SUBMISSIONS FROM THE POLICE ACTION LAWYERS GROUP ON

THE QUALIFIED ONE WAY COSTS-SHIFTING SCHEME

Introduction

1. The Police Actions Lawyers Group ("PALG") is a national organisation comprised of solicitors, barristers and legal executives who represent complainants against the police throughout England and Wales. PALG members are concerned first and foremost with the principal objectives of the complainants we represent: to ensure that the police are held accountable for their conduct through all available avenues, including the police complaints system, civil claims and compensation applications.

2. Due to our large and varied membership, the collective experience of PALG is considerable. We include lawyers who act on behalf of victims of misconduct by police officers from virtually every force in England and Wales. PALG members have been involved with numerous notable police complaint cases and inquiries. These cases typically involve allegations of false imprisonment, assault and malicious prosecution, often aggravated by discrimination. Many of our clients have suffered the most serious abuse at the hands of the police. Some of the most distressing cases we deal with are on behalf of families whose relatives have died in police custody.

3. We have been following the changes to public funding, and the implementation of Jackson LJ's Review of Civil Litigation Costs, closely, as we have grave concerns that the combined effect of these reforms will be a serious diminution in access to justice for the clients we represent.

4. We are conscious that the rules for implementing a scheme of Qualified One-Way Costs Shifting ("QOCS") are currently being drafted. In light of our concerns we would respectfully ask the Civil Procedure Rules Committee ("the CPRC"), the Civil Justice Council ("the CJC") and the Ministry of Justice ("the MOJ") to take the following points into account during that process. We note that the CPRC in particular has a statutory obligation to consult before making or amending Civil Procedure Rules[1].

   These submissions will address the following matters:

   - the scope of QOCS generally
   - equality issues
   - cases raising Article 6 issues
   - cases involving applications to strike out
   - Part 36 and QOCS

[1] See the Civil Procedure Act 1997, s.1(2)(a).

(1) The scope of QOCS generally

5. We have repeatedly expressed our concern that the QOCS scheme is at present limited to cases involving personal injury claims.

6. PALG's position is that QOCS should be extended to cover all civil liberties cases (whether or not a personal injury claim is included), for the following reasons.

7. At present, Claimants in civil liberties claims who are not eligible for legal aid, and who cannot afford to pay privately, have the option of pursuing litigation under a Conditional Fee Agreement ("CFA"), whereby they agree not to pay their own lawyers any costs unless the claim succeeds (in which case it is hoped that the costs will be paid by the losing party). CFAs at present are generally underpinned by an After the Event insurance ("ATE") policy, to protect Claimants from the risk of having to pay the Defendant's costs if the claim fails.

8. Once the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") comes into force, the cost of such ATE premiums will no longer be recoverable from a losing Defendant (as currently occurs). Claimants will therefore need to meet the cost of such premiums themselves out of their damages. However in civil liberties cases, damages are relatively low despite the constitutional importance of the issues raised and insurance premiums are relatively high. Therefore the level of the ATE premium is frequently equal to or higher than the damages awarded, making pursuing many if not most civil liberties claims under a CFA with ATE unviable: no Claimant would want to pursue a claim whereby even if they succeeded, any damages they won would be payable to an insurance company, or where they may even end up in debt to an insurance company despite having won their claim.

9. Excluding civil liberties claims that do not involve a personal injury claim from QOCS will necessarily prevent many of those who have suffered abuse of state power or a breach of fundamental civil rights from accessing the courts and will lead to serious wrongdoing going unchallenged. Examples of civil liberties claims that may well no longer be viable for Claimants without QOCS include:

    - Claims for false imprisonment and malicious prosecution when an officer relies on falsified evidence. A typical case involving a detention of up to 12 hours and a prosecution lasting 6 months is likely to 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 £20,000;

    - Judicial reviews, where damages are not generally awarded. For 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; and

- Claims brought under the Equality Act 2010 for race, sex, disability and other forms of discrimination against the police and other public authorities. Damages for discrimination are valued at up to £6,000 for one-off incidents and £6,000-£18,000 for more serious cases.

10. This issue is likely to affect an even greater number of Claimants than those currently using CFAs because of the further limitations on the availability of legal aid which LASPO introduces, through restriction of the financial eligibility criteria.

11. Excluding civil liberties cases without a personal injury element from QOCS will lead to perverse results. 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. 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.

12. In addition, if QOCS remains limited to personal injury claims the mass market for ATE insurance is likely to disappear making such insurance even more expensive or unavailable for remaining claims.

13. We note that:

    (i) The CPRC must exercise its power to make Civil Procedure Rules **"with a view to securing that the civil justice system is accessible, fair and efficient"** [emphasis added][2];

    (ii) The CJC' functions include **"[c]onsidering how to make the civil justice system more accessible, fair and efficient"**[3] [emphasis added];

    (iii) Both these bodies, and the MOJ itself, are public authorities for the purposes of the Human Rights Act 1998 ("the HRA") and must therefore ensure that they act compatibly with the rights set out in Schedule 1 to the HRA[4], including the right of access to a court under Article 6 of the European Convention of Human Rights.

14. We are concerned that excluding civil liberties claims without a personal injury element from QOCS, and the inevitable limitations on access to justice that will flow from that, are not consistent with the above obligations.

15. If, however, civil liberties claims were included within QOCS, and there was therefore no presumption on the recoverability of Defendant's costs against unsuccessful Claimants, this would remove or greatly reduce the need for Claimants to obtain ATE insurance, and abate much of the prejudice caused to Claimants by the removal of ATE premium recoverability.

[2] See the Civil Procedure Act 1997, s.1(3).
[3] See the Civil Procedure Act 1997, s.6(3)(b).
[4] See the HRA, s.6.

16. In summary, without QOCS only the very poor or very rich will be able to hold state agencies to account for breach of their fundamental rights.

17. We therefore repeat our request that the QOCS scheme 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.

(2) Equality issues

18. We are also concerned that there have been deficiencies in the manner in which the equality impact of the QOCS scheme has been assessed, and that fundamental issues relating to the ability of individuals to bring claims under the Equality Act 2010 have not been considered.

19. There was no formal equality impact assessment in the November 2010 consultation paper that outlined the QOCS scheme[5]. However annexe B to the Impact Assessment was headed "Equality Impact Assessment Initial Screening". This drew attention to the fact that there was "*very limited information to identify the likely impact on different groups of people*" and invited stakeholders to "*provide data covering the profile of both the clients and providers in CFA cases…*". On the limited material that it did have, it concluded:

> "(a) "*We do not have any evidence to suggest that these proposals would have a positive impact on specific groups of people. If implemented this proposal would provide protection for Claimants in certain types of case, so that they would only ever be liable to pay their own costs, even if they lose*"; and
>
> (b) *We do not have sufficient data to assess the differential impact of these proposals on people depending on their sex, gender reassignment, race, religion or belief, sexual orientation, pregnancy or maternity or age. However we have no reason to believe that these groups would be disproportionately affected. We need to be able to assess the impact on both individuals (Claimants or Defendants) and providers (Law firms, insurers). We welcome evidence that shows the impact on Claimants, Defendants and providers based on these protected characteristics*".

20. Although the government specifically welcomed "*evidence that shows the impact on Claimants, Defendants and providers based on these protected characteristics*", we have not seen any of the material that was so provided, nor does it seem to be publicly available.

---

[5] *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations*, Consultation Paper CP 13/10.

21. Claims under the Equality Act 2010 are, by definition, exclusively brought by members of "protected" groups. Therefore, a rule which makes it more difficult to bring those claims will, by definition, place members of those groups at a disadvantage because they will be more likely to need to bring discrimination claims than others.

22. As we have explained under heading (1) above, the failure to include discrimination cases in the QOCS scheme is a rule that will make it more difficult to bring Equality Act 2010 cases. This is because it will mean that those Claimants who are not eligible for public funding and who cannot pay privately will be forced to bring discrimination claims facing full costs risks and, post-LASPO, will be unlikely to be able to, or want to, obtain ATE insurance to protect them from those risks. Accordingly it is our view that members of protected groups generally will be less able to vindicate their rights through the courts. This limitation on access to justice could be avoided if such cases were included within QOCS, as there would then be less of a costs risk for Claimants and so less of a need for insurance.

23. We are not confident that proper consideration has been given to this potentially discriminatory consequence of the current QOCS proposals.

24. The MOJ is, of course, bound by the public sector equality duty under the Equality Act 2010, s.149. This is a duty to have **"due regard"** in the exercise of public functions to the matters set out in s.149(1). These include the elimination of unlawful discrimination (paragraph a) but also go further than that and include at paragraph (b) the advancing of equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. This latter phrase would surely embrace equality of opportunity for access to justice. That, after all, is one of the main ways that protected groups have been able to advance equality of opportunity in recent years.

25. **"Due regard"** for these purposes means **"such regard"** as is **"appropriate in all the circumstances"** (*Pieretti v Enfield LBC* [2010] EWCA Civ 1104 and *R (on the application of McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33). The Administrative Court has recently observed that **"...[t]he importance of complying with s.149 is not to be understated"** (*Bailey v Brent LBC* [2011] EWCA Civ 1586, 2011 WL 5903380, per Davis LJ at para. 102).

26. We therefore invite the MOJ to consider extending the current QOCS scheme to Equality Act 2010 cases.

27. If this is not undertaken we submit that it is necessary for the MOJ to conduct a full Equality Impact Assessment of the failure to do so. For the avoidance of doubt, the November 2010 assessment cannot assist with this because it was preliminary in nature (see above) and because it was concerned with the QOCS scheme as a whole, and not this particular aspect of it.

(3) Cases raising Article 6 issues

28. As indicated above we are concerned that the inability to recover ATE insurance premiums from a losing Defendant will act as a major obstacle to Claimants wishing to litigate claims.

29. We consider that there are likely to be some cases where this issue, together with the failure to afford the Claimant QOCS protection, will be tantamount to a denial of access to justice under Article 6 in that particular case. This would be contrary to the obligations that bind the CPRC, the CJC and the MOJ as set out above.

30. We would therefore suggest the inclusion within the QOCS scheme of a power for the court to decide, in a particular case that does not involve a personal injury claim, that the Claimant should be afforded QOCS protection, so as to safeguard their Article 6 rights adequately.

(4) Cases involving applications to strike out

31. We understand from the Ministerial Statement on QOCS made by Jonathan Djanogly MP on 10 July 2012 that it is proposed that QOCS protection would be lost if a Claimant's case has been struck out where the claim discloses no reasonable cause of action, or where it is otherwise an abuse of the court's process (or is otherwise likely to obstruct the just disposal of the proceedings). This proposal reflects the wording of the court's power to strike out statements of case under CPR 3.4(2).

32. In our experience CPR 3.4(2) is frequently used to strike out claims that are seeking to pursue novel points of law. Indeed if a case is a test case seeking to challenge Court of Appeal or Supreme Court authority, pursuing the claim, accepting that it will be struck out at first instance and then appealing it to the Court of Appeal and Supreme Court may well be the only route available. Many landmark cases in the area in which we work are cases of this nature. For example, *Hill v Chief Constable of West Yorkshire* [1989] AC 53 (addressing the duty of care of the police to the victims of crime) and *Brooks v Commissioner of Police for the Metropolis* (addressing the duty of care of the police to the witnesses of crime) were both cases decided on a strike out basis, that ultimately went to the House of Lords and established key legal principles of wider application.

33. While we would accept, of course, that QOCS protection should be lost if a claim is abusive, it is wrong in our submission to stigmatise an action that is found, after complex legal argument, not to disclose a cause of action.

34. Moreover, we are concerned that the prospect of losing QOCS protection after an unsuccessful strike out hearing would be a serious disincentive to Claimants to bring these "test" cases. This could have a chilling effect on the development of the law which would be a regressive step, and is not in the public interest.

35. We would suggest that discouraging the litigation of novel points of law by the current proposals with respect to QOCS would be contrary to the obligations on the CPRC, the CJC and the MOJ set out at paragraph 13 above.

36. We would therefore respectfully invite the CPRC, the CJC and the MOJ to consider including within the QOCS rules a provision by which the court can determine that a case involves "*an important point of principle or practice*" or that there is "s*ome other compelling reason*"[6] such that QOCS protection should not be lost after an unsuccessful strike out hearing.

37. To be effective, it would in our submission be appropriate to afford courts the power to make such a determination at the outset of proceedings, to give Claimants in such test cases the certainty of knowing that their QOCS protection would not be lost should they fail to defend a strike out hearing, or the ability to make an informed choice to proceed without QOCS protection.

(5) Part 36 and QOCS

38. We note from the Ministerial Statement referred to above that it is also proposed that QOCS protection be lost if the Claimant has failed to beat a Defendant's "Part 36" offer to settle.

39. We assume that it is not intended that this should apply where a Claimant loses their claim, as this would be tantamount to reinstatement of the "loser pays" principle.

40. We assume that what is meant is that QOCS protection will be lost if a Claimant succeeds at trial, but does not beat a Defendant's Part 36 offer, and so is simply a development of the current scheme of adverse costs consequences for Claimants who fail to beat a Defendant's Part 36 offer. However we would be grateful for clarification of this point.

Police Action Lawyers Group

October 2012

[6] We have taken these words from CPR 52.13(1), the provisions under which permission can be granted to appeal to the Court of Appeal, as these words would seem to capture the essence of the sort of cases we are trying to protect by this proposal.