
September 2018
Response of the Equality and Human Rights Commission to the Ministry of Justice survey:

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<th align="right">Title:</th>
<th>Post-implementation review of Part 2 of the LASPO Act: Litigation Funding and Costs</th>
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Introduction

The Ministry of Justice (MOJ) is undertaking a Post-implementation review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).¹ The MOJ has invited stakeholders to contribute to the review by submitting evidence and substantiated views in response to a survey.

The Equality and Human Rights Commission (Commission) is a non-departmental statutory public body established under the Equality Act 2006 (2006 Act). It is the United Kingdom’s National Human Rights Institution (as recognised under the Paris Principles, UN Resolution 48/134). The Commission has statutory duties, inter alia, to promote understanding of the importance of human rights and equality and diversity, to encourage good practice in relation to human rights, equality and diversity including by issuing statutory Codes of Practice for the Equality Act 2010 (Equality Act), and to enforce human rights and equality enactments (see sections 8(1) and 9(1) of the Equality Act 2006). The Commission may fund discrimination claims by virtue of section 28 of the 2006 Act and in accordance with its strategic priorities.²

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² As set out in the Commission’s Strategic Plan (available at: https://www.equalityhumanrights.com/en/what-we-do/our-strategic-plan), Current Business Plan (available at: https://www.equalityhumanrights.com/en/what-we-do/our-business-plan), and Strategic
The Commission is responding to the following question:

Section 46 abolished the recoverability of after the event (ATE) insurance premiums (except in relation to clinical negligence expert reports). Qualified One Way Costs Shifting (QOCS) was introduced in its place in personal injury claims. In your experience what have been the impacts of this reform?

The Commission’s response is set out in two parts and covers the application of the QOCS regime to mixed claims, and the extension of QOCS protection to discrimination and human rights claims. Recommendations are made in respect of both of these areas of concern in the “Recommendations” section below.

The Commission has had a longstanding concern regarding the impact of costs provisions on access to justice and has frequently intervened to seek to assist the Courts on such issues. For example, it intervened in the landmark case of R (UNISON) v Lord Chancellor [2017] UKSC 51 concerning the compatibility of Employment Tribunal fees with the common law right of access to justice and fair trial rights under the European Convention on Human Rights and EU law.

It is well understood that the civil litigation provisions in LASPO Part 2 arose from Lord Jackson’s proposals to “control costs and promote access to justice” and were aimed at redressing some areas of civil litigation costs which were “disproportionate and impede access to justice”. Whilst QOCS was adopted in parallel to the removal of ATE insurance premiums, Lord Jackson was considering the broader access to justice principles and the requirement for a high degree of certainty in order to enable effective access to justice through the package of reforms. The Commission regards the QOCS regime to be fundamental for accessing justice in the civil courts for discrimination claims and human

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3 Other notable cases include Letts v Lord Chancellor [2015] EWHC 402 (Admin) (exceptional funding for inquests), and R (Howard League for Penal Reform and The Prisoners’ Advice Service) v the Lord Chancellor [2017] EWCA Civ 244 (prisoners’ access to legal aid).

4 The EU principle of effectiveness requires that ‘the procedural requirements for domestic actions must not be liable to render practically impossible or excessively difficult the exercise of rights conferred by EU law’.

rights abuses. As such, the reforms should be construed, and impact assessed, through the lens of promoting access to justice.

In the initial assessment document, the MOJ notes that based on feedback so far, there is nothing to suggest that QOCS is not working as anticipated. However, the Commission is concerned that QOCS is not working as it should. It is the Commission’s experience that a lack of reasonable predictability regarding costs liability before litigation is commenced is a significant deterrent to the pursuit of meritorious claims and QOCS, or a lack thereof, adds to this chilling effect by acting as a barrier to effective access to justice.

Mixed claims

The Commission’s focus is on mixed claims, being proceedings which include a claim for damages for personal injury. The Commission is concerned that the fundamental purpose of the QOCS regime of securing access to justice in personal injury claims, which will frequently and in a range of contexts be accompanied by related non-personal injury elements, is being undermined by uncertainty and a narrow application.

The Commission raised its concerns through an intervention in the joined appeals of The Commissioner of Police of the Metropolis v Andrea Brown and The Chief Constable of Greater Manchester Police v Andrea Brown. This was the third case before the High Court over the past year which dealt with the interpretation and application of QOCS in the context of mixed claims and the applicable exception which exposes a personal injury claimant to enforcement of the full extent of all costs orders made against them (i.e. this exposure is not limited to the personal injury elements of the claim).

The Commission sought to assist the Court by gathering evidence of the practical consequences of adopting a narrow construction of the mixed

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7 Royal Society for the Protection of Birds and others v Secretary of State for Justice and ors [2017] EWHC 2309 at [28].
8 Civil Procedure Rules (CPR) 44.13(1)(a) and 44.16(2)(b).
11 CPR 44.16(2)(b).
claims exception. The Commission contacted a number of individuals, legal practitioners and practitioner groups, including housing law providers, personal injury practitioners, and human rights specialists.

One of the organisations contacted, the Police Action Lawyers Group (PALG), called on its members to provide relevant case studies, and to provide information via answers to a short survey regarding their members' experience of QOCS. This generated the most significant volume of information on the effect of the application of the mixed claim exception. Twenty-three practitioners from ten different firms and two barristers' chambers specialising in police actions responded. The evidence is summarised in the Annex below.

The Commission is concerned that claimants are being denied effective access to the courts and/or being forced to drop strong non-personal injury elements of their claim, even where they directly overlap, in order to obtain and maintain QOCS protection without risk of losing all. For example, in an Equality Act claim for psychiatric injury resulting from serious discrimination by a public body, there is likely to be a significant degree of overlap between a claim for injury to feelings and a claim for psychiatric injury, however there is no certainty of protection against enforcement of costs for the injury to feeling element.

For a regime which was supposed to bring certainty to claimants who bring proceedings with a claim for damages for personal injury, it provides little certainty. Rather than personal injuries litigation being understood as a broad concept, evidence suggests that it is primarily understood in mainstream or ordinary personal injury contexts only, for example “slip and trip”. The Commission is concerned on the impact of this narrow application which seemingly encourages access to justice for a claim for personal injury damages formulated in negligence, but deters a claim for personal injury damages arising out of intentional infliction of the same personal injury (and ancillary compensation for injury to feelings). Further the extent of this exposure is only determined at the conclusion of the case and this inevitably results in uncertainty at the stage of embarking on a claim as to how this exception will ultimately be exercised.

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12 Jeffreys.
13 The degree of overlap was recognised by the Court of Appeal in Vento v Chief Constable of West Yorkshire [2002] EWCA Civ 1877 at [63].
14 Review of Civil Litigation Costs. Chapter 19, para 1.1. Lord Jackson recognised personal injuries litigation as a broad concept.
The Commission is unaware of any alternative enforcement or effective cost protection, such as costs capping orders, and whilst the Commission may fund strategic discrimination litigation it is constrained by the relevant strategic policies and overall resourcing, as acknowledged by the House of Lords in their report on *The Equality Act 2010: the impact on disabled people*.

As such, claimants are turning to ATE however practitioners repeatedly told us that it is difficult to find suitable ATE cover for mixed claims (which are higher risk, and incur expensive lawyer fees particularly where defendants are typically insured or self-insured for the purpose of discrimination and human rights claims) and/or at a reasonable price (relevant in the context of the low value of discrimination and human rights claims and the fact that in 2016/17 48% of UK households had either no savings (36%) or savings of less than £1,500 (12%). A further one in five (23%) had savings of between £1,500 and £9,999 and only three in ten households (30%) had savings of £10,000 or more). Practitioners have informed us that legal costs for contested claims involving a public body easily run to £50,000 but even at the time of costs budgeting, the exposure may already be in the region of £10,000.

It became evident whilst we were collecting evidence to assist the Court in *Brown* that there is limited data around the impact of QOCS, something which has been recognised by the MOJ. Many practitioners have confirmed that they do not systemically record data on the cases which are not pursued because of the cost implications. Further, there has been limited jurisprudence on QOCS, and as such, we anticipate that the full impact of the uncertainty may be more evident in the years to come.

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17 *Commission v UK* [2014] QB 988 the CJEU noted that “…the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers’ fees’ (at [58]).


The Commission recommends that the Civil Justice Council\textsuperscript{20} (CJC) conduct a thorough review on the impact of the QOCS regime on mixed claims and the MOJ commissions the Civil Procedure Rules Committee\textsuperscript{21} (CPRC) to address any uncertainties to clarify the wording and ensure effective access to justice for all claimants with meritorious mixed claims.

**Extension of QOCS**

**Discrimination**

Prior to the introduction of QOCS, the Commission wrote to the CPRC concerning the scope of the QOCS regime, with particular reference to the potential impact on access to justice for discrimination claims. We cautioned that the combined effect of the changes in LASPO Part 2 would deter individuals from bringing discrimination claims under Parts 3, 4 and 7 of the Equality Act and claimants would be less likely to bring such claims for financial reasons alone. We also highlighted the asymmetry (unequal nature) of the relationship between claimant and defendant in such cases and referenced Lord Jackson’s view that QOCS may be appropriate on grounds of social policy, where the parties are in an asymmetric relationship.\textsuperscript{22} When considering the Commission’s request, the CPRC noted that it was amenable to extending QOCS protection to other classes of cases however any “any extension would need to be supported by wide consultation and that it was for the MOJ to consider if a policy change was desirable”.\textsuperscript{23}

In their report on The Equality Act 2010: the impact on disabled people, the House of Lords considered stakeholder evidence concerning the impact of LASPO Part 2 on discrimination claimants, including the paucity of advice available to them through the Civil Legal Advice Telephone Gateway service, operated by the Legal Aid Agency, and the few solicitor firms willing to face the cost implications from discrimination

\textsuperscript{20} The CJC is an advisory non-departmental public body, sponsored by the MOJ and established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the civil justice system. The CJC provide advice to the Lord Chancellor, the Judiciary and CPRC on the effectiveness of aspects of the civil justice system, and make recommendations to test, review or conduct research into specific areas.

\textsuperscript{21} The CPRC is an advisory non-departmental public body set up under the Civil Procedure Act 1997 to make the rules of court for the Civil Division of the Court of Appeal, High Court and the County Court.

\textsuperscript{22} Review of Civil Litigation Costs. Chapters 9 and 19.

\textsuperscript{23} Minutes of CPRC, 7 December 2012.
cases.\textsuperscript{24} It was noted that ATE premiums can amount to thousands of pounds, and can dwarf compensation awarded for injury to feelings under section 119 of the Equality Act, meaning that the costs of bringing a claim are almost always prohibitive.\textsuperscript{25} In conclusion, the House of Lords recommended that the Civil Procedure Rules (CPR) should be amended to apply QOCS to discrimination claims under the Equality Act.\textsuperscript{26} In its response, the Government affirmed its commitment to undertaking this post-implementation review and noted that “access to justice considerations, including whether QOCS should be extended to other categories of law, will be addressed as part of that review”, where the House of Lords’ report would assist the consideration.\textsuperscript{27}

The Commission notes that other forms of costs protection, for example, cost capping orders,\textsuperscript{28} do not apply to statutory torts such as a breach under the Equality Act. While the Commission may provide legal funding for discrimination claims, it is unable to support all Equality Act claims and it is no alternative to effective costs regulation. Further, anecdotal evidence from practitioners has echoed the fact that where firms accept cases on a CFA basis, firms often “take a hit” with the success fee due to the low value of the claims, either a nominal fee or none at all, and if a claimant loses it will still need to cover all disbursements which the ATE would have covered (for example court fees, administrative costs, expert reports). As such, it would be difficult to envisage the extension of QOCS to Equality Act claims resulting in a floodgate effect and that is notwithstanding the evidential thresholds required to meet discrimination claims and our experience that 80-90% of first instance discrimination claims settle.\textsuperscript{29}

\textsuperscript{24} The Equality Act 2010: the impact on disabled people Inquiry para 394: Douglas Johnson, from the Law Centres network, said: ”There are precious few firms of solicitors in the country that will go anywhere near a discrimination case. That is why the [Equality] Act is not being enforced. It is simply not cost effective for most firms of solicitors to take that risk from a business sense."

\textsuperscript{25} Ibid at para 396. See also: Unison where Lord Reed gave the example of the real world effect of Tribunal fees of £390 in a claim for damages worth £500, instructive for effective access to justice generally, and observed that: “…no sensible person would pursue the claim unless he could be virtually certain that he will succeed in the claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded. In practice, however, success can rarely be guaranteed.” (at [96])

\textsuperscript{26} The Equality Act 2010: the impact on disabled people Inquiry, at para 402.


\textsuperscript{28} See: sections 88 and 89, Criminal Justice and Courts Act 2015.

\textsuperscript{29} The Equality Act 2010: the impact on disabled people Inquiry at para 426.
Human rights

The points above concerning asymmetry of relations, paucity of advice, accessibility of legal aid,30 ATE availability and premiums,31 and low value awards apply equally to human rights claimants. While human rights abuse may result in personal injury, there is currently no guarantee of costs protection beyond the personal injury element. While claimants may consider pursuing a judicial review claim, where post-permission cost capping orders may be provided, this is not an alternative to pursuing individual remedies in civil proceedings under section 7 of the Human Rights Act 1998.

Summary

Based on the Commission’s experience and anecdotal evidence from stakeholders, there is no evidence to suggest an extension to discrimination and human rights claims would result in an abuse of the QOCS regime or open the floodgates. The CPR, and the QOCS regime itself, has measures to deal with legally or factually unsustainable claims and, as the evidence indicates, the practicalities of litigating these low value and high risk areas of law will reasonably act as a filter. We would expect an evidenced based and equalities impact approach to any decision refusing an extension in this area. Further, we are mindful of the Public Sector Equality Duty32 and giving due regard to any decision which may have an adverse impact on groups with certain protected characteristics.

Extension may be suitable in other areas where there is an asymmetry of relationship, such as actions against the police, and we would welcome a further consideration of this by the MOJ following the CJC Review in 2016 and the CJC’s response to this post-implementation review survey which

30 The Commission launched an inquiry on 4 September 2018 to investigate whether changes to legal aid funding have left some victims of discrimination unable to access justice following research it commissioned to assess the impact of the LASPO on access to justice for individuals who have legal problems that no longer qualify for civil legal aid. Available at: https://www.equalityhumanrights.com/en/our-work/news/new-inquiry-determine-whether-discrimination-victims-lower-incomes-are-being-denied [accessed 7 September 2018]
31 Leigh Day Submission to the JCHR Inquiry on Business and Human Rights. 31 August 2016. Leigh Day noted the cost of premiums for human rights abuses reaching 80-90% of the amount insured due to the risk involved and high costs of defending a claim. Available here: https://www.leighday.co.uk/LeighDay/media/LeighDay/documents/Corporate%20accountability/2016_08_31-LEIGH-DAY-SUBMISSION-TO-THE-JCHR1.pdf
32 Section 149 of the Equality Act.
notes the “strong argument in principle to extending QOCS to actions brought by the police”. 33

It is instructive to refer to Lord Reed’s observations on the wider public interest/rule of law dimension to facilitating the pursuit of meritorious civil claims: 34

“…the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.”

Recommendations

1. The Commission recommends that the CJC conduct a thorough review on the impact of the QOCS regime on mixed claims and the MOJ commissions the CPRC to address any uncertainties to clarify the wording and ensure effective access to justice for all claimants with meritorious mixed claims.


3. In the alternative, we call for a robust evidence based approach, through consultation by the CJC, to any partial extension of QOCS to certain discrimination or human rights claims. It is critical that the impact from any restricted extension of QOCS to be analysed to monitor the effects on persons with protected characteristics not so covered by any partial extension.

34 Unison, at [71] and [72].
4. The Commission calls for a comprehensive review of access to justice for discrimination\(^{35}\) and human rights cases to ensure that people can access good quality, cost effective advice and dispute resolution in light of the changes brought by LASPO.

ANNEX
Equality and Human Rights Commission’s response to the LASPO Part 2 Survey

(a) Proportion of personal injury damages claims that are mixed claims

The PALG survey enquired what proportion of practitioner’s cases in which legal aid is not available include both a claim for personal injury damages and a claim for another type of damages or other remedy. Practitioners reported proportions between 25% and 100% with an average proportion of over 77%. The PALG survey went on to enquire what proportion of these claims involved a claim for personal injury damages together with a claim for another type of remedy flowing from the same cause of action. The proportions reported were between 30 and 100% with an average proportion of approximately 80%.

While it was not possible to conduct similar surveys with practitioners in other areas of law, the qualitative evidence provided by practitioners contacted indicated that human rights claims in other areas of law had been deterred as illustrated by the examples below.

(b) Practitioner evidence of the deterrent effect of the application of the mixed claim exception

The information gathered by the Commission highlighted the significant chilling effect in cases where the mixed claim exception applied or where there was uncertainty as to its application leading to:

(i) In the majority of cases, abandonment (claimants not proceeding) at the outset due to the risk of adverse costs liability absent other costs protection.

(ii) Attempts by claimants to avert the application of the mixed claims exception by abandoning non-personal injury elements even when these elements were closely related to the personal injury damage claims.

(iii) Claimants being placed under additional pressure to accept early settlement at an undervalue.
This is illustrated by the following examples and feedback given by practitioners.

Example 1:

A practitioner described a claim by a young woman (G) with Down’s syndrome for assault and battery, breaches of the Equality Act 2010 and under the Human Rights Act 1998 (Articles 3, 5, 8 and 14 of the European Convention on Human Rights ‘ECHR’)) who was removed forcefully from a toilet cubicle by a male police officer whilst partially naked and handcuffed. The police officer’s conduct caused soft tissue injuries and significant distress. Counsel’s advice following the exchange of pleadings was that the claim had greater than 60% prospects of success such that G continued to satisfy the legal aid merits eligibility threshold. However, when the claimant accepted a monetary settlement of £10,000 in another case arising from discrimination she became financially ineligible for legal aid. The practitioner’s firm were satisfied that the claim against the police had sufficient prospects of success to merit a CFA; however, due to the mixed claims exception and the unavailability of ATE insurance the claim had to be discontinued with no order for costs.

Example 2:

A practitioner identified four cases she had conduct of arising out of sexual relationships with undercover police officers in which claims for torts of deceit, misfeasance, assault/battery and negligence were advanced. Each have a personal injury element. None of the clients were eligible for legal aid due to their financial means. However, despite advice that the claims have good prospects (around 70%), none of the clients are prepared to pursue these claims given the risk of an adverse costs order pursuant to the QOCS mixed claim exception. Thus success in these claims will depend solely on negotiating an early settlement. Prior to the LASPO-reforms, such claims were successfully pursued by this practitioner with the benefit of ATE insurance.

Example 3:

A practitioner gave the following category of her cases by way of example:

“Many of my clients are refugees or people with uncertain immigration status seeking to sue the Home Office for unlawful detention which
[applying Jeffreys] necessarily includes a 'mixed claim' eg for psychiatric harm arising from detention and loss of liberty. They are often worried about challenging the state and are deeply concerned by costs risks, as they have few resources. For example, a refugee was ineligible for legal aid due to working as a care assistant. He had an extremely meritorious case for unlawful detention (he had been detained in the detained fast track when as a gay asylum seeker with a history of torture and persecution he was obviously unsuitable for the detained fast track) and although he issued his civil claim accepting the costs risks he settled it at an early stage, for less money that he could have achieved at trial because he was worried about the costs risks in the event he lost."

She further explained:

“As set out above I act for many people who are refugees or asylum seekers, ex detainees who are not in a position to afford to pay for civil litigation…. This cohort invariable have psychiatric injury arising from their detention by the Home Office (which, for example, can be a reminder of persecution in the country they have fled from) as well as a claim for loss of liberty etc from unlawful detention.”

Example 4:

Another practitioner gave an example of a claim by a single parent employed as a teaching assistant who, while not well off, was nevertheless financially ineligible for legal aid. She pursued a claim against Durham Constabulary for damages arising out of the actions of her ex-partner, a detective, who accessed confidential information about people in her life on police databases. A police misconduct investigation found this conduct proved. Particulars of Claim (pleaded before Jeffreys) advancing a claim for misfeasance in public office were drafted so as to seek to limit the claim to personal injury damages (psychiatric injury) only, though aggravated and exemplary damages were also claimed. When the Defendant nevertheless disputed the application of QOCS to the entirety of the claim, the client decided that she was unwilling to pursue the matter further and the claim was discontinued with an order for no costs.

Other practitioners likewise mentioned attempts to retain QOCS protection by jettisoning meritorious related non-personal injury elements.
Example 5:

Another practitioner gave the example of:

“…a man of Iranian heritage who was arrested and detained in connection with terrorism in circumstances where it appeared that there was no reasonable grounds and that his arrest was motivated by the officers' prejudicial assumptions based on his race. We advised him that he may have claims for false imprisonment and under the Equality Act. He suffered psychiatric injury so his claim included a PI claim, but also included claims for loss of liberty, injury to feelings, and aggravated and exemplary damages, and was therefore a mixed claim. In view of *Jeffreys*, we had to advise him he was at substantial cost risk proceeding with the claim, and so he chose not to.

“The man in that example (an academic of modest means and with young children to support, but ineligible for legal aid) was, because of the absence of QOCS, placed in a position where he could only obtain redress for the discrimination he suffered by risking his livelihood and that of his young family. Unsurprisingly, he felt unable to do so - this was a flagrant denial of access to justice.”

*(c) Practitioner summary of the overall effect*

Example 1:

A senior partner at a leading police actions firm explained the stark effect of the deterrent effect of engagement of the mixed claim exception:

“If legal aid is not available a client will be exposed to having to pay *inter partes* costs if they lose. ATE insurance (to back a CFA) is generally not available. Only 1 CFA client since 2013 has instructed me to proceed to issue their claim if they have not been able to settle prior to issue. Others have compromised and settled their claims significantly undervalue; or felt obliged to drop their claims altogether on account of the potential costs risk they would face if they proceeded.”

Example 2:

Another police law practitioner explained:
“The majority of my clients who face the risk of an adverse costs order will not be willing to take such a risk and therefore, will withdraw instructions. This is something I believe the Police are well aware of and therefore, will defend cases that are not defendable, purely on the basis of knowing the client's risk. I have acted for extremely vulnerable individuals who have not been willing to take the risk of an adverse costs order....”

Example 3:

Practitioners further informed the Commission that attempts to seek prospective clarity regarding the application of QOCS protection by application to the Court have – perhaps unsurprisingly, given the structure of the QOCS provisions – been unsuccessful. Such an application in one case was met with the following response from a Senior Master who identified agreement with the defendant as the only route to obtain such prospective clarity:

“You can apply for a determination as to whether rule 44.16(2) (b) applies, but I am not sure whether that would assist because:
(i) It seems to me that the claim would fall within the paragraph, on a brief consideration of the Claim form;
(ii) The rule allows the court discretion to order that any costs order should not be enforced, so even if my preliminary view is correct that does not mean that the Claimant would face enforcement of an adverse costs order; and
(iii) I do not consider that the court could prejudge the appropriate costs order on the outcome of any application.
The answer may be to discuss the issue with the Defendant to see (sic) if any agreement could be reached on any of these issues.”