BACH COMMISSION ON ACCESS TO JUSTICE

WRITTEN EVIDENCE ON BEHALF OF THE POLICE ACTION LAWYERS GROUP

TOPIC 1: The current state of access to justice

1. Please provide us with your name, contact details, and the name of your organisation and your role in it (if applicable).

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2. In a sentence, what are your biggest concerns about the state of access to justice? Please provide up to three answers.

   PALG's biggest concerns about the state of access to justice are:
   - The collapse of the availability of insurance to bring claims against the police and public authorities on behalf of those who are financially ineligible for legal aid. This, taken together with the more stringent financial eligibility criteria imposed by LASPO, results in people who have been victims of State abuses of power being unable to bring claims to vindicate their rights and expose culpable conduct.
   - Following the decision of the Court of Appeal in R (Sisangia) v Director of Legal Aid Casework [2016] EWCA Civ 24, legal aid is no longer available in false imprisonment cases where it cannot be shown that the illegality was a result of dishonesty, rather than recklessness or honest mistake. This is a major incursion into access to justice in cases concerning the liberty of the individual, and will prevent meritorious claims for unlawful deprivations of liberty being litigated so as to vindicate individual rights and learn lessons for the future.
   - The chilling effect caused by the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 that drastically restrict funding for judicial review claims, and particularly test cases that raise novel and important points of law.

3. Please outline in more detail the way in which your/your organisation's work intersects with the question of access to justice, and the way in which current policy enables and undermines access to justice.

What would you or your organisation describe as the biggest impact of LASPO?

Members of the Police Action Lawyers Group ("PALG") recognise that LASPO allows for funding to be obtained in the areas of our work subject to meeting the proportionality test and the case having sufficient prospects of success. However, the swingeing cuts to legal aid that LASPO introduced, followed quickly by severe restrictions on funding for judicial review claims, have had a chilling effect on access to justice across the board, with the knock-on effect that transparency, accountability and the vindication of

individual rights is rendered illusory for many of those who have suffered at the hands of the State.

In particular, PALG members are enduring the impact of the recent judgment in R (Sisangia) v Director of Legal Aid Casework [2016] EWCA Civ 24. This judgment interprets paragraph 21, part 1 of schedule 1 to mean funding will now only be granted for cases where there has been a deliberate and dishonest abuse of power by a public authority. This is an interpretation is contrary to the wording of the statute, which states funding will be available for acts which are "deliberate or dishonest." It therefore restricts the availability of funding for potential claims against the police if dishonesty cannot be shown to be an issue, for example false imprisonment claims based on honest but unlawful conduct. The effect of this judgment is already being felt in the Legal Aid Agency's decision making: many meritorious, important claims against the police, such as the one brought by the individual in Sisangia itself, would not be funded today as they were previously under LASPO. This is a significant restriction of the availability of funding in police claims and the is to prevent access to justice so as to vindicate one of the most ancient common law rights: the right to be free from arbitrary detention.

PALG members have also felt the serious adverse impact of the change in the funding regulations for judicial review claims. If permission to bring a judicial review claim is refused, the costs of bringing the application will not be paid by the Legal Aid Agency. This is regardless of the merit of the case when it was issued, the actions of the Defendant or any other third party, the public interest in bringing the claim or the reason for permission being refused, such as an unexpected decision of a higher court that rendered the case unarguable. The costs risk at the permission stage has a significant chilling effect. As the claimants in the case of R (Ben Hoare Bell & Ors) v Lord Chancellor [2015] 1 WLR 4175 evidenced, the work done on application for judicial review, particularly in legally or factually complex cases, or cases that raise significant issues of policy and practice, can reach the tens of thousands. The reasons for a refusal of permission can be arbitrary, unpredictable and outside of the control of the lawyer or the claimant. This introduces a heavy costs risk in circumstances where claimant legal aid firms are already working within extremely tight margins and where no matter how conscientious and professional the lawyer is, something may happen beyond their control that means they do not get paid for the work they have done even though it was reasonable of them to have done that work.

Furthermore, in cases where the claim is withdrawn before the permission stage is reached, the claimant lawyer will only be paid if the LAA decides to exercise its discretion, save for in very restricted circumstances. This introduces an unjustified uncertainty into the process that means that lawyers who act reasonably in bringing a meritorious claim which, for a reason outside their control, is compromised before the permission stage, stand to lose thousands of pounds.

The effect of the Regulations (which were passed without any Parliamentary scrutiny despite their implications for access to justice in judicial review cases) has been to restrict access to judicial review generally, and to public interest litigation and test cases

in particular because where there is no clear legal precedent the financial risks are too high for practitioner firms.

PALG members are also concerned about the delays in judicial review claims. The latest statistics published by the Ministry of Justice show that for 95% of the judicial review claims lodged in 2014 that are classed as closed cases, means times from lodging were 75 days to reach the permission stage, 149 days to reach oral renewal and 233 days for a final hearing.

What difficulties do you, your organisation, your clients or the people you represent face in navigating bureaucratic legal procedures?

PALG members act for claimants in civil litigation against public bodies, particularly the police, the Home Office, hospitals, care homes and prisons. Due to a variety of factors, including limitation periods and lack of engagement from defendants, proceedings often need to be issued at court before they are settled. A claimant is in a disproportionately disadvantaged position if they are not receiving assistance from someone who is legally qualified. Claimants in this context, without legal representation, would have to understand a vast amount of procedural rules and are inevitably, and seriously, disadvantaged when facing a represented public authority who can use the rules to their tactical advantage such that meritorious claims may be thwarted. Members of our organisation, who act solely for claimants, advise their clients through the court process. For example, the rules governing part 36 claims, which have potentially serious consequences, are often complicated for a lay client to understand.

A difficulty our members and clients face in many cases is seeking to ensure defendants comply with their disclosure obligations which can reveal case critical information. For example, there is often a need for our members to make specific disclosure applications to request police officers' previous substantiated and unsubstantiated complaints. These can show a pattern of behaviour on the part of a police officer and therefore will very likely be supportive of a claimant's case but are rarely disclosed during standard disclosure.

As indicated above, there are also serious concerns among our members about the delays in both private and public law cases. This has the effect of putting individuals through months or years of the stress of litigation.

What difficulties do you, your organisation, your clients or the people you represent face in enforcing their legal rights?

In the pre-Jackson era Conditional Fee Agreements (CFAs) were a source of funding offered to those clients who were financially ineligible for legal aid. Some insurers were willing to provide After the Event ('ATE') insurance that could then be recovered from defendants. LASPO made the financial eligibility requirements for legal aid even more restrictive than they were previously, meaning that many people are ineligible for public funding despite living in poverty and being plainly unable to afford court fees, let alone legal fees, or the risk of adverse costs.

As a result of reforms which made ATE premiums irrecoverable from defendants, for most of those clients there is currently no viable funding model. PALG firms are unable to assist many potential clients whose meritorious cases could have previously been run on a CFA.

Our clients' cases are rarely aimed at securing financial compensation alone, and damages are usually low when compared with commercial cases. An average claim arising from an unlawful arrest and prosecution, a death in custody, or discrimination, might be worth between £10,000 and £20,000. A judicial review would commonly include no financial claim. Clients seek non-financial remedies such as a declaration of a violation of their rights, an apology or a change in policy. Their cases have wider significance to the public and serve to improve standards and practices within police forces and other public authorities. Without these cases many improper, discriminatory and unlawful practices would never be brought to light, culpable conduct would not be exposed and lessons would not be learned for the future.

In contrast litigation costs are relatively high – for both claimants and defendants. Despite their low value, cases are litigated robustly by defendants due to the wider implications of an admission of wrongdoing or an adverse judgment. Actions against the police and other public authorities are risky. They usually involve various causes of action, some of which provide the right to an unpredictable jury trial, and many of the remedies sought are granted at the court's discretion (including aggravated and exemplary damages). Most cases hinge on the credibility and performance of witnesses at trial. These are just some of the factors that make outcomes difficult to predict.

Due to the litigation risk involved, ATE premiums are high (up to £40,000 under the old CFA regime), and routinely outweigh compensation, even with the 10% uplift applied to general damages post-Jackson. This means that CFAs, and the new Damages Based Agreements (DBAs), are unworkable in the vast majority of claims in this field, leaving many clients of modest means unable to pursue their claims due to the significant financial risks involved.

<u>How have court and tribunal fees affected the capacity to enforce legal rights of you, your organisation, your clients or the people you represent?</u>

PALG firms operate under tight budgeting and cash flow constraints and very narrow profit margins, as has been repeatedly recognised by the courts. Claims routinely take around five years to conclude, and many take double this time. It is not financially viable for firms to fund disbursements (i.e. court fees) on behalf of clients. Those few clients who are able to access a CFA or a DBA are usually expected to fund their own disbursements, and court fees constitute a significant proportion of these. Increases in court fees add to the costs risks faced by privately paying clients, and make litigation even less affordable for those using such funding arrangements, regardless of the strength of the claim or the public interest in it being brought.

The impact of the recent increases to court fees has not yet fully crystallised, but PALG's legally aided clients are also likely to be impacted. The Legal Aid Agency does take into account both incurred costs and likely costs when deciding whether to grant legal aid to

our clients. Costs limitations are imposed incrementally throughout a case and extensions may be refused when overall costs reach a certain level. Any increase to court fees therefore affects the ability of our clients to secure legal aid and maintain funding to the end of a case.

What, as a user of the system, are you or your clients' biggest frustrations?

The issues that we have set out within this topic are all fundamentally linked, and the effect must be looked at cumulatively to have a full understanding of the current state of access to justice. The reality is that a large proportion of the public are simply not in a position financially to challenge state authorities, no matter how serious the wrongs they have endured.

As a result of Sisangia, PALG firms will have to become even more selective in the cases taken on; a decision shaped by funding restrictions rather than the merit of the case. CFAs are unworkable, ATE insurance is effectively not available, court fees are prohibitively high and judicial review claims are very financially risky.

It is deeply frustrating for members of PALG to deny help to victims of state misconduct. Equally, it is unfair and deeply distressing for individuals to be denied legal advice, and for existing clients to have to withdraw claims, on the basis of funding alone.

Unrepresented individuals pursuing a case against a public authority are extremely unlikely to be provided with the appropriate documentary evidence, be able to quantify the financial value of their claim, or navigate civil procedure effectively. This is in the context of the provision of seemingly limitless funding for legal advice to public defendants, paid from the public purse. The effect is that claimants face insurmountable hurdles at every turn and access to justice is rendered meaningless for many.

Topic 2: Transforming our justice system

4. In a sentence, what practical steps could be taken to ensure access to justice for all was a reality? Please provide up to three answers.

    - Provision of insurance so that those with meritorious claims who do not qualify for legal aid but are too impecunious to fund disbursements and legal fees can bring their claims.
    - Reversal of court fee increases and instatement of fee remission scheme for settled cases and cases where the claim form is issued but not served.
    - Reinstatement of legal aid for all false imprisonment claims, subject to means and merits criteria being met.

5. Please outline in more detail ideas for practical solutions to the crisis in access to justice. These could range from minor alterations to a radical overhauling in our justice system.

Legal Aid: Financial Eligibility

The principle that every person with a meritorious claim should have access to high quality legal advice and representation regardless of wealth has to be at the heart of our justice system.

Sadly, it is the experience of our members that individuals who suffer police misconduct are finding it increasingly difficult to obtain legal aid. Significant reform to the rules and processes around assessing financial eligibility is therefore required:

1. The disposable income threshold for determining financial eligibility should be raised. Currently, anyone whose disposable income is deemed to exceed £733 per month or whose disposable capital exceeds £8,000 is deemed ineligible for most civil legal aid. On any view, this is extremely low and anyone who is not in receipt of passporting State benefits will find it very difficult to be assessed as financially eligible.

2. The capital limit should be raised to at least £16,000 in line with means-tested benefits and the disregard should be raised. Currently only the first £100,000 of equity and up to £100,000 of mortgage debt is disregarded. This means that owners of homes which are of even relatively modest value find it difficult to qualify for legal aid.

3. For those whose disposable income does not exceed £733, the current imposition of monthly contributions should be stopped:

    - If a client has disposable income which is £316 to £465 then they will have to pay 35% of income in excess of £311 (so a maximum of £53.90);

    - If a client has disposable income which is between £466 and £616 then they will need to pay £53.90 plus 45% of income in excess of £465 (so a maximum of £121.85); and

    - If a client has disposable income which is between £617 and £733 they will need to pay £121.85 plus 70% of income in excess of £616 (so a maximum of £203.05).

    These cause significant difficulties and members have experienced clients being forced to withdraw their claim because they are unable to pay these contributions and are naturally therefore unable to fund their disbursements under a CFA retainer.

4. The system for assessing financial eligibility must become less bureaucratic. Even those who are on means tested benefits now have to provide full evidence of their capital. The Legal Aid Agency currently expends significant time and energy assessing family's income. Our members regularly experience significant delays in receiving confirmation of client's eligibility.

Court fees

For the reasons given above, court fees must be significantly reduced in order to ensure that individuals are not prohibited from enforcing their rights. The combined effect of court fee increases will result in a serious diminution in access to justice for the clients we represent. PALG's primary position is that the increases should be reversed.

If the increases cannot be reversed, the fees regime should be rearranged so that the fees incurred are proportionate to the actual court time and resources used. The current front-loading of court fees at the start of a claim acts as a barrier to the courts, rather than as an incentive to parties to use court time wisely and efficiently.

The beginning of a claim is often delayed by following the complaints procedure (which can take several years). The short limitation periods for claims under discrimination legislation (six months less one day) and the Human Rights Act (one year less one day) mean proceedings must commonly be issued to protect the claimant's position, although it will not be possible to consider settlement until the conclusion of a complaint and any disciplinary/criminal proceedings against police officers that may result. It is inherently unfair to charge an extremely high fee (often now running into thousands of pounds) merely to issue a claim, which is likely to later settle or be discontinued without the use of any further court services.

An interim application is often a necessary step to address the unreasonable behaviour of another parties. For example, PALG lawyers regularly experience defendants refusing reasonable requests for disclosure, such that it then becomes necessary to make an application to court for an order for disclosure. The mere step of making an interim application can then encourage the parties to resolve the matter by consent, without the need for a hearing of the application. However, the court fee for the application is still in those circumstances the same as it would have been had a hearing been necessary. As application fees increase, parties will be discouraged from settling matters by consent, as whichever party 'concedes' may then be liable for the court fee.

One way to resolve these specific issues would be to create a system of fee refunds whereby:

- If a claim form is issued and not served, the issue fee is refunded in full or in part; and
- If an interim application is resolved by consent without the need for a hearing, the application fee is refunded in full or in part.

A system of fee refunds has operated for the trial fee payable in multi-track trials (which include police actions trials) in the County Court. However this system is set to be abolished, which will further discourage settlement.

Alternatively the fees could be redistributed so that:

- A small fee is payable on issue of a claim, with a second larger fee being payable upon service of the claim; and

- The fee for an interim application is similarly divided between the stage at which the application is made and the stage at which a hearing is necessary.

It is worth pointing out that in theory the hike in fees may perversely incentivise Defendants to delay settlement negotiations until the pre-action stage if they consider a Claimant may be unlikely to meet the fee.

For the avoidance of any doubt, the current fee remission scheme is not a viable remedy: firstly, the income threshold is very low; and secondly, it is not available for persons who have the benefit of a public funding certificate.

The increased court fees is also significantly prejudice publicly funded claimants because the Legal Aid Agency, at present, take the high fees into account when determining the cost/benefit (the legal cost of bringing the litigation as opposed to the likely benefit a person(s) may achieve) and the proportionality test, which is discussed further below.

<u>The availability of funding for lower value claims and a recognition of other remedies besides financial</u>

The tightening of rules on proportionality and the cost/benefit analysis can lead to clients with very strong claims being refused funding. This is compounded by the fact that damages for claims against the police are notoriously low[1] even in the case of very serious abuses of state power. PALG members draw an analogy between the cost/benefit and proportionality criteria applied to funding for actions against the police vases in contrast with public law cases in which this requirement is dispensed with.

PALG members have seen strong and important claims fail to get funding and the Legal Aid Agency repeatedly refuse and/or omit to recognise that a client can have a range of other outcomes other than financial ones: accountability in the form of explanation, apology, change in policy, commitment to undertake training, and an admission of liability. A legal aid system should, as a minimum requirement, provide redress for victims in taking civil action against the police.

The need for effective requirement in the civil courts is made all the more necessary by the ineffectiveness of the police complaints system in seeking redress for those who find themselves on the receiving end of police misconduct. PALG members believe that legal aid for complaints could take the pressure off the court, and this should also be provided as a minimum requirement of a legal aid system. Complaints are a fundamental means through which individuals can access justice without recourse to expensive and distressing litigation, and complaints can meet requirements for investigation and answers, leading to lessons being learnt and those who are culpable facing disciplinary action.

A properly effective police complaints system with funding in place for assistance to make effective complaints could be a way of discouraging people away from litigation.

[1] The guideline rates being set by the case of <u>Thomson and Hsu v Commissioner of Police for the Metropolis [1998] Q.B. 498</u>

However, this has to be seen in the context of the fact that those wishing to bring a complaint should not have to be left to do it themselves in circumstances where they may have completely lost faith in the system and they may also be living in fear of receiving further misconduct at the hands of the police.

Mediation-led approaches

A way of creating a more integrated approach to solving people's problems could be met by a system which provides for funding to engage in mediation-style discussions with representatives for the police. This could lead on from a complaint of be negotiated at the same time. Further, PALG considers that where a Claimant makes a formal offer of mediation the police force or public authority Defendant should be legally obliged to take up the offer unless there are exceptional reasons, which must be provided in writing, for declining the offer. Strict adverse costs consequences should apply when a Defendant fails, unreasonably, to take up mediation. This would encourage the successful settlement of claims, saving resources in the court system and the legal aid budget, and meaning that Claimants are not forced to pursue protracted and distressing litigation.

However, a system of integrated mediation must be funded, it should not rely on volunteers who may not have the necessary expertise or knowledge to support victims. It must also be remembered that mediation-led approaches to seeking a remedy for unlawful conduct/abuses of state power could result in remedies which are not enforceable. This is most likely to be a cause for concern when the mediation results in the payment of compensation for victims, and a system of ensuring that remedies can be enforced should remain in the UK court system with a provision for publicly funded representatives to revert to a judge. A problem with an approach like this which should be remembered is the short time limits for civil claims, as detailed above, mean that claims will still need to be issued and stayed so that a potential claimant's remedy in court is not prejudiced.

PALG members are firmly of the view that a legal aid system which is fit for purpose and encourages confidence has to provide a greater equality of arms between individuals and the state bodies from which they are seeking a remedy. The government must recognise that in the area of actions against the police, legal professionals are working with clients who are seeking redress for unlawful activity in the past and in these circumstances it will be much more difficult to devolve aspects of the legal aid system where redress in the court and, to a great extent, in the complaints system is by its nature adversarial. Until victims and our clients see an indication that the police and the representatives are willing to approach cases in a more conciliatory way, without publicly funded legal representation, there will be no confidence in the prospect achieving redress within the system.

In summary, PALG submits that the following should be available:

1. A removal of the strict cost/benefit and a loosening of the proportionality criteria in cases where there is alleged abuses of state power;
2. Funding for representation through the police complaints system;

3. If a mediation–led approach is to be suggested, a system for insuring that individuals claims are not prejudiced if the mediation is unsuccessful, a mandatory requirement that Defendants engage with mediation unless there are exceptional reasons for them to refuse to do so, and funding for any suggested mediation-led approach.

Technology

We recognise the importance of utilising technology to improve the civil court process. We understand that Lord Justice Briggs' Civil Courts Structure Review is currently in the early stages of consultation and that it proposes, among other things, the implementation of an Online Court.

We make the important observation that technological developments must genuinely improve efficiency and must be planned in close consultation with lawyers from a range of legal fields.

The challenge of doing so is highlighted by the Legal Aid Agency's recent introduction of an online system for processing civil public funding applications: Client and Cost Management System (CCMS). Since the compulsory roll-out, preceded by a trial period suffused with difficulties, CCMS users have continued to experience significant administrative and technical problems. Whilst CCMS may have saved some of the LAA's time, the time our members have taken preparing applications has dramatically increased.

Further, whilst it is important to make court processes more user friendly, the importance of Claimants being able to access representation should be recognised. We resist any contention that technological developments should render lawyers unnecessary for Claimants, including for those bringing relatively low value claims i.e. under £25,000. The majority of our members' clients would find it extremely difficult to bring claims successfully against the State without representation as such claims involve significant legal and evidential complexities and clients are often very vulnerable and traumatised by their experiences.

Please outline in more detail ideas for practical solutions to the crisis in access to justice. These could range from minor alterations to a radical overhauling in our justice system.

Before The Event insurance policies are unable to bridge the gap in access to justice created by the removal of ATE recoverability due to the high level of litigation risk involved. It is extremely rare for BTE policies to cover actions against the police or other civil liberties cases.

Third party funding from the private sector is unlikely to be a viable replacement and is designed to fund claims with high prospects of success (more than 70%) and high value claims (only those worth more than £100,000).

We note Jackson's proposals to establish a third party 'contingent legal aid fund' for meritorious cases not covered by legal aid funding. Due to the low hourly rates and cash-flow constraints associated with legal aid work, PALG firms survive on inter partes

costs orders, and, as set out above, profit margins are very tight. Any deductions made from inter partes costs towards the fund may be unworkable commercially, unless a significant volume of work could be funded with limited bureaucracy / non-chargeable administration costs. Similarly, as above, as damages in these claims are modest, the contributions towards the fund could not come from these. It is recognised that in principle, such a fund could increase access to justice, at least in a limited sense of providing an additional source of funding for particular public interest cases which are not taken on by charitable organisations. However, generally, the model of such a fund appears to be similar to the modern model of a legal aid firm itself, in that it will be able to fund potentially loss-making riskier public interest work only by taking other more secure profitable work. In that sense, it is no solution to the commercial difficulties increasingly faced by legal aid firms, which is the true crisis in access to justice. Lastly, the fund in itself would do nothing to resolve the costs risks faced by our claimant clients, unless legislation were introduced to afford those users of the fund with the same costs protection as recipients of legal aid.

An alternative option is for the Legal Aid Agency to be empowered, through an amendment to LASPO, to fund claims that are in the public interest even though the claimant does not meet the financial eligibility criteria. A set of criteria governing such a discretion could be developed to include, for example, the seriousness of the alleged abuse of power, the public interest in the matter being resolved and the complexity of the legal issues.

Other possible solutions would be to:

- Revert to the position pre-Jackson whereby ATE premiums were recoverable from defendants. Prior to the implementation of LASPO, PALG lobbied for our cases to be exempt from the removal of recoverable ATE premiums.

- Extend Qualified One-Way Cost Shifting (QOCs) to civil liberties cases, to reduce significantly the costs risk to claimants in pursuing their claims. PALG has been lobbying the Civil Justice Council, Civil Procedure Rules Committee, and Ministry of Justice in respect of such an extension since the Jackson reforms were introduced.

The underlying principle that should determine whether QOCS applies should be the equality of relationship between claimant and defendant. In our cases most defendants are either public bodies or large insured corporations, both of which will be able to access specialist legal representation without difficulty. In contrast, the claimants we represent are generally of modest means, and many of them have protected characteristics under equality legislation.

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 Jackson included claimants in actions against the police and judicial review (Jackson Final Report December 2009 Chapter 9 paragraph 5.11).

The chair of the Civil Justice Council post-LASPO working group has voiced publicly his support for an extension of QOCS to claims against the police, ('Jackson reforms: counting the costs', The Law Society Gazette, 4 April 2016). However to date there has been no formal recommendation by the working group for such an extension.

PALG
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