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14 February 2011

Dear Ms Cowell

Re: PALG response to "Proposals for the Reform of Legal Aid in England and Wales" Consultation - Paper CP12/10

I now enclose detailed submissions on behalf of the Police Action Lawyers Group (PALG) in response to the "Proposals for the Reform of Legal Aid in England and Wales" Consultation Paper CP12/10.

Please confirm receipt by return.

Yours sincerely,

Sarah Ricca
Chair
Police Action Lawyers Group

Response of the Police Action Lawyers Group (PALG) to "Proposals for the Reform of Legal Aid in England and Wales" Consultation - Paper CP12/10

INTRODUCTION

PALG is comprised of solicitors, barristers and legal executives who represent complainants against the police throughout England and Wales. PALG was formed in 1991, and its 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.

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.

As a group we have also been in a position to liaise with other organisations representing complainant interests, including INQUEST, Liberty, Justice and MIND. We have also developed a lobbying role, particularly in relation to the police complaints system. To that end our members have attended before Select Committees, met with Ministers, provided guest speakers for conferences and prepared regular briefings. We meet regularly with the representatives of Independent Police Complaints Commission (IPCC) and the Directorate of Legal Services of the Metropolitan 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 the Metropolitan Police Service and other constabularies. These cases typically involve allegations of false imprisonment, assault and malicious prosecution, often aggravated by racism. A significant number of our clients are diagnosed with Post-Traumatic Stress Disorder, sometimes exacerbated by their experience of the police complaints system. 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 and in this capacity attend regular meetings with the Prison and Probation Ombudsman (PPO).

Our members therefore have a much broader expertise than solely police actions, and often represent some of the most vulnerable members of the community in actions against other state bodies such as the prison service. With more and more public services now being carried out by private companies, our work increasingly entails holding companies to account in the execution of these functions. The majority of our clients are publicly funded and would

not be able to bring these cases, and ensure the rule of law is upheld, if funding was withdrawn.

GENERAL COMMENTS

The Metropolitan Police Service alone spends more than £7million on internal legal services. This does not take into consideration the vast sums spent on services tendered to outside firms, who often charge in excess of £300 per hour for their services – a grossly disproportionate amount compared to the unsustainable legal aid rates claimant solicitors are paid. Further, from our regular meetings with various stakeholders in police actions it is patently clear that the decision whether or not to litigate a case in the Metropolitan Police Service is taken by their Directorate of Professional Standards. In reality, this means that the decision whether or not to pursue a case is taken by a police officer seconded to the DPS, with neither the legal training nor financial knowledge to assess whether or not the case should be fought or admitted. None of these issues and their accompanying costs appear to have been considered by the MoJ.

This consultation appears to be based on an inaccurate assumption that lawyers who act for publicly funded claimants have something to gain by pursuing poor cases. But to do so would be to go not only against our clients' interests, but also against our own: the last thing our clients need is to pursue a case that is unlikely to succeed, and no sensible solicitor would seek to run such a case to trial since we cannot survive on legal aid rates. We do not and will not advise our clients to pursue cases when prospects of success are poor.

SCOPE

Question 1: Do you agree with the proposals to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme? Please give reasons.

We broadly agree with these proposals on the basis that we believe that for each area that has been identified as one that should remain in scope there are good reasons for doing so.

Actions Against the Police cases

However, we make the following observations about how the scope proposals are intended to affect funding for Actions Against the Police, etc ("AAP") category cases.

(a) We welcome the assurance we have been given by the Ministry of Justice that AAP cases will generally remain within scope as claims against public authorities

In light of the fact that there is no section in the consultation specifically addressing whether AAP cases should remain within scope or be removed from it, prior to responding to the

consultation, we have been in correspondence with the Ministry of Justice to clarify the position.

On 19 January 2011, Stephen Jones (Head of the Civil Legal Aid Eligibility and Scope Branch) assured our group in writing that police claims will generally remain in scope, as "claims against public authorities" (paras. 4.43-4.55 of the paper), albeit that the criteria for funding within that category will change (see below). Claims that do fall within this category are, according to Mr Jones, "*expected to meet the lower merits criteria at chapter 8 of the Funding Code*".

We assume that this category will cover the vast majority of police claims, for the intentional torts such as assault, false imprisonment, malicious prosecution, misfeasance in a public office, trespass, for breaches of the Human Rights Act 1998, for breaches of the Data Protection Act 1988 etc.

We welcome this assurance, because each and every one of the criteria that have been adopted to determine what areas should remain in scope (para. 4.12 of the paper) apply to these sort of AAP cases. Addressing each in turn:

(i) The importance of the issue: A "typical" AAP case involves an individual who has been assaulted by the police, wrongfully arrested (falsely imprisoned) and then maliciously prosecuted. It is plain that such cases raise issues of the utmost importance in terms of society's need to hold the police to account, and the individual's need to obtain redress for the wrong done to them personally;

(ii) The litigant's ability to present their own case (including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law): Claimants in AAP cases are particularly unable to present their own cases because of the venue (frequently a jury trial), because this would violate the principle of equality of arms, since such Claimants are disproportionately from the most vulnerable and/or disenfranchised sections of society in contrast to the Defendants in such claims who are state bodies, funded by insurance or public funds, with a full legal team, and with individual witnesses who have professional experience of giving evidence in court; because Claimants have often suffered psychiatric injury as a result of their experiences and the pressures of litigating their own case would be likely to exacerbate their injury; and because the law in this area is complex, and indeed only practised by a small number of practitioners;

(iii) The availability of alternative sources of funding: As explained elsewhere in the response (see, for example, in answer to question 6), there are real difficulties in securing alternative sources of funding for AAP cases;

(iv) The availability of alternative routes to resolving the issue: While there is in existence a police complaints system that can, in some cases, secure accountability of individual police officers for wrongdoing, there are recognised shortcomings in this system, it only permits the complainant to have a very limited involvement, and it cannot result in any financial compensation for an individual complainant. We have elsewhere provided detailed commentary upon the shortcomings of the police complaints system and we can provide this if it would assist. Suffice to say here that the former chair of

the IPCC, Nick Hardwick, accepted at a PALG meeting that the complaints system was at its least effective in cases where the complainant was alleging intentional misconduct ie assault/false imprisonment/malicious prosecution. This is precisely the kind of case with which we typically deal. In such cases litigation remains the only effective remedy for complainants.

(v) The state's domestic, European and international legal obligations: This applies to AAP claims because:

(a) Article 2 of the European Convention on Human Rights ("the ECHR") (the right to life) requires that the families of those who have died in circumstances where the investigative obligation under Article 2 is engaged have the right to be involved in such investigations to an appropriate extent[1]. As indicated above the police complaints system cannot satisfy this requirement, and in cases where there is no inquest, the same can only be achieved through litigation. Cases involving the right to life inevitably involve issues of the utmost serious, so that proper legal representation is necessary for those families properly to exercise their Article 2 rights; and

(b) It has been held that the investigative obligations under Article 3 of the ECHR may be discharged by civil litigation. In such cases for litigation to satisfy the investigative duty, legal representation is essential.

(c) Article 5(5) of the ECHR requires that individuals receive compensation for any arrest or detention in breach of Article 5. Such a claim against the police will often overlap with a common law claim for false imprisonment. As indicated above the police complaints system cannot provide such compensation. Accordingly litigation is the only route to it.

(d) Article 6 of the ECHR requires that there be equality of arms in litigation. For the reasons set out above, such equality can be assured if a claimant is required to litigate in person.

(b) It should also be made explicit that the criteria for bringing AAP cases involving claims other than negligence within scope have not changed

We note that:

(i) Claims against public authorities are currently within scope where they involve "(i) 'serious wrong-doing', or (ii) abuse of position of power or (iii) significant breach of human rights, or (iv) where they are of Significant Wider Public Interest (and where they form part of a Multi-Party Action where the likely damages exceed £5,000)" (para. 4.44 of the paper); and that

[1] See *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at para. 25.

(ii) It is proposed to replace this wording with "(i) abuse of position of power; and/or (ii) significant breach of human rights; and/or (iii) negligent acts or omissions falling very far below the required standard of care" (para. 4.52).

The stated intention of revising the wording for such claims is **"…to clarify the criterion and make it absolutely clear that simple negligence is insufficient to fall within this category, as was always intended"** (para. 4.49) **and to ensure that "…cases of very serious negligence are still within scope while ensuring that less serious cases of negligence are properly out of scope"** (para. 4.53).

We therefore understand that the revision of this wording is not intended to affect any AAP claims involving torts other than negligence, namely claims of assault, false imprisonment, malicious prosecution, misfeasance in a public office and the like.

Again if there is any doubt about this, we would argue that all such claims by definition involve **"an abuse of position or power"** and/or **"a significant breach of human rights"** such that they fall within the first two of the three criteria set out above: it is hard to see, for example, how an assault by a police officer (which inherently involves an unlawful use of force from the outset, or an excessive use of force) or how a wrongful arrest or malicious prosecution (which frequently involves allegations that police officers have lied about the claimant's conduct) is not within these categories.

It is also entirely unclear what would be classified as a "significant" breach of human rights. We would argue that this issue could be addressed more effectively by the cost-benefit criteria (which will operate to exclude on quantum grounds those cases which involve *de minimis* breaches) rather than as a "scope" filter.

It is also the case that breaches of the qualified rights under the ECHR, such as Article 8, are in reality as significant as breaches of the absolute rights (Articles 2 and 3). Challenges to breaches of Article 8 are all the more important given society's move towards technocracy. We therefore assume that such cases will remain within scope as they do, in truth, involve a significant breach of human rights.

(c) The applicability of the <u>category of "claims arising from allegations of abuse [of a child or vulnerable adult] or sexual assault" to police cases should be clarified</u>

Mr Jones also indicated to us that police cases may remain in scope if they fall within the category of "claims arising from allegations of abuse [of a child or vulnerable adult] or sexual assault" (para. 4.56 of the paper).

The rationale for retaining these cases in scope is that:

> "*…money claims which arise out of allegations of the abuse of a child or vulnerable adult, or allegations of sexual assault, have an importance that goes beyond a simple money claim. While stronger claims may be suitable for alternative sources of funding such as CFAs, we consider that victims may well be vulnerable and need assistance in pursuing a claim. We do not consider that the alternative forms of advice or assistance which are available are sufficient to justify the withdrawal of legal aid…In the light of*

> *the importance of the issue at stake, the seriousness of the alleged harm suffered by the litigant, the likelihood of their vulnerability and the lack of sufficient alternative forms of assistance to justify the withdrawal of legal aid, it is our view that the provision of legal aid funding is justified. We propose that it is retained for these claims*" (paras. 4.57-4.58).

Insofar as it is alleged that a police officer or analogous authority has directly perpetrated abuse on a child or vulnerable adult, or committed a sexual assault, the claim should surely be treated within the wider "claim against a public authority" category discussed above, and so considered under chapter 8 of the Funding Code.

We therefore assume that the relevance of this category to AAP cases is that it will cover:

(i) Claims against the alleged perpetrators of abuse or sexual assault who are <u>not</u> public authorities; and

(ii) Claims that relate to a public authority's failure to prevent, or their response to an allegation of, such abuse or assault.

We would argue that it is appropriate to include both of the above categories of case within this category, and so within scope, because the rationale set out at paras. 4.57-4.58 of the paper as underpinning this category (quoted above) applies with equal force to them.

However it would assist if the Ministry could confirm its position in this regard.

(d) <u>We are concerned at the proposed reduction in scope for negligence claims against the police</u>

The consultation paper proposes that negligence claims against the police (and other public authorities) will only be in scope if they involve "**(iii) negligent acts or omissions falling <u>very far below</u> the required standard of care"** (para. 4.52) [emphasis added].

Given that the three criteria set out in para. 4.52 are disjunctive (see the "and/or" separating each of them) we assume that a negligence claim, even if it involves "simple" negligence, will still be within scope if it also involves **"a significant breach of human rights"** (criteria (ii) of para. 4.52).

We would therefore expect that claims involving, for example, "simple" negligence in the context of a prison death that also amounts to a significant breach of Article 2, or with regard to the calculation of the time for which an individual is detained by the police and/or immigration or other authorities, but which has led to a significant breach of the Article 5 right to liberty[2], will remain within scope.

[2] See, for example, *R v Governor of HMP Brockhill, ex parte Evans* [2000] 3 WLR 843 where the Claimant had been unlawfully detained for 59 days after a period of lawful detention; and *Clark v Crew and another* (Court of Appeal, unreported, 28 May 1999), where the Claimant had served around an additional 30 hours in custody due to the negligent endorsement of a warrant.

However there will plainly be some cases of "simple" negligence that do not otherwise fall within scope under criteria (i) or (ii) of para. 4.52. We have in mind the following sort of cases:

(i) Cases where a prisoner has been in a position to assault another prisoner due to negligence by the supervising officers[3], where the assault is not so serious as to amount to a significant breach of the Claimant's rights under Articles 2, 3 or 8 of the ECHR;

(ii) Claims of negligence by the police in the manner in which a rape or similar allegation has been investigated, where the failings in the investigation were not so serious as to amount to a breach of the Claimant's rights under Articles 3 or 8;

(iii) Claims of negligence with respect to a failure to obtain medical treatment in custody which do not result in a breach of the Claimant's rights under Articles 2, 3 or 8; and

(iv) Claims for breaches of the Police and Criminal Evidence Act 1984 ("PACE"), which have not led to any additional or significant breach of the right to liberty under Article 5 of the ECHR[4] (because the arrest was otherwise substantively justified).

In all these cases, we believe that such claims should remain in scope because:

(i) The criteria that have been adopted to determine what areas should remain in scope apply to these cases as they do to AAP cases generally (see above, with the exception of the jury trial issue which does not apply to negligence claims); and

(ii) Such cases are still **"an important means to hold public authorities to account and to ensure that state power is not misused"** and so are in the same category as those negligence claims that it is intended to keep within in scope (see para. 4.53 of the paper).

Areas related to Actions Against the Police cases

We strongly support the retention of all discrimination claims within scope.

We also strongly support the retention within scope of all judicial review applications save "business" cases (paras. 4.95 – 4.99). The Consultation Paper rightly recognises the vital role which judicial review plays in allowing citizens to hold the State to account, and ensuring that State power is exercised responsibly.

We agree that legal aid should not continue to be available for public law in business cases, and that this is a sensible saving (although we are concerned that no working definition of "business cases" has been provided in the Consultation Paper).

[3] See, for example, *Hartshorn v Home Office* (21 January 1999, Legal Action, January 2000).
[4] Such as an arrest in breach of the necessity requirement in s.24(5) of PACE, or where officers have effected an arrest on private premises to which they have gained entry unlawfully, contrary to s.17(1)(b) thereof

However we are concerned at the reference in paragraph 4.98 to "*alternative forms of dispute resolution, such as complaints procedures or referral to an ombudsman*". No detail is provided here, so we assume that this refers simply to the existing obligation, enshrined in public law jurisprudence, to use judicial review only as a mechanism of last resort. If, however, this reference is intended to add an extra and new filter to funding for judicial review cases, we would be extremely concerned. Given the tight timeframe for judicial review (maximum 3 months from the date of the impugned decision), and ombudsmen's sometimes restricted powers, complaints mechanisms and the ombudsmen are often not available as effective alternative remedies to the litigant.

For example, in a judicial review of a prison adjudication, the internal complaints/appeal process to the Ministry of Justice takes at least 6 weeks, half of the available 3-month period, and the Prison and Probation Ombudsman ("PPO") is unable to even consider the case until after that process has been exhausted. In our experience, when asked to expedite his decision to allow for the judicial review timeframe, he is generally unable to do so, and the PPO review process generally takes upwards of five months before resolution is reached.

Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable the Court to make interim lump sum orders against a party who has the means to fund the costs of representation for the other party? Please give reasons.

No comment, as outside our area of expertise.

Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.

No: we are gravely concerned that the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme will lead to a serious erosion of access to justice, for which an insufficient case has been made.

We are conscious that other groups with a wider remit than ours (such as the Bar Council, Legal Aid Practitioners Group and Young Legal Aid Lawyers) will be responding in detail on this issue and we endorse their responses.

However of particular concern to AAP practitioners is the proposal to remove from scope claims of "tort and other general claims" (para. 4.239 of the paper) insofar as they are directly analogous to claims against public authorities. We have in mind cases such as claims for malicious prosecution brought against private individuals which would currently be within the scope of public funding[5]. In our experience the wrong done to the individual victim is

[5] See, for example, the recent cases of *H v B* (2009) EWCA Civ 1092, Times, October 28, 2009 *Ministry of Justice v Scott* [2009] EWCA Civ 1215.

every bit as great whether it is the dishonesty of a police officer or a member of the public that has led to a malicious prosecution; and the number of cases within this category is very small. Moreover the criteria that have been adopted to determine what areas should remain in scope (para. 4.12 of the paper), apply to these sort of cases as they do to AAP cases against public authorities (see above). We would therefore argue that such cases should remain within scope.

We are also concerned at the proposal to remove from scope the ability to provide Legal Help to those seeking criminal injuries compensation (paras. 4.173-4.174), who are frequently also AAP clients. We believe that this work should remain within scope because:

(i) Removing Legal Help from this area runs counter to the other efforts that have been made in recent years to recognise and strengthen the rights of the victims of crime;

(ii) Successive governments have regarded funding for such work as necessary, and cost-effective;

(iii) We do not accept that one of the stated reasons for the change – namely that provision of public funding for those at risk of losing their liberty is more "important" than providing assistance to the innocent victims of crime – is correct in principle, as both are important in their own ways;

(iv) In our experience, the scheme does not operate in as "user-friendly" way as one would hope: many victims find the process intrusive, the application form is long and wide-ranging, and many applications raise complex or important legal points, including time bars on abuse claims, fatal accident claims, the proper calculation of awards including future loss claims for earnings and the necessary restrictions/entitlements to NHS/private medical care. Accordingly legal assistance is crucial;

(v) Moreover, our experience dictates that the process itself seems skewed towards refusals at the application and review stages, and that it is only after an oral appeal hearing, with full representation, that the applicant secures compensation;

(vi) By definition, those who would be adversely affected by this change are the innocent victims of crimes of violence, an inherently vulnerable category of people. Many – such as child victims of sexual and/or physical abuse, female victims of domestic violence, victims who have suffered severe psychiatric injury, in addition to victims of traumatic brain injury – would be particularly unable to represent themselves in this process;

(vii) The cost of this area of Legal Help is understood to be relatively modest, yet it assists a wide cross-section of the public with the applications, reviews and appeals stages of the process;

At the very least, if Legal Help is to be removed from this area, there would need to be a change in the CICA's function so that it was required actively to promote the interests of the victim.

Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

While in general we support the proposal for a new exceptional funding scheme for excluded cases, we believe that there should be further consultation on the criteria to be applied

In particular, we believe that the entire *raison d'etre* of a system of publicly funded legal services is that it can support cases which benefit many individuals other than the Claimant out of a wider public interest. This is an important point of principle, and a cost-effective way of achieving the maximum benefit from the investment of public funds in "test" type litigation. We do not consider that removing the ability to fund such cases would result in a significant cost saving.

We also believe that there should, in principle, still be a discretion to fund appropriate cases which involve "Jarrett" complexity, in order to ensure equality of arms as between individuals and the state.

Question 5: Do you agree with the Government's proposal 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 source of funding, such as a Conditional Fee Arrangement? Please give reasons.

We do not object in principle to the availability of alternative sources of funding being considered before public funding is granted: if a claimant can fund their claim through Before the Event insurance, for example, then they should be required to do so rather than draw on the public purse. In fact it is already the case that providers are expected to check if BTE insurance is available prior to applying for legal aid. However, we are opposed to the suggestion that providers must investigate whether a claim can be funded by a CFA with ATE insurance before an application for legal aid is made, particularly bearing in mind the proposed changes in the Jackson consultation to which we have responded separately.

In addition claims against public authorities, and AAP cases, are often particularly unlikely to be "suitable" for such alternative sources of funding for the following reasons:

(i) AAP cases 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. Rather, in police actions, the determination of issues of liability may often depend ultimately upon a jury's preference for one version of events over another at trial; awards of quantum may be unpredictable, often falling within the jury's area of responsibility; and "success" is often hard to define, as it is not uncommon for the Claimant to succeed

on some heads but not all (such as showing that excessive and unreasonable force was used during an arrest, albeit that the arrest itself was shown to be lawful). Above all, it will usually be the case that the Claimant does not have access to much of the relevant documentation and information until a relatively late stage in proceedings, often because it is within the control of a Defendant police force that is reluctant to disclose it until ordered to do so by a court. This means that the preliminary "risk assessment" necessary for a lawyer to conduct in deciding whether to accept a client on a CFA, and for an insurance company to conduct in order to decide whether to fund it, is virtually impossible;

(ii) The effect of the above is that very few practitioners can afford to accept many, or indeed any, actions against the police on a CFA basis. Claimants against the police face an uphill struggle from the start in that success usually requires them to overcome the odds and succeed in having a police officer's account undermined before a jury. Few practitioners would be willing or indeed able to accept large numbers of instructions in such cases on a CFA basis.

(iii) Our experience is that insurance is not widely available in such claims:

(a) We are not familiar with any "before the event" insurance policies which cover police claims (indeed we understand that one major insurer will not fund <u>any</u> claim against a public authority);

(b) As far as "after the event" insurance is concerned, insurers have so far proven extremely wary of funding actions against the police. If insurers are willing to provide cover, they will often only do so only at very high premiums given the particularly risky nature of police actions. Such premiums will be prohibitively high for the vast majority of our clients; 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);

(c) Even if insurance is available, after the event insurance only indemnifies a Claimant in respect of the consequences of being "wholly unsuccessful". As we have said, in police claims, "success" is much harder to define than in conventional personal injury cases, where the issues are much more straightforward; and

(iv) In the absence of ready access to adequate insurance cover, it would be particularly unfair to require Claimants to fund AAPs under CFAs. Those who bring actions against the police and who are currently publicly funded are often among the most marginalised groups within society. It would be wholly wrong to put them in a position where in order to bring litigation challenging an abuse of power by the state, they must risk an extremely substantial costs order against them. This risk would act as a major deterrent to litigants, regardless of the merits of their claims. We cannot see how such a potentially large reduction in access to justice, in such a fundamental area of work, can sit comfortably alongside the Government's stated aims and areas of priority;

(v) Even in those cases where a CFA is viable and ATE insurance is obtained, this still means the claimant having to pay the cost of disbursements while the case is ongoing. This will often lead to substantial expenditure over a period of several years, which for the majority of our clients is simply not affordable and will therefore act a further deterrent to bringing claims.

These arguments were previously put forward in our response to the Legal Services Commission Consultation Paper 'A New Focus for Legal Aid' in October 2004, when they were found to be persuasive: it was decided then that the option to decline public funding on the grounds that there is an alternative source of funding would not apply to such claims against public authorities. Since then, as far as we are aware, nothing has changed in the market for alternative sources of funding for AAP cases to justify a different conclusion.

If, contrary to our primary submission, the proposed change of wording in the merits criteria is adopted, then we would urge that "suitable" must be interpreted as meaning "in reality" and not "in principle": in other words, funding should only be refused in such cases where the Claimant has shown an actual ability to fund the claim via an alternative source rather than a theoretical one. To do otherwise would be grossly unfair in principle and run completely counter to the Government's recognition elsewhere of the important issues that underpin AAP cases and justifies them being brought with the use of public funds.

Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.

Our experience makes if clear that where Claimants have to bear the burden of conducting litigation as litigants in person, the result is delay, additional cost to the court system and to opponents, and a serious risk of points being overlooked which may have assisted the litigant or, indeed, brought him/her success.

We believe that the judiciary shares this view: indeed we understand that one of the reasons for the introduction of the system of Judicial Assistants in the Court of Appeal over a decade ago was to address the difficulties presented to individuals and the courts by the increasing number of litigants in person.

The 2005 research quoted at para. 4.268 of the consultation paper is outdated and limited in scope: it dealt only with first-instance matters, whereas if the proposals in the consultation paper are adopted in full, there will be a much larger number of litigants in person at all court levels.

In the absence of appropriate up-to-date research, the experience of practitioners and judges in relation to these issues cannot and should not be ignored.

THE COMMUNITY LEGAL ADVICE TELEPHONE LINE

Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.

No. The proposals would fundamentally change the way people access legal services and impose a requirement to access services solely through the CLA. There is very limited information in the proposals or the attendant equality impact assessments as to how this will materially operate. Bearing in mind the significance of the proposed changes both on clients and organisations contracted by the LSC to provide advice and assistance under the Legal Help scheme it is regrettable that the proposals are not more detailed or informed.[6]

It is clear that the drive to telephone services is overwhelmingly financially motivated[7]. Given this motivation it is a cause for concern that the proposals appear to give little consideration to the quality of service offered. In particular it is noted that the objective to 'channel demand through a single gateway enabling call agents to diagnose the nature of the problem and route clients to the services and channels most appropriate for their circumstances' is offered entirely without context.

It is respectfully suggested that given the lack of clarity and the wide undefined scope of the proposal, it is difficult to contribute meaningfully. However with a view to assisting future consultation processes the following broad observations regarding the establishment of a single gateway are made.

First, the direction of all initial matters through a single gateway significantly reduces the clients' choice of services and restricts their ability to choose a service appropriate to their needs. Indeed this is recognised in the Impact Assessment, paragraph 31 noting that some clients may feel worse off in terms of perceived service quality if they prefer face-to-face contact to phone. The direction of all legal services through a single gateway curtails the opportunity for the client to make a decision based on reputation of the firm or quality of service they have experienced in the past. It is a gross interference with the client's discretion and entitlement to choose a service based on their views and objectives.

Second, there is a risk that legal issues will be over simplified either at the operator level or a telephone advice stage.[8] There is a risk of compromising the quality of legal services offered and of oversimplifying (boxing) legal issues. In this connection, it is noted that civil litigation against state bodies necessarily engages disputes of facts as well as complex and novel areas of law: without the benefit of appropriate specialist knowledge in this regard, there is a real

[6] To that end we note that the MOJ published a clarification of the telephone advice proposal on 7 January 2011 which deals with "emergency" cases and sets outs further information regarding the current functions of the CLA

[7] Moving specialist advice provision from face to face to phone is estimated to reduce Legal Services Commission (LSC) expenditure on specialist advice by between £50m and £70m per year, Legal Aid Reform Provision of Telephone Advice, EIA 15.11.10

[8] The CLA website confirms that the operators are not legally trained but they will ask questions and decide which area of the law / what kind of problems the client has.

risk that new enquiries may be dismissed as having no means of redress. Further it is obvious that initially investigative work which arises from the first face to face meeting is critical to the establishment of the client's objectives, preparation of early evidence and understanding regarding outcomes. To that end, face to face advice is cost effective and, absent careful initial work, greater costs may arise.

The proposals do not explain how the single gateway will work in relationship to other levels of funding. The proposals do not address the additional costs that may be incurred by splitting work between different firms or practitioners. It is unclear how matters will operate that move to a different funding scheme (i.e. to a certificate) and in particular the cases may have to be dealt with by different lawyers or even different firms leading to duplication and additional unnecessary cost.

There appear to be no proposals regarding accountability or redress if referred to wrong place and no consideration appears to have been given to risk arising from limitation issues[9]. It is simply not appropriate nor fair to place an additional requirement on clients that may endanger their legal remedies.[10]

Third, the engagement of particular groups with a single gateway is likely to present a real risk of discrimination issues arising from difficulties such as literacy problems, language barriers and disability related access issues.

Fourth, it is unclear how the single gateway provision will work under the contract. For example if some one cold calls an AAP firm, is the firm under an obligation to refer to CLA? If the LSC are referring to specialist telephone advice, will they have knowledge of the organisation's allocated matter starts?

Fifth, the proposal fails to consider that organisations and firms cultivate and offer legal services via professional and community relationships. It is not clear that if the client is referred from an NGO what the role of the CLA will be. For example, many of PALG practitioners under take work following referrals from NGOs such as Just for Kids, INQUEST etc. So also, there is likely to be significant risks to smaller firms that may have developed niche practices or services for specific communities as recognised at paragraph 90 of the Impact Assessment: "There is a risk that smaller organisations may be less likely than larger firms to win telephone advice contracts if they are unable to benefit from the economies of scale in bidding for a larger volume of work and reflecting this in their price bid. Small firms may also be less likely to have the expertise in operating a phone based service."

Sixth, there are likely to be serious professional conduct issues arising from the provision of information slipping into advice over the telephone. It is not at all clear what safeguards are being taken to ensure that non-legally qualified individuals do not offer legal advice.

[9] Note that para 4.272 states "However the services will be designed to minimise the risk that clients with emergency cases experience delay in accessing the help they need."

[10] PALG notes that the clarification published on 7 January 2011 indicates that "emergency" cases will not be required to call the single gateway first. Consultees have been requested to address the definition of "emergency"

Finally it is not clear how the determinations made by the Operator Service regarding "diagnosing" legal matters and establishing financial eligibility will work in practice.

Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.

In a broad context of enabling access to justice PALG recognises and supports the provision of legal information and advice to help people deal with legal issues. PALG supports the provision of information and advice to encourage transparency of the legal process and to enable redress.

PALG recognises the difficulties people may experience in accessing legal services [4.271]. It is not considered that a specialist telephone service will address all of the issues identified regarding people's ability to access legal services. The proposal fails to recognise the fact that different vulnerabilities or needs require different working practices, a "one stop" route will not discharge these concerns.

It may be appropriate for telephone legal advice to be given in some areas of law ie debt, welfare etc. However, it is not and cannot be appropriate for actions against the police and other state bodies which, by definition, involve a process of holding the state to account for wrongs suffered: the remedies sought may involve, not just damages, but also other non-pecuniary steps such as declaratory relief, lessons to be learned, an apology or other action (e.g. correction of an unlawful record). In almost every case, scrutiny will be required in order to ensure compliance with Convention requirements in respect the abuse of power by the state. Simply, actions against public authorities are wholly unsuited to a tick box exercise or telephone advice for all the reasons set out above.

The current information provided by CLA about actions against the police recognises that this is a complicated and specialized area of law which requires expert knowledge to negotiate: "You may be able to sue the police if they behaved or treated you extremely badly. But suing the police is not easy, and there are complicated rules on when and how you can do so. You'll need a solicitor who has expert knowledge in this area to work out when you can." Given this recognition we trust that it is accepted that it is not appropriate to deal with AAP via a telephone service.

Any abolition of face to face advice is likely to result in increased costs as there are matters which are critical to understanding the client's concerns as well as identifying issues which may not be stated on the telephone. The complexity of this area of work means that the early stages of preparation are critical to preserving evidence and safeguarding the client's position.

Question 9: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?

PALG does not accept that there should be a strict criteria for when face to face advice is required. There are clearly some cases or types of law when telephone advice would be appropriate with a view to resolving matters in a manner which suits the client. However, any strict application of fixed criteria runs the risk of curtailing access to justice even in types of matters which currently benefit from the telephone advice service. It is our submission that certain areas of law will rarely be appropriately dealt with through telephone advice (claims against public authorities, public law, housing etc) by reason of the nature of the case. There is a separate and distinct reasons relating to public interest, achieving accountability, and recognition of the matters at stake which means that these cases cannot be concluded or resolved via telephone advice.

As well as the nature of the matter, other facts which are likely to encourage a presumption for face to face advice include any matters which relate to a vulnerable client group, by reason of personal characteristic or otherwise.

It seems to be accepted that face to face advice will be necessary in urgent cases (termed "emergency" cases), although there is currently no assistance given to define what this might mean. Obviously any need to presere the client's position via the court process or administrative redress would have to weigh in favour of face to face advice.

Question 10: Which organisations should work strategically with Community Legal Advice and what form should this joint working take?

It is difficult to comment on strategic working on basis of the current proposals. Given the broad ranging nature of the proposals and limited information regarding their implementation, we would expect that the MOJ would seek to consult further with a view to affording practitioners a proper opportunity to respond to clear proposals.

Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline? Please give reasons.

Again, there is insufficient information before us to enable proper comment. Paragraph 4.279 states: "the LSC would set out in the relevant tender the requirements in respect of quality standards, maximum rates to be charged, assurances about standards of service for both **eligible and non-eligible** clients, and so on [emphasis added]" PALG is keen to provide its view, on the provision of further detailed information about how this proposal would work.

FINANCIAL ELIGIBILITY

We broadly agree with the Government's rationale to ensure that those who can afford it should pay for, or contribute towards, the costs of their case.

However, we have grave concerns that the extent of the proposals, if they are all implemented, will greatly curtail access for justice and will fall far short of the Government's aim to continue to preserve access for those without the means to pay for legal services. In particular, we make the following observations:

(1) The proposed changes to the financial eligibility requirements will have a substantial impact on the number of people who are able to bring claims against the police and other public authorities, as all AAP cases are means tested and will be affected by the proposals.

(2) It is vital to natural justice for people to have access to legal resources where their rights have been infringed by state bodies and they can't afford to pay for representation. The people who are most vulnerable and likely to have cases in AAP are those on the lowest income levels.

(3) The changes to financial eligibility will increase the imbalance between the power of the state and the rights of individuals, thereby resulting in a lack of "equality of arms". Public authorities are often represented by expensive firms of solicitors. As far as we are aware, there have been no proposals to restrict the funding provided to public authorities to defend cases.

(4) We agree with the comment made in the Impact Assessment that "case outcomes might be less fair than beforehand". This unfairness will be particularly apparent in AAP cases and claims against other public bodies in which, in our experience, Defendants are generally reluctant to accept responsibility for wrongdoing or enter into negotiations without the issue of civil claims. The most vulnerable people in society will no longer be able to obtain assistance to make those claims and will, in all likelihood, be prevented for obtaining justice.

(5) We agree with the comment made in the Impact Assessment that "a significant reduction in fairness of dispute resolution may be associated with wider social and economic costs".

    i. A reduction in access to legal advice and representation will cause an increase in the numbers of litigants in person. This is associated with greater costs in relation to courts and defendant legal fees, as litigants in person are unfamiliar with legal procedures and are less likely to enter negotiations and mediation.

    ii. Less access to legal advice and representation at an early stage of disputes will mean that more cases are unfairly decided against Claimants. This is particularly relevant in relation to people who will no longer be able to obtain assistance under Legal Help for complaints against the police. This

is likely to lead to an increase in the number of complaints that are not upheld which may cause an increase in applications for Judicial Review against the Independent Police Complaints Commission.

(6) We agree with the comment made in the Impact Assessment that "the perceived failure to apply the law fairly is likely to result in reduced social cohesion" and that "this may generate an inclination not to respect rules and regulations and not comply with social norms and expectations, generating social costs and increased criminality". This is particularly the case where failure to hold the state to account may cause increased animosity for state bodies such as the police. This causes a great deal of social problems and discontent which can result in increased criminality and failure to cooperate with the police.

Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants? Please give reasons.

No. We adopt the submissions made by Young Legal Aid Lawyers in this regard.

Question 13: Do you agree with the proposal that clients with £1,000 or more disposable capital should be asked to pay a £100 contribution? Please give reasons.

We consider that the introduction of a capital contribution fee will act as a substantial deterrent to many people seeking legal redress as it will cause them undue hardship. We consider that for those who have only £1,000 disposable income, a payment of 10% is a large sum to pay and that this proportion is too high.

We do not agree that any capital contribution fee should be obtained by the legal aid provider and then deducted from the payments due. We consider that this would compromise the independence of the legal aid provider in the eyes of the client. We consider that any capital contribution fee should be paid directly to the Legal Services Commission in the same way as other contributions.

We agree that if a client were unable to pay this capital contribution because they did not have an available liquid asset, the LSC should postpone payment of the contribution for a reasonable period until such time as the client did have available capital.

Question 14: Do you agree with the proposals to abolish the equity and pensioner capital disregards for cases other than contested property cases? Please give reasons.

We agree in principle with abolishing the equity disregards.

We are concerned that abolishing the capital pensioner disregard will cause undue hardship to one of the most vulnerable groups in society. Pensioners who have little resources and few prospects of gaining any further capital should not be forced to use the limited capital

available to them. We suggest an alternative would be to increase the age of eligibility for pensioner capital disregard to 65 and to proportionately decrease the amount of capital that may be disregarded.

Question 15: Do you agree with the proposals to retain the mortgage disregard, to remove the £100,000 limit, and to have a gross capital limit of £200,000 in cases other than contested property cases (with a £300,000 limit for pensioners with an assessed disposable income of £315 per month or less)? Please give reasons.

We agree that clients who have substantial capital should use it to fund their own proceedings, where they are able to do so, rather than relying on public funds.

We agree that the capital means test should focus on the actual, rather than notional, equity held and that the mortgage disregard should, therefore, be maintained.

We agree that the proposed gross capital limit should be higher for pensioners.

Question 16: Do you agree with the proposal to introduce a discretionary waiver scheme for property capital limits in certain circumstances? The Government would welcome views in particular on whether the conditions listed in paragraphs 5.33 to 5.37 are the appropriate circumstances for exercising such a waiver. Please give reasons.

We broadly agree with the proposals and consider it appropriate that there should be a waiver scheme where clients are unable to access the equity in their property.

Question 17: Do you agree with the proposals to have conditions in respect of the waiver scheme so that costs are repayable at the end of the case and, to that end, to place a charge on property similar to the existing statutory charge scheme? Please give reasons. The Government would welcome views in particular on the proposed interest rate scheme at paragraph 5.35 in relation to deferred charges.

There is need for consultation on more finite version of the scheme. However, we accept that as a mechanism for funding necessary litigation repayment of costs is sensible and could be workable with a far greater level of management and organisation than the current statutory charge scheme. The interest rate should not be fixed at such a high level and simply left for years but ought to be subject to annual variation.

Question 18: Do you agree that the property eligibility waiver should be exercised automatically for Legal Help for individuals in non-contested property cases with properties worth £200,000 or less (£300,000 in the case of pensioners with disposable income of £315 per month or less)? Please give reasons.

We agree with this proposal. In relation to AAP cases, we consider that the early availability of Legal Help can assist clients with resolving their disputes through the police complaints procedure and / or obtaining advice on their claims without recourse to legal proceedings.

Question 19: Do you agree that we should retain the 'subject matter of the dispute' disregard for contested property cases, capped at £100,000 for all levels of service? Please give reasons.

No comment as outside area of expertise.

Question 20: Do you agree that the equity and pensioner disregards should be abolished for contested property cases? Please give reasons.

No comment as outside area of expertise.

Question 21: Do you agree that, for contested property cases, the mortgage disregard should be retained and uncapped, and that there should be a gross capital limit of £500,000 for all clients? Please give reasons.

No comment as outside area of expertise.

Question 22: Do you agree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income? Please give reasons.

We disagree with the proposal to raise the levels of income-based contributions up to a maximum of 30% of monthly disposable income.

A raise in income contributions will prevent many people from seeking legal redress as they will be unable to afford to pay the contributions. From our experience, many clients already struggle to pay their contributions and any increase will cause substantial and undue hardship.

We note that this proposal also lacks clarity as there is uncertainty regarding the number of people affected and their income distribution.

Question 23: Which of the two proposed models described at paragraphs 5.59 to 5.63 would represent the most equitable means of implementing an increase in income-based contributions? Are there other alternative models we should consider? Please give reasons.

We consider that the first model represents the most equitable means of implementing an increase in income-based contributions. We consider that clients who are better off should pay a larger proportion of disposable income than those with lower disposable income. We would support the proposal with the lowest increase in contributions for clients who already struggle to pay the existing contributions.

CIVIL REMUNERATION

PALG welcomes the Ministry of Justice's (MoJ) proposal not to undertake a radical restructuring of the fee structure in respect of civil and family cases. Whilst PALG unequivocally does not support the review of any of the current remuneration rates for any areas of civil legal aid, we call on the MoJ to recognise the unique character of our practice and its role in holding public bodies to account.

PALG's main submission is a concern that the proposed reform is yet another hurdle for legal aid practitioners who have had to develop their practices to accommodate constantly changing limits to scope, eligibility and cost recovery. Whilst the MoJ makes clear that it is committed to reducing its spending whilst ensuring that clients continue to access legally aided services, it is unclear how these proposals intend to maintain this assurance given that many practices are unable to remain cost-effective at current rates which have been frozen since 2000**.**

PALG considers that the proposals on remuneration of civil and family cases must be considered in line with general concerns about access to justice; the corresponding proposals in the Jackson Review limiting the extent to which claimant solicitors' can recover success fees or obtain ATE insurance, and an unrealistic expectation that firms should subsidise their AAP/public law practices resulting in the burden of accountability falling to the legal representative rather than remaining the responsibility of the state.

To those committed to providing a high quality service for all, in the private practice as in the not-for profit sector, any further limitation on cost recovery will inevitably result in their operations becoming financially unviable and practitioners simply being unable to continue to do this important work. PALG therefore urges the Ministry of Justice to recognise that any proposal to limit cost recovery will have the inevitable consequence of limiting the availability of quality legal advice and access to justice rather than encouraging efficiency and innovation.

The figures offered in the section on remuneration are unclear, making it difficult for those being consulted to provide a reasoned response. Although at paragraph 7.8 the document provides that the LSC spent £97 million in 2008-9 in non-family civil cases, it would appear that actions against public authorities and judicial review represents the smallest proportion of that figure, although no breakdown is provided. It is also unclear whether the £97 million represents a net amount taking into consideration how much was eventually recovered by the LSC following a costs order being made against the defendant solicitor to the benefit of the legal aid fund, and if so to what extent that recovery was in respect of claims against public authorities, as opposed to other areas of civil legal aid.

PALG is also concerned at the assertion at paragraph 7.8 that the availability of legal aid '*may be encouraging people, and their lawyers, to bring cases which have too little chance of success to attract a CFA'*. PALG would like to challenge the myth that AAP practitioners seek legal aid for unmeritorious claims. It is not in any practice's financial interest to bring unmeritorious claims whether by CFAs or through legal aid. The legal aid rates as they currently stand are insufficient in any event to maintain any kind of viable practice. CFAs are inappropriate for most AAP claims or public law challenges due to the complex nature of the work, the variety of remedies sought, the inevitable unpredictability of bringing legal challenges to public authorities, and the lack of availability of ATE insurance for such claims.

Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10% rather than undertake a more radical restructuring of civil and family fees? Please give reasons.

PALG considers that any reduction in fees paid in civil matters will result in a reduction in the provision of high quality legal services in that it will become financially unviable to maintain a civil practice undertaking the highly unpredictable and complex calibre of cases currently being brought.

PALG also considers the suggestion that all fees be reduced by 10% to be entirely unworkable when viewed in context of the other proposals in the consultation document including:

(a) The limitation on scope;
(b) The introduction of a telephone gateway;
(c) The suggestion that all cases should paid at risk rates from the end of the investigative stage.

Furthermore, in the absence of a breakdown of statistics it is impossible to conclude that a fee reduction of 10% will produce the savings that the consultation document suggests.

Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate. Please give reasons.

PALG strongly opposes the capping of enhanced rates. The standard hourly fees paid to solicitors at legal aid rates currently do not meet the expense of time spent, nor do they reflect the skill and expertise required to undertake claims against public authorities. The enhanced rates are in recognition of the highly complex, novel and often urgent work undertaken by those working in this field, and even at 200% is well below the equivalent market rates. The enhanced rate is one of the few financial aspects that makes it sustainable and viable for highly skilled and experienced practitioners to remain working in the field.

PALG also opposes the suggestion that claims in courts other than the High Court, Court of Appeal and Supreme Court should be capped to 50% without exception. For example, discrimination claims, often highly complex and requiring specialist knowledge, can only be brought in County Courts, so this proposal will result in firms being penalised for developing this area of law.

PALG does not oppose the development of criteria for enhancements; however we are concerned that doing so may result in a tick box approach which is not sufficiently flexible to cater for the variety and complexity of our current caseloads. We submit that the vast majority of our work requires highly specialist knowledge and would remain eligible for enhancements in any event.

Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5 above, subject to a further 10% reduction?

PALG does not agree with the proposal to codify the rates paid to barristers in accordance with the table set out at para 7.13 of the consultation document. The stated rates are not recognised as being the rates that are currently paid, and a subsequent 10% reduction would therefore be unsustainably low. The proposal for a standard hourly rate does not reflect the diverse range of work that is currently undertaken and the variety of complexity which may merit a higher hourly rate. PALG wishes to express concern that the general codification will result in lower quality of work, as practitioners may be reluctant to take on more complex work and not be remunerated for it.

Question 35: Do you agree with the proposals:

- **To apply 'risk rates' to every civil non-family case where costs may be ordered against the opponent; and**
- **To apply 'risk rates' from the end of the investigative stage or once total costs reach £25,000 or from the beginning of cases with no investigative stage?**

PALG strongly opposes the proposal to extend risk rates which we consider will result in claims against the police and judicial reviews becoming entirely unsustainable and uneconomical. We would submit that the introductions of risk rates has limited the extent to which practitioners are able to run more risky but nevertheless important cases with significant public interest. We are concerned that the proposal to introduce risk rates at an early stage directly contradicts the MoJ's apparent commitment to access to justice.

We do not recognise any correlation between the introduction of risk rates and any increase of success rates, and we would request a further breakdown of the statistics which indicate

that the success rate in claims against public bodies has increased from 51% to 92% as a result of 'risk rates'. We would also be grateful for further insight into the figures which attempt to quantify this success. In particular we seek clarification as to whether these figures include cases where a costs order has been made to the benefit of the legal aid fund. In the absence of a contextual analysis as to the various reasons why there has been an increase in success for cases since 2000, including the obvious fact that since the Woolf reforms there has been a simultaneous encouragement to settle claims at a pre-action stage before they would reach VHCC status, we would submit that these statistics are meaningless.

We would also note that the proposal that 'risk rates' should apply from the moment the investigative stage is complete and a substantive certificate is issued, demonstrates a fundamental lack of understanding of this area of practice. The complexity of this area of work means that the investigative stage is often long and the nature of the risk cannot be assessed from the point that the substantive certificate is issued. To implement risk rates at such an early stage would deny the practitioner the opportunity to properly assess the merits of the case.

The Government would also welcome views on whether there are types of civil non-family case for which the application of 'risk rates' would not be justifiable. For example, because there is less likely of cost recovery or ability to predict the outcome.

Like judicial reviews for which the cost recovery process is recognised as being distinct from that for private law proceedings, many of our cases involve non-financial remedies such as apologies, declarations or recognition of failings and lessoned learned. It is clear that risk rates are inappropriate for such cases as they do not meet the standard cost/benefit criteria in any event.

EXPERT REMUNERATION

Question 39: Do you agree that:

There should be a clear structure for the fees to be paid to experts from legal aid;

The proposals to have a clear structure for the fees to be paid to experts in civil litigation cases is fine, provided the same fee structure applies to all public bodies, such as hospitals, local authorities and police forces around the country.

Careful consideration should be given to the budgets of all public bodies, to determine how much of tax payer's money is being used by other publicly funded bodies in civil litigation cases on legal and expert fees. In the vast majority of civil litigation cases both parties are often paid from public funds. As such any structured regulation of the fees to be paid to

experts should equally apply to all publicly funded bodies, to ensure consistency, transparency, fairness and equality of arms.

It cannot be fair if individuals who are publicly funded are restricted from choosing an expert of their choice simply because of the fee structure imposed by the LSC whilst the Defendant who is also publicly funded body is not subjected to the same structure for fees to be paid to experts and as such is able to instruct senior and highly skilled experts in a particular field at significant higher rates compared to publicly funded individuals.

Unless the structure for fees to be paid to experts is applied to all public bodies, it will place those that it seeks to assist i.e. the poorest and most vulnerable sections of our society at a further and greater disadvantage, especially as many civil litigation cases involving serious abuses of state power and assaults upon individuals are often compromised at an early stage in the proceedings if their claims are supported by expert evidence. It is therefore essential in the interest of justice and fairness that all public bodies are subjected to the same fee structure for experts.

In the short term, the current benchmark hourly rates, reduced by 10%, should be codified;

PALG does not agree with the recommendation to codify the rates paid to experts instructed in civil litigation cases. The proposed current benchmark hourly rates do not represent a realistic rate of remuneration for most experts instructed in civil litigation cases. The rates do not adequately encompass senior experts and will result in limiting the choice amongst civil practitioners. The proposals make no allowance for more complex cases where a greater level of experience, complexity or expertise may merit a higher rate.

Furthermore the current benchmark hourly rates are not based on up to date statistical data and the Impact Assessment does not quantify the savings that are likely to be made should these proposals go ahead.

It is highly likely that if the hourly rates of experts are reduced it may lead to a reduction in the number of experts who are prepared to do publicly funded work, or take on cases which are more demanding where a higher level of attention and expertise is warranted. It will reduce the pool of experts for publicly funded individuals and could restrict access to justice.

In the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;

PALG considers that the long term proposals for fixed and graduated fees and a limited number of hourly rates will seriously impact upon the pool of experts who will continue to do publicly funded work.

Senior medical experts and others may cease to do work under the proposed rates, since it will no longer be cost effective to do this type of work. The proposed rates will therefore severely reduce the breadth of experienced experts willing to undertake civil litigation cases, especially when experts can earn more in private practice.

The proposals fail to appreciate that the LSC does not have the same relationship with experts as they do with solicitors and barristers. No consideration has been given to what happens should no expert in a particular discipline be agreeable to acting in a case at the rates imposed by the LSC.

The vast majority of experts have the option of other work and are not dependent upon the LSC for work. For example a NHS consultant would look to earn £200–300 per hour in private practice and a hospital specialist in the NHS of middle range seniority with the lowest level of merit award could earn up to £470 per day. However under the proposals it is clear that such fees are unattainable if they did publicly funded work. Furthermore many experts in their normal employment also have the benefits of no additional costs or overheads and access to a full supporting staff.

However for many expert witnesses it is likely that the specialist work which is required will be done as a private undertaking and the specialist will be bearing all additional costs associated with this particular work.

There would therefore be no real incentives for experts to continue to do publicly funded work if further reductions are made and they are subjected to a fee structure which results in work done not being paid, time lost because of waiting or travelling and no allowances are made for cancellations even when these may be outside the experts control.

The categorisations of fixed and graduated fees shown in Annex J are appropriate;

It is difficult to see any circumstances in which fixed fees would be appropriate in cases involving serious abuse and wrong doing by state bodies.

The case for changing the fee structure for experts has not been adequately made out by the MoJ or the LSC. There is simply a lack of statistical data and detail supporting the proposals which make it very difficult to understand the various bands and fees suggested. For example the proposals suggest that all experts who prepare an initial report should be paid a fixed fee, however no consideration has been given to issues surrounding the differences in specialism's, expertise, complexity of the case, volume of documents, how much work is required and more importantly it is not clear what an 'initial report' should consist of. It is therefore likely that this will increase costs because a further report following an initial report may be required.

The proposals of the various band rates are also inconsistent and unfair:

- No consideration has been given to the seniority, expertise and skills of experts;
- No consideration has been given to the disparities between the regions. For example London based experts may have higher overheads compared to regional experts even though there may be more London based experts compared to other regions;
- The hourly and day rates are identical for seven of the fourteen categories, which begs the question why they are separated;
- There seems to be little understanding of experts and/or their expertise; for example, accident and emergency specialists appear in general medical as do paediatricians.

Medical practitioners appear under forensic scientist, as do accountants and architects; and

- No consideration has been given to allowing travel costs which are necessary in order to asses or prepare an expert report on a publicly funded individual who may be detained in prison or an immigration detention centre, which are usually based in remote parts of the country and are difficult to get to.

The proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?

PALG considers that it is important in maintaining access to justice that the LSC has discretion in appropriate cases to increase the fees payable to experts beyond the fixed, or graduated fees proposed.

The definition of what should be considered as 'exceptional' cases - i.e. *the experts' evidence is key to the client's case; and either the complexity of the material is such that an expert with a high level of seniority is required or the material is of such specialised and unusual nature that only very few experts are available to provide the necessary evidence* - appears reasonable and may be practicable depending on how the criteria is applied to individual cases.

We further consider that the definition of exceptional cases should also include *the particular circumstances and urgency of the case* to ensure that vulnerable individuals who need urgent advice and assistance are not prejudiced in any way, especially since in many cases the quality of expert evidence is essential to the effective running of the civil litigation cases and the selection of the right expert is critical to the outcome of cases.

ALTERNATIVE SOURCES OF FUNDING

Question 40: Do you think that there are any barriers to the introduction of a scheme to secure interest on client accounts? Please give reasons.

In answering this question the consultation paper asks that we "*have the overall fiscal context firmly in mind*". In so doing PALG considers that the significantly low interest rates in the current climate will render any benefits from such a scheme to be minimal. Moreover, given both the added administrative burden of administering such a scheme and the limited means of legal aid clients PALG considers that the benefits of such a scheme would likely be outweighed by the cost of implementation and ongoing administration.

PALG wish also to iterate that whilst the points outlined within the consultation are acknowledged solicitors have a duty to account for interest accrued on money held on behalf of their clients.

In light of the above and the limited consideration that has thus far been given to the practical barriers to such a proposal PALG considers that greater analysis and reflection is required

before the implementation of a scheme to secure interest on client accounts can be properly considered.

Question 41: Which model do you believe would be most effective:

Model A: under which solicitors would retain client monies in their client accounts, but would remit interest to the Government; or

Model B: under which general client accounts would be pooled into a Government bank account?

Please give reasons.

Please see our answers to question 40 above

Question 42: Do you think that a scheme to secure interest on client accounts would be most effective if it were based on a:

a) mandatory model;

b) voluntary opt-in model; or

c) voluntary opt-out model?

Please give reasons.

Please see our answers to question 40 above

Question 43: Do you agree with the proposal to introduce a Supplementary Legal Aid Scheme? Please give reasons.

No

Whilst we appreciate the underlying desire to find alternative sources of revenue to maintain the availability of Legal Aid funding for those that are eligible, PALG is opposed to proposals to generate such funding out of the damages awarded to claimants in successful cases.

The proposals to create a Supplementary Legal Aid Scheme are couched in terms that such a scheme would serve to achieve two objectives;

(1) Create an alternative funding stream, and

(2) Address the '*inter-relationship between legal aid and proposals on the reform Conditional Fee Agreements*' as set out in Jackson's report on Civil Litigation Costs.

PALG has set out in detail our opposition to the proposals concerning CFA's, in particular in respect of the recoverability of success fees, in our separate response to Jackson's report. We

will not re-iterate these here but stress that our response to the above proposals must be read in conjunction with our response to Jackson's report.

We would hope that the measures set out in Jackson's report are not introduced, thereby rendering obsolete the need to strike a balance between claimants in receipt of legal aid and those funded by CFA's,. Moreover should the proposals for the recoverability of success fees set out in Jackson's report not be adopted, any subsequent introduction of a SLAS would render claimants funded by legal aid at a distinct disadvantage. PALG would strongly oppose any such move as it would contradict the very purpose of legal aid, namely to ensure that those who do not have the financial means are nonetheless not excluded from access to justice.

Setting aside the proposals on CFA's and taking the proposals for a SLAS in isolation PALG is disappointed at the governments apparent desire to bolster funding for Legal Aid out of the damages awarded to the very claimants Legal Aid is designed to assist.

It is suggested within the consultation paper that legally aided claimants will benefit from the proposed increase in general damages of 10% suggested by Sir Jackson. Whilst we naturally welcome the proposal to increase damages, particularly in an area such as AAP's where damages are generally low, we do not agree that this will serve to compensate claimants sufficiently if a percentage of their damages is removed into a SLAS. Our reasons for this stance are set out below.

It is proposed that in order to maintain an equal footing the percentage recovered from Claimant's damages for a SLAS would be commensurate with that for CFA success fees, namely 25%.

Even taken at face value it is clear that the proposed increase in damages will not serve to plug the gap left by the removal of 25% of damages awarded to successful claimants whose cases have been publically funded. The disparity is even greater however when the proposed increase of 10% is examined in greater detail. PALG has addressed these issues within our response to Jackson however they apply equally in respect of the proposals in this instance.

It is apparent that the increase of 10% is envisaged to apply to general damages and it is understood that this is taken to mean basic compensatory damages only. This is of particular concern to PALG in respect of AAP's where the overall damages awarded will often be substantially comprised of aggravated and exemplary damages.

Due to the nature of actions against the police there are many examples of cases where a claimant suffers only relatively minor or moderate injuries, attracting basic damages in the region of £2,000- £3,000 (in line with the leading authority on damages in AAP work), 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 increase would therefore fall far short of what a claimant might be expected to loose given the proposed percentage that would be recovered from them for the SLAS.

In light of our concerns set out above read in conjunction with our response to Jackson's report on Civil Litigation Costs PALG would oppose the introduction of a SLAS as an alternative source of funding for legal aid.

Question 44: Do you agree that the amount recovered should be set as a percentage of general damages? If so, what should the percentage be?

If the proposal to introduce a SLAS is implemented we consider that the recovery from damages would need to be restricted to a percentage of general damages alone, taken to mean basic damages, and that that percentage must be set at a level that would be commensurate with the increase afforded by the proposals of Jackson's report, taking into account our submissions above on the nature of AAP damages.

Alternatively the proposals for an increase of general damages would need to be amended to include an increase to aggravated and exemplary damages, and the percentage to be deducted from claimant's damages towards the SLAS would need to be set at a level that would be commensurate with the actual increase in damages received.

Even with these safeguards however there is likely to be a loss to the claimants as a result of the generally low damages awarded in these types of claims and we would therefore reiterate our view that we would be opposed to a scheme whereby money would be recovered from publically funded claimant's damages.

GOVERNANCE AND ADMINISTRATION

PALG welcomes the underlying ethos of moves towards improving the administration and governance of legal aid in so much as it is designed to ensure the longevity of publically funded work and improve and maintain access to justice.

Question 45: The Government would welcome views on where regulators could play a more active role in quality assurance, balanced against the continuing need to have in place and demonstrate robust central financial and quality controls.

PALG recognises the importance of ensuring effective quality assurance of legal aid work and welcomes moves to establish minimum quality controls.

It is essential that the focus in this respect is upon the quality of work delivered to clients and as such quality assurance ought to be developed in partnership with practitioners who are delivering services to their clients in various areas of practice. Our submissions throughout the consultation are therefore central to the theme of quality assurance and we consider that due weight must be given to ensuring that the provision of legal aid is both properly remunerated and viable so that providers are able to ensure best practice and maintain high levels of quality.

Question 46: The Government would welcome views on the administration of legal aid, and in particular:

the application process for civil and criminal legal aid;

applying for amendments, payments on account etc.;

bill submission and final settlement of legal aid claims; and

whether the system of Standard Monthly Payments should be retained or should there be a move to payment as billed?

PALG welcomes moves to improve the administration of legal aid and considers that this is an area that will need to be consulted on further following the outcome of the current consultation process and when the landscape of legal aid has been clarified.

Question 47: In light of the current programme of the Legal Services Commission to make greater use of electronic working, legal aid practitioners are asked to give views on their readiness to work in this way.

PALG welcomes the proposals for greater use of electronic working and consider if implemented properly it could serve to increase efficiency.

Question 48: Are there any other factors you think the Government should consider to improve the administration of legal aid?

As expressed in our response to question 46 above we consider that a greater level of consultation with practitioners will be necessary at the conclusion of this consultation process. PALG considers that this ought to be an ongoing process to ensure that decisions about the administration and efficiency of legal aid ought to be developed in line with practitioners work to ensure quality service provision.

IMPACT ASSESSMENTS

We adopt the submissions set out in the response provided by Young Legal Aid Lawyers in respect of this issue.

CONCLUSION

Legal aid makes up a tiny proportion of the national spend, yet fulfils a crucial function in a democratic society. Over the last years, legal aid has been cut to the bone. The proposals will inevitably reduce access to justice and disproportionately affect some of the most vulnerable members of society. Whilst the areas of law practiced by members of PALG are largely unaffected by the reductions in scope in the Green Paper, PALG is gravely concerned by the proposals to reduce the availability in other areas of law.

The complex, novel and developing nature of actions against the police requires highly skilled and specialist practitioners. Whilst those practicing this area of law are unlikely to be primarily motivated by personal financial gain, providers must be able to build on and maintain sustainable practices, and must be able to compete with non-publicly funded sectors to ensure the next generation of lawyers is able to maintain the standard of specialist work we provide. Quality must be the cornerstone of any proposed changes to legal aid. PALG is deeply concerned that, taken as a whole, the proposals will inevitably compromise the quality of work provided under a publicly funded scheme, and lead to a discriminatory two-tier justice system. This must not be allowed to happen.

PALG would be happy to meet with representatives of the MoJ or LSC to discuss these submissions in more detail. Please contact Kat Craig (katherinec@christiankhan.co.uk) for further information.