

LEGAL AID, SENTENCING & PUNISHMENT OF OFFENDERS BILL (BILL 109)

PROPOSED EXTENSION OF QUALIFIED ONE-WAY COSTS SHIFTING TO CIVIL LIBERTIES CASES

Introduction

1. The Police Actions Lawyers Group (PALG) is a national organisation which represents complainants against the police and other detaining authorities throughout England and Wales. Litigation through the civil courts is often the only means by which they are able to enjoy any access to justice and thereby to defend their civil liberties in the face of malpractice on the part of officers of the state.
2. We are concerned that it is precisely this access to justice which will be denied to a large proportion of the public if the proposals set out in the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) are implemented. This problem can be mitigated only if such civil liberties cases are brought within the proposed scheme of Qualified One-Way Costs Shifting ("QOCS")¹, which is currently envisaged to cover only personal injury cases.

LASPO

3. LASPO as currently drafted will seriously reduce the ability of claimants to bring civil liberties cases in two ways.
 - (a) First, it will further restrict eligibility for legal aid which is currently the only means by which those of the most limited financial means can pursue civil liberties claims.
 - (b) Second, for those falling outside the scope of legal aid (e.g many people who own their own home and most people in full-time employment), it will remove their ability to protect themselves from the risk of liability in respect of defendants' costs, and thereby make litigation practically impossible. This is the problem that is addressed in what follows:
4. For people of modest financial means, who do not qualify for legal aid but cannot afford to pay for litigation privately, the only means by which litigation is possible is through lawyers willing to act under Conditional Fee Agreements (CFAs). However, such CFAs cannot provide protection from the risk of liability in respect of defendants' costs unless underpinned by After the Event ("ATE") insurance cover. Clauses 43 and 45 of LASPO as currently drafted would remove the ability of successful claimants to recover the cost of insurance premiums from defendants, resulting in such premiums becoming payable out of damages. This will make CFAs unworkable in a high proportion of civil liberties cases which – although of fundamental importance to claimants and of wider benefit to society - are typically of high risk and low financial value such that any damages recoverable are likely to be exceeded by the insurance premiums payable, as detailed below. For these reasons, PALG has lobbied hard for civil liberties cases to be exempted from Clauses 43 and 45².

QOCS

5. Under QOCS, losing claimants would be afforded a level of costs protection in that they would only be liable to pay a successful defendant's costs where, and to the extent that, in all the circumstances it is reasonable for them to do so (rather than the usual "loser pays"

¹ The QOCS scheme, which is not provided for on the face of the Bill, is to be implemented in its wake.

² For further details see our briefing with case studies dated 16.1.12.

principle applying to claimants)³. At present the government only proposes to include personal injury cases in the QOCS scheme.

6. PALG's submission is that QOCS should be extended to cover all civil liberties cases (whether or not such cases include a personal injury claim): this would remove or very significantly reduce the need for claimants to obtain ATE insurance and thereby abate much of the prejudice that would otherwise result from the removal of ATE premium recoverability.
7. Many ATE premiums are staged, starting in the region of £3,000 to £5,000 following issue of a claim, rising at specified steps within the litigation, and ending in the region of £30,000 to £40,000 for a case that succeeds at trial. Others are calculated as a percentage of the defendant's costs and result in similar figures. If such premiums are to be paid by successful claimants out of their damages rather than being paid by unsuccessful defendants, most civil liberties claims will become economically unviable; indeed, such claimants would face the risk of remaining in debt to an insurance company even following a successful claim.
8. Examples of civil liberties claims that will no longer be available to claimants without QOCS:
 - Claims for false imprisonment and malicious prosecution. A typical case involving a detention of up to 12 hours and a prosecution lasting 6 months may be worth between £10,000 and £20,000.
 - Claims arising from deaths in custody. A claim for a breach of the right to life under the European Convention on Human Rights, when the deceased was unmarried and unemployed, is frequently valued in the region of £10,000 to £15,000.
 - Discrimination claims. Examples would include a black driver stopped repeatedly whilst driving or a female detainee subjected to sexual harassment by officers. Damages for discrimination are valued at up to £6,000 for more minor or one-off incidents and £6,000 to £18,000 for serious cases.
 - Judicial reviews – where no damages are awarded. Such proceedings as would be pursued by a rape victim whose allegation has not been properly investigated by the police. As a further example, an unlawful decision to issue a police caution can effectively bring an end to the career of a person working with children or vulnerable adults and cannot be challenged through any other avenue.
9. If QOCS is limited to personal injury claims, the mass market for ATE insurance is likely to disappear, with the result that ATE insurance cover for remaining categories of claims will become even more expensive or unavailable.
10. Lord Jackson, in his review of civil litigation costs, proposed that QOCS “may be appropriate on grounds of social policy, where the parties are in an asymmetric relationship”. Examples given by him included claimants in actions against the police and judicial review. He stated that further consultation is required, if his recommendations are accepted in principle, as to which categories of litigant should benefit from QOCS⁴. Such consultation has not yet taken place.

³ See Proposals for Reform of Civil Litigation Funding and Costs in England and Wales, CP 13/10, para. 130.

⁴ Jackson Final report December 2009 Chapter 9 paras 5.10 and 5.11

11. The exclusion of civil liberties cases (without a personal injury) from QOCS will lead to perverse results.
 - (a) A person on an income marginally above the legal aid limit, or a person on legal aid who enters employment and becomes disentitled to legal aid, will be unable to pursue their claim.
 - (b) Similarly, a person who suffers a personal injury in the course of an unlawful arrest may be able to utilise QOCS whereas one who does not will be excluded from the civil justice system.
 - (c) Without QOCS, defendants will be able to delay settlement of claims until the ATE premium reaches a level which makes the claim no longer viable for the claimant.
12. Claims by individuals against public authorities invariably involve a large disparity of resources between the parties. Very wealthy claimants can be excluded by the qualifications applied to cost shifting. Defendants to civil liberties claims already operate under a version of QOCS in respect of legally aided claimants.
13. The CFA regime itself will serve to limit claims to those considered sufficiently meritorious by claimants' lawyers such that they are willing to risk recovering no fees. Without recoverability of ATE premiums there is no other way to maintain access to justice for all who suffer violations of fundamental rights.

Conclusion

14. **Without QOCS only the very poor or very rich will be able to hold state agencies to account for breach of their fundamental rights and serious wrongdoing will go unchallenged. We therefore propose that QOCS be extended to cover those cases which would fall within the definition of "claims against public authorities" which applies for the purpose of legal aid funding.**