants subject to a SLAS?**

We consider it is of paramount importance that all claimants against the police are in the same position, regardless of their financial means. Under the proposals, CFA claimants would lose out for the reasons discussed above, as would legal aid claimants subject to a SLAS. In the rare cases when a claimant brings a claim against the police on a privately-funded basis, they will not be subject to such deductions. Despite this, we do not consider that any increase in damages should be limited to CFA claimants and legal aid claimants subject to a SLAS as this would create an unequal position. We agree with the point raised in paragraph 99 that on principle, the damages awarded should not depend on the type of funding and consider this is another argument in favour of retaining recoverability of success fees and ATE premiums instead of removing this and trying to compensate by adjusting damages levels.

## 2.4 Part 36 Offers

**Q 21 – Do you agree with the proposal to introduce an additional payment, equivalent to a 10% increase in damages, where a claimant obtains judgment at least as advantageous as his own Part 36 offer?**

PALG agrees with the overall proposal to increase the reward where the claimant obtains a judgment at trial which is at least as advantageous as a Part 36 offer

previously made by the claimant. However, as with the proposed increase in general damages, we do not consider this will be a sufficient safeguard against claimants' losses resulting from the other proposals**.**

The proposal is to increase the reward by 10% of total damages awarded by the court. This would in some ways be more helpful to claimants in actions against the police, because they would reflect aggravated, exemplary and special damages as well as basic damages.

However, the view of Sir Rupert cited at paragraph 114, that the increase will help compensate for payment of a success fee and ATE premium, will not apply in the vast majority of cases which settle before trial. This point is acknowledged at paragraph 115, which states that around 25% of cases overall proceed to trial but acknowledges that this figure will vary between different areas.

Our experience is that only very small proportion of actions against the police proceed to trial, given the particular duration and expense involved in a civil jury trial. However, many claims against the police settle shortly before trial, meaning they still involve high costs but will not lead to the claimant receiving an uplifted award. These provisions are therefore unlikely to compensate claimants for the payment of success fees and ATE premiums in the majority of cases.

We note the points at paragraph 113 of the consultation, which argues that the proposals may encourage Defendants to accept higher offers rather than risk penalties if they proceed to trial. The proposed reforms may be helpful in encouraging defendants to accept reasonable offers at an earlier stage of proceedings. They may therefore assist in bringing down the success fee and ATE premium a claimant has to pay from their damages.

We do not agree with the proposal at paragraph 114 that the court should have a discretion to award less than 10% where there are good reasons to do so. This will create uncertainty and a lack of consistency for claimants and it is difficult to see what the "good reasons" could be. If such a proviso is implemented along with this reform, it would be important to specify with precision the circumstances in which the additional 10% would not be awarded in order to avoid both unfairness to claimants and appeals.

**Q 22 – Do you agree that this proposal should apply to all claimant Part 36 offers (including cases for example where no financial remedy is claimed or where the offer relates to liability only)? Please give reasons and indicate the types of claim to which the proposal should not apply.**

Yes, PALG agrees that the proposal should apply to all Part 36 offers including those where no financial remedy is claimed, as it is equally important to incentivise early settlement in such cases. Similarly, the introduction of this proposal in offers relating to liability only could be helpful in putting pressure on defendants to accept liability, which is currently strongly resisted by police forces in many claims.

We consider the proposals should also apply with regards to the non-monetary awards which are often part of settlements in police actions, such as apologies and recommendations to remove the claimant's DNA and fingerprints from the Police National Computer. In some cases these are more important to the claimant than compensation, and they are often resisted by police forces. If a claimant's Part 36 offer which includes such a term is refused and then beaten at trial, it is important for this to be reflected in the additional amount awarded.

**Q 23 – Do you agree that the proposal should apply to incentivise early offers? Please explain how this should operate.**

While it is true that a standard 10% uplift on its own does not necessarily incentivise early offers, this proposal would operate alongside the current system of penalties, which (as noted at paragraph 117) is already designed to reward and encourage early offers. Furthermore claims against the police can be difficult to accurately value at an early stage – it is often necessary to obtain expert medical and / or psychiatric evidence and as discussed in the previous section, there are various reasons that court proceedings have to be issued in many actions against the police.

However, we agree that early offers should be incentivised where possible. This could be achieved by introducing a staged uplift if the claimant's offer was made substantially before trial – e.g. to 15% for an offer made more than six months before trial and 20% for an offer made more than a year before.

**Q 24 – Do you consider that the increase should be less than 10% where the amount of the award exceeds a certain level? If so, please explain how you think this should operate.**

**Q 25 – Do you consider that there should be a staged reduction in the percentage uplift as damages increase?**

PALG does not agree that the increase should be applied differently depending on the level of damages, as this will create an inconsistent system which is unfair to claimants with high value claims. Paragraph 114 gives the example of a claim worth £500,000 and states that the Defendant would not want to proceed to trial and risk paying an extra £50,000 unless they were very certain of winning.

This argument is questionable – for example, if the Defendant believed their chance of success were 60%, they would still be likely to take the risk of paying an extra £50,000 as, according to their assessment, they are more likely than not to have to pay nothing to be recover their costs. The Defendant is only likely to

be influenced in this way where prospects are nearer to 50/50, in which case it is preferable for the case to be settled in any event. Furthermore, the Defendant would always have the option of making a counter-offer at a lower value than the Claimant's offer.

**Q 26 – Do you agree that the effect of *Carver* should be reversed?**

We support the proposal to revise the definition of "more advantageous" to mean any judgment that is better in financial terms than a Part 36 offer, no matter how small the difference, and agree with Sir Rupert's view that the current arrangements can put unreasonable pressure on claimants to settle for figures that are slightly or moderately too low.

**Q 27 – Do you agree that there is merit in the alternative scheme based on a margin for negotiation as proposed by FOIL? How do you think such a scheme should operate?**

The alternative scheme suggested at paragraph 125 – 126 is, in our assessment, very problematic. It would exacerbate the current problem identified by Sir Rupert, whereby Claimants are pressured into accepting settlements that are slightly too low for fear of costs sanctions against them unless they can substantially beat the offer. We do not agree that there is merit to this scheme. If it is implemented, we consider the "ranges" within which an offer is not seen to have been beaten, should be no higher than 5% in order to minimise the pressure on claimants to accept offers which are lower than the value of their claim.

**2.5 Qualified One Way Costs Shifting**

**Q28 Do you agree with the approach set out in the proposed rule for qualified one way costs shifting (QOCS) (paragraphs 135-137)? If not, please give reasons.**

PALG would welcome QOCS so long as it is certain. It is particularly appropriate in our cases. The kind of cost protection suggested already exists for most AAPS via public funding and works well.

We welcome and support the use of the tried and tested wording of section 11(1) of the Access to Justice Act with which our members are all too familiar.

We do not however recognise the definition of it as set out in paragraph 136. In our experiences part (a) which deals with a person's ability to pay takes precedence. We are not aware of costs protection being lost for an impecunious client because of conduct issues. It would not be worth a defendant going to the time, trouble and cost of trying to enforce such a cost order against an impecunious individual.

PALG agrees with the proposition that cost protection will not apply if parties are on an equal financial footing but not that insurance should be illustrative of this. Many police forces chose not to be insured but are obviously not on an equal footing with someone whose only income is a state pension. We are content with "conspicuously wealthy" so long as it is clearly defined, set at a sufficiently high level and excludes equity in a claimant's main dwelling where that it the only capital.

**Q29 Do you agree that QOCS would significantly reduce the claimant's need for ATE insurance?**

Only if a claimant can be certain at the outset of the risk they face. While conduct remains an issue until the end of a case a claimant will face the prospect of having to pay all the defendants costs as so will want to insure themselves against that risk. Capping costs to the amount of damages received when a defendant's offer has not been exceeded will reduce some

risk. An early hearing to determine whether to depart from the presumption of cost protection will not assist if conduct is to be taken into account. It may also be subject to abuse by defendants in the hope that claimants will discontinue their claim if ordered to pay some or all of a defendants costs at the outset.

**Q30 Do you agree that QOCS should be extended beyond personal injury? Please list the categories of case to which it should apply, with reasons**

Yes. It should apply to all claims against public authorities.

**Q31 What are the underlying principles which should determine whether QOCS should apply to a particular type of case?**

The equality of the relationship between claimant and defendant.
Claims against pubic authorities which raise issues of public interest.

**Q32 Do you consider that QOCS should apply to (I) claimants on CFAs only or (ii) all claimants however funded?**

However funded otherwise all cases will become CFA funded.

**Q33 Do you agree that QOCS should cover only claimants who are individuals? If not, to which other types of claimant should QOCS apply? Please explain your reasons.**

No. It should also include non-commercial organisations bringing claims in the public interest given their constitutional importance and public interest group actions.

**Q34 Do you agree that, if QOCS is adopted, there should be more certainty as to the financial circumstances of the parties in which QOCS should not apply?**

Yes. For our purposes the presumption should be that QOCS should apply to any claim by an individual against any public authority save for "conspicuously wealth" claimants defined in paragraph 136 as those "easily able to pay the winning defendant's legal costs". In our area of law this will only to the very wealthy but this may not be the case in personal injury cases.

**Q35 If you agree with Q34, do you agree with the proposals for a fixed amount of recoverable costs (paragraphs 143-146)? How else should this be done?**

As set out above an early hearing to determine whether to depart from the presumption of cost protection will not to assist if conduct is to be taken into account. It may also be subject to abuse by defendants in the hope that claimants will discontinue their claim if ordered to pay some or all of a defendant's costs at the outset. If a claimant might be liable to pay any costs, even a fixed amount, then they will obtain ATE insurance or may feel pressured into withdrawing or under settling their claim.

### 2.7 Alternative Recommendations on Recoverability

**Q36 Do you agree that, if the primary recommendations on the abolition of recoverability etc are not implemented (i) Alternative Package 1 or (ii) Alternative Package 2 should be implemented?**

No. For the reasons set out above we do not see a need to change the existing scheme in so far as it applies to our area.

**Q37 To what categories of case should fixed recoverable success fees be extended? Please explain your reasons.**

As set out above PALG would prefer fixed recoverable success fees in preference to no recoverable success fees. There is no reason in principle why they cannot apply to our area.

**Q38 Do you agree that, if recoverability of ATE insurance remains, the Alternative Packages of measures proposed by Sir Rupert should also apply to the recovery of the self-insurance element by membership organisations?**

This is outside our area of expertise.

**Q39 Are there any elements of the alternative packages that you consider should not be implemented? If so, which and why?**

n/a

**2.8 Proportionality**

**Q40 Do you agree that, if Sir Rupert's primary recommendations for CFAs are implemented, a new test of proportionality along the lines suggested by Sir Rupert should be introduced?**

PALG do not consider it necessary to introduce a new test for proportionality irrespective of whether the proposals are introduced for not.

As set out above the value of claims is our area of law cannot be judge by their financial value. Costs assessments are relatively common in our area, more so now given the perceived emphasis of proportionality limited to costs and damages. We are satisfied that the existing approach post *Lownds* of reasonable and necessary equip the court with the necessary tools to appropriately take account of proportionality.

**Q41 If your answer to Q40 is no, please explain why not and what alternatives would you propose to achieve the objective of ensuring that costs are proportionate?**

As above

**Q42 How would your answer to Q40 change if (I) Sir Rupert's alternative recommendations were introduced instead or (ii) no change is made to the present CFA regime? Please give reasons.**

As above

**Q43 Do you agree that revisions to the Costs Practice Direction, along the lines suggested (at paragraph 219) would be helpful?**

For the reasons set out above we do not consider it necessary to make any changes.

**Q44 What examples might be given or circumstances where it would be inappropriate to challenge costs assessed as reasonable on the basis of the proportionality principle?**

As now, where the work done was necessary.

**2.9 Damages-Based Agreements**

**Q45 - Do you agree that lawyers should be permitted to enter into Damages-Based Agreements (DBAs) with their clients in civil litigation?**

Under section 59 of the Solicitors Act 1974, DBAs are not permitted in civil litigation. Sir Rupert recommends that both solicitors and counsel should be permitted to do so in contentious cases. This is on the basis that claimants should have as many funding options as possible.

PALG does not support the introduction of DBAs in the field of actions against the police (AAPs); this is because they are simply unworkable and because we believe that claimants in our area should keep all their damages.

Firstly, the DBAs will destroy the long established principle in English law of full compensation for losses/ injuries suffered. Compensation in the UK is calculated solely to recompense the claimant for the losses/ injuries they have sustained. Therefore any deduction to the claimant's compensation for legal fees will lead to

them being under compensated as there is no purely compensatory element to any award.

The proposed 10% increase to damages will not be sufficient to compensate the claimant for the full losses sustained at the hands of the tortfeasor, especially if the maximum deduction for legal fees under the contingency fee agreement is above this figure.

The UK system should be distinguished from the USA. In the USA, contingency fees frequently operate, but compensation is significantly higher. According to Hansard on 26 January 1999, Lord Goodhart considered: -

> '...Contingency fees are part of the reason why civil litigation in the USA has become completely out of hand. It has now reached a level which is seriously damaging the economy.'

This defeats Lord Rupert's arguments that contingency fees will be proportionate. Contingency fee agreements may increase the cost of litigation generally and lead to the possibility of the court and/ or juries increasing damages to fully compensate the claimant for their loss/ injury.

Secondly, Lord Rupert states at para 221 in his Proposals for Reform of Civil Litigation Funding & Costs in England & Wales in November 2010 that contingency fees are: -

> '...suitable for use in cases where the claimant receives damages or some **other specified financial benefit**.'

Contingency fee agreements are therefore highly inappropriate for actions against the police, which deal with intentional torts at the hand of the State. A

civil action for compensation is not solely concerned with monetary compensation but also holding the police to account for their actions. Our cases are high profile and attract public and media interest. The claimants that PALG represent often consider: -

1. an apology
2. amendments to their CRB Disclosure;
3. removal of fingerprints/ DNA and photographs from the police national database; and/ or
4. Declarations under the Human Rights Act 1998 and Equality Act 2010.

are far more important than financial recompense. These non financial remedies cannot be quantified under a contingency fee agreement.

The House of Lords in Ashley v Chief Constable of Sussex [2008] UKHL 25 emphasised the importance of pursuing litigation for non financial remedies. In this case, James Ashley was shot and died following an armed police raid at his home. The police argued that it was an abuse of process for the estate to pursue litigation against them as there was little prospect of more damages being recovered than had already been offered. The court disagreed. It held that damages were not confined to a compensatory purpose but included a vindicatory purpose.

The importance of non financial awards to claimants is also illustrated in judicial review proceedings brought last June 2010. In this case, the claimant was the victim of a sexual assault. The CPS discontinued criminal court proceedings at trial after the victim gave evidence that she felt safe to report the assault to the police after finding out her attacker was in prison. Instead of a retrial, the CPS offered no evidence against the Defendant on the basis that the victim's credibility had been fatally undermined. The CPS' failed application for special

measures also meant the victim gave evidence unscreened before her attacker, which is almost unheard of in these types of cases and caused her great distress.

The case finally settled at mediation, but the non pecuniary losses were certainly more important to the claimant than the £16,000 compensation paid. These included:

1. An admission that the decision to discontinue the prosecution was in breach of common law principles and Article 3 ECHR (inhumane and degrading treatment);

2. A comprehensive and unconditional apology recognising that the victim's credibility should have never been in doubt;

3. A change to CPS policy to include explicit instructions that prosecution counsel should warn witnesses about the giving of prejudicial evidence during their testimony;

4. An instruction to all CPS London prosecutors that discontinuing the prosecution was unlawful;

5. A review of the CPS prosecutor to determine whether they should be allowed to prosecute rape and sexual assault cases in the future. The prosecutor's manager was also subject to a review;

6. A review of prosecution counsel by the CPS' Joint Advocate Selection Committee to determine whether they should be instructed in rape and sexual assault cases in the future.

In other case two well respected political journalists were reporting on a protest outside the Greek Embassy in London. Following a successful civil action against the Commissioner of Police of the Metropolis, they received modest damages in the sum of £3,500 each, but more importantly, they received a public apology

and an admission of liability that their Article 10 ECHR right of freedom of expression had been breached. In this case, the Defendant confirmed that it recognised that freedom of the press is a cornerstone of democracy and that journalists have a right to report freely.

These cases illustrate that success cannot be measured in purely financial terms and shows why contingency fee agreements are entirely inappropriate in actions against the police.

Thirdly, another difficulty with contingency fee agreements is that rather than promoting access to justice; they will act as a deterrent if replacing other funding currently available. If legal representatives receive a proportion of the claimant's damages; many will consider this area of law is uneconomical.

Human Rights Act (HRA) damages are traditionally modest compared to domestic compensation. This is because the HRA is not just concerned with money but 'just satisfaction,' which may include a declaration and/ or another remedy.

Another complication in action against the police cases at common law is the discretionary nature of aggravated and exemplary damages in civil court proceedings. Actions against the police are also one of the few areas of civil litigation with trial by judge and jury; which means that proceedings are significantly longer and therefore more costly.

Often actions against the police cases can be factually and legally complex and lead to modest awards of compensation but with other non monetary rewards. For example, a death in police custody will lead to the claimant seeking legal representation for an Article 2 ECHR compliant inquest and the subsequent civil

action. Legal representation at the inquest will be pivotal to gather evidence for the subsequent action.

If there is a successful Human Rights Act claim for a failure to protect life under Article 2 ECHR but no financial dependency claim, compensation will only be in the region of £10,000, but the family's participation in the inquest through legal representatives and subsequent civil action may lead to important lessons being learnt, the court making declarations of incompatibility under the Human Rights Act and/ or an apology.

PALG members have provided information on costs and damages received following successful civil actions following deaths in custody. In the case of 'M' there was a 5 week inquest leading to costs in the region of £300,000, the damages in the subsequent civil action were £15,000. In another 5 week inquest, costs were in the region of £250,000 and damages £30,000. A PALG member has an ongoing Article 2/3 ECHR claim following a death in custody in which costs will outweigh expected damages, but funding has been granted by the Legal Services Commission on the grounds that the case has a significant wider public interest and a declaration will fulfil an important function of obtaining acknowledgement of failings, where the Defendant has failed to implement Rule 43 recommendations made by the Coroner at the inquest. This case has recently been in the Court of Appeal on a preliminary issue and established an important precedent that a 'criminality defence' does not apply to claims under the Convention.

If legal representatives acted under a contingency fee agreement; this work would simply not be viable and will not reflect the time spent and/ or the complexities of the case. A firm could not afford to take on such a case under a DBA. This is despite the important issues that such cases raise and/ or the public and media interest they generate.

Fourthly, contingency fee agreements give solicitors an interest in the action, which may conflict with their duties to the claimant and the court. There is also the issue of how counsel will be paid under a contingency fee agreement and disbursements.

In conclusion, actions against the police will remain in scope for public funding, although financial eligibility will be drastically reduced if current proposals are adopted by the UK Government under the Green Paper. In limited cases, there is also the availability of Before the Event Insurance (BTE), but this is not without its difficulties.

Both contingency fee agreements and CFAs hinge on the successful outcome of a case. The availability of CFAs in their current form (rather than proposed reform) will be more attractive to both the claimant and their legal representatives than a contingency fee agreement on the grounds that the legal representative will be paid their hourly rate at inter partes rates plus a success fee, which is a percentage uplift for the risk of taking on the case and losing.

In contrast, a contingency fee agreement, which involves the legal representative taking a percentage of the claimant's compensation, will only be economically viable in high value claims and denies the claimant full compensation.

PALG does not consider that DBAs promote access to justice in the field of actions against the police and therefore are opposed to their introduction.

**Q46 – Do you consider that DBAs should not be valid unless the claimant has received independent advice?**

It is important that claimants are fully advised on their funding options. However, PALG do not consider it is necessary for the claimant to see

independent advice if DBAs were introduced. It is sufficient for the solicitor to advise the claimant on all their funding options at the initial appointment to enable them to make an informed decision. This is currently what happens in personal injury cases and there is no such requirement for such advice before entering into a Conditional Fee Agreement (CFA). Another complication is who would pay for the 'independent' advice? It is an additional cost burden that neither the claimant nor Legal Aid firms are able to pay. PALG also understands that contingency fee agreements currently operate in employment cases without the need to seek independent legal advice.

**Q 47 – Do you consider that DBAs need specific regulation? If so, what should the regulation cover?**

If DBAs are introduced, PALG agrees that they should be regulated. Sir Rupert proposes that 'the Damage-Based Agreements Regulations 2010,' should be adopted. This is currently used in employment cases.

PALG agrees that claimants should be protected but adopt the Law Society's submissions that these regulations could be embodied within the Solicitor's Code of Practice and supervised by the SRA. 'Double regulation' is not proportionate or necessary.

**Q 48 – Do you agree that, if DBAs are allowed in litigation, costs recovery for DBA cases should be on the conventional basis (that is the opponent's costs liability should not be by reference to the DBA)?**

Yes – PALG considers the Defendant's cost liability should be based on the work undertaken on the case and not by reference to the DBA. If the percentage taken is by reference to the DBA – it is not reflective of the complexities of the case, but rather the actual amount of compensation awarded.

**Q 49 – Do you consider that where QOCS is introduced for claims under CFAs, it should apply to claims funded under DBAs?**

Yes

**Q50 – Do you consider that the maximum fee lawyers can recover from damages under a DBA in personal injury cases should be limited to (i) 25% of damages excluding any damages referable to future care or losses as proposed, or (ii) some other figures? Please give reasons for your answer.**

This is outside our area of expertise – we are not personal injury lawyers.

However, personal injury lawyers are unlikely to take on cases, which are low value and considered 'risky' under a DBA if the maximum fee was limited to 25%.

**Q51 – Do you consider that in personal injury claims where the solicitor accepts liability for paying claimant's disbursements if the claim fails, the maximum fee should remain at 25%? If not, what should the maximum fee be? Should the limit be different in different categories of cases?**

PALG are not personal injury lawyers and we are therefore not in a position to comment.

**Q52 – Do you consider that there should be a maximum fee that lawyers can recover from damages in non-personal injury claims? If so, what should that maximum fee be, and should the maximum fee be different in different categories of case?**

PALG is against the introduction of DBAs and any deduction from claimants' damages under such an arrangement. Given PALG's stance, we do not feel able to comment on whether there should be a maximum fee that lawyers can recover in non-personal injury claims.

However, if DBAs were introduced, firms would not take on cases under a DBA unless the maximum fee reflected the risks of litigation. PALG understands the maximum fee in employment cases is currently 35%.

In the Lords Hansard text for 26 January 1999, Lord Ackner indicated that in most USA States the maximum proportion that could be taken from the claimants' compensation in legal fees was in the region of 40%.

**Q53 – How should disbursements be financed by claimants operating under DBAs?**

There will be difficulties with funding of disbursements in DBAs.

***1. Firm Funding***

Traditionally, actions against the police departments operate within Legal Aid firms, who are already operating under extremely tight economies of scale. These firms are facing further cuts to funding if the Government implements proposed funding reform.

Legal Aid firms are simply not in a financial position to fund disbursements until the conclusion of the case. Firstly, it is often difficult to ascertain prospects of success at the outset in actions against the police cases.

Often disbursements have to be incurred prior to making an assessment on prospects of success. For example in an assault case, where it is disputed how and when an injury was sustained, medical evidence will have to be obtained to deal with these causation issues. This is expensive and it is unfair to expect firms to fund these disbursements, when there is a possibility that subsequent evidence may reveal that a claim is not viable and the disbursement(s) will have to be written off.

Even if a civil claim is successful, actions against the police can routinely take up to 5 years and sometimes 10 years to settle. Often firms comply with the police complaint process before instigating civil actions for compensation. There may

also be criminal proceedings against the officer(s), which takes precedence to the civil action, inquests etc.

It is extremely rare to receive an early or any admission of liability. Often police forces will fight these cases until late into civil court proceedings before agreeing settlement. If cost cannot be agreed, firms must then embark on detailed assessment proceedings to recover their full costs and disbursements.

Given the tight budgeting constraints that action against the police departments current operate and the small amount of profit generated in this field, it is simply not viable for firms to fund disbursements that may not be recovered or may take years to recover from the Defendants in successful litigation.

### *2. The Claimant Pays?*

Many claimants do not have the disposal income to pay for all the disbursements necessary to fund civil litigation, especially if the Government slashes the financial eligibility limit for public funding as it is currently proposing.

Disbursements in civil litigation are expensive. Many claimants come from socially disadvantaged backgrounds and would not bring claims if required to fund their own disbursements. Litigation would therefore be the preserve of the rich or the extreme poor.

### *3. Bank Loans?*

An option for firms and/ or the individual claimant is to obtain a disbursement loan facility via a bank or another organisation. At the current time, PALG is unable to comment on whether or not this is a viable option. However, firms would be reluctant to take on additional liabilities; especially if they would be required to pay for all disbursements in unsuccessful cases.

As stated above, many claimants come from socially disadvantaged backgrounds and it is therefore most unlikely that banks would be willing to offer them loan facilities for disbursements or would only agree to such an arrangement if there were high prospects of success.

There is also the issue with interest being charged and whether this should be deducted from the claimant's damages, which means once again that they are not fully compensated for the losses they have sustained.

### *4. Insurance*

The only other option in DBAs is an insurance policy that operates the same as After the Event (ATE) Insurance in Conditional Fee Agreements (CFA). In other words, an insurance policy would be taken out on behalf of the Claimant to cover all disbursements and the risk of losing their case and being liable for the Defendant's costs (if one way cost shifting is not introduced). In the event of the claimant losing their case, the premium would be waived. If the claimant won, the premium would be recoverable from the Defendant.

At the current time, it is not clear whether insurers would agree to enter into such a funding arrangement. Historically, ATE providers have been reluctant to provide insurance for actions against the police cases funded under CFAs.

The viability of this option also hinges on whether or not the government will proceed with its current proposals to limit the recoverability of ATE premiums. Clearly if this happens, insurers would not offer insurance for DBAs due to problems with recoverability at the conclusion of litigation.

## 2.10 Litigants in Person

**Q54 – Do you agree that the prescribed rate of £9.25 per hour recoverable by litigants in person should be increased? If not why not?**

Yes.

**Q55 – Do you agree that the rate should be increased to (i) £16.50 per hour, (ii) £20 per hour or (iii) some other rate (please specify)?**

£29 increasing by £1 each April to bring it in line with the Employment Tribunal.

**Q56 – Do you agree that the prescribed rate of £50 per day for the small claims be increased? If so, to what figure?**

Yes. It should be increased with the Average Earnings Index.