



THE SCOPE OF QUALIFIED ONE-WAY COSTS SHIFTING:

Further Issues for Consideration

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FOREWORD

This report sets out the discussions of a very expert and able Working Group which was formed immediately after the CJC's conference that sought to explore early effects of, and signals from, the 2013 costs and procedural reforms. I would like to thank all of the members of the Group for their time and their contributions and in particular to thank Peter Farr and Andrea Dowsett of the Civil Justice Council Secretariat for their support.

The Group experienced difficulties in engaging with police force lawyers with regard to the debate about extending QOCS protection to **claims against the police**. It is for this reason that chapter 3 of this report is missing a section dealing with arguments that might weigh against extending costs protection to such claims.

The costs regime for **environmental claims**, and any special protections within in that, may remain an evolving area in the medium term. This report does not deal with such cases. However, it is understood that the CJC may revisit this area during the course of the activities of the Civil Litigation Review Working Group, which is to be chaired by Professor Rachael Mulheron.

In respect of **negligence claims against solicitors** following failed personal injury actions, it is worth pointing out here for the avoidance of doubt that the essence of discussions on this matter pointed to an argument in principle - to put it no higher than that - that QOCS might be extended to higher value claims. It was however, recognised that a number of practical difficulties would arise were a decision to be taken to that effect.

This report is the third to explore QOCS under the banner of the Council. The first examined some matters of principle in respect of personal injury cases and the second covered further detail in that area during the period before the relevant CPR provisions were drafted.

This third report covers wider areas and other types of claim. The work raised not only questions of policy but also noted quite limited evidence of possible effects. For these reasons, its conclusions are framed in somewhat looser and more discursive terms than in the two earlier reports and clearly point out that Government decisions will be required if these topics are to be taken forward.

Alistair Kinley
March 2016

SUMMARY

1. The Civil Justice Council set up a working group following its 2014 conference, which had been arranged a year after the civil justice reforms of 2013. The group was allocated wide terms of reference.
2. The breadth of the matters potentially under consideration was found to be significant. In addition, the prospect of appellate litigation on transitional arrangements emerged as a concern. For both reasons, a decision was taken to prioritise those aspects of the activity that focused on Qualified One-way Costs Shifting or QOCS.
3. Three areas were considered: QOCS and claims against the police, QOCS and professional negligence cases resulting from personal injury claims and costs protection in environmental claims. However, the last of these fell away with the Ministry of Justice issuing a consultation paper and taking the lead on the topic in autumn 2015. This report therefore deals with claims against the police and with professional negligence claims.
4. It recognises that there is a strong case in principle for extending QOCS to the former type of case. This has been vigorously argued by lawyer groups. It notes that limitations on engagement and on data make it extremely difficult to investigate matters fully. It also notes that any decision to extend QOCS to these cases would be a matter of policy and therefore for the Ministry of Justice to advance by way of consultation, if it were so minded.
5. With regard to the latter, it notes that while there may be a case in principle for extending QOCS here, there does not appear to be a similar push for its application. It notes that a risk of a secondary market in these claims has been raised and it considers that Government may have regard to that as a factor. Again, it notes that any decision to extend QOCS would be a matter of policy for the Ministry of Justice.
6. The report indicates that the Council remains prepared to assist in any way it can should any of the issues identified here be taken forward by the Ministry.

CHAPTER 1. CONTEXT AND BACKGROUND

1. General introduction

- 1.1 This paper is, in essence, the third in which Qualified One-way Costs Shifting (QOCS) has been considered by the Civil Justice Council¹. The first and second were prepared in the run up to the implementation of wide-ranging civil justice reforms in 2013. The first was published in October 2011 and examined principles relevant to the application of QOCS in personal injury claims (it was part of a broader report that also dealt with Part 36 and proportionality). The second considered more detailed issues likely to arise in practice, in accordance with a commissioning note issued by the Ministry of Justice, with a view to assisting in the formulation of rules about QOCS. It was published in June 2012.
- 1.2 Questions about the scope of the QOCS mechanism that were raised at the Council's March 2014 conference were included in terms of reference initially allocated to the Working Group set up after that conference. However, for the reasons set out later in this introduction, this report does not deal with the wider matters that had also been included in those initial terms of reference.
- 1.3 The Council's March 2014 conference brought together a wide range of stakeholders and its purpose was to examine initial experiences of the first year or so of operating under the civil justice reforms brought about by Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and by changes to the Civil Procedure Rules (CPR). Most of the measures thus introduced from 1 April 2013 can be traced to recommendations made by Lord Justice Jackson in *Review of Civil Litigation Costs: Final Report*, published in December 2009. More than fifty detailed written submissions were received before the conference, all of which have been made available on the Civil Justice Council's website.

2. Initial terms of reference and membership of the working group

- 2.1 Questions arising from transitional cases and relating to the scope of costs protection were among key concerns discussed at the conference and set out in submissions. Consequently, the Council set up a Working Group to examine these and related topics. Its initial terms of reference and membership are set out in the table below.

¹ The first and second reports are available at the following URLs:

- <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/CJC+Working+Group+on+Technical+Aspect+of+Jackson+Implementation.pdf>
- <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+responses/CJC-response-to-MOJ-pt2-legal-aid-sentencing.pdf>

<i>Terms of reference</i>	
1.	<i>To advise the Civil Justice Council about issues arising from implementation of the Review of Civil Litigation Costs (save in respect of damages-based agreements).</i>
2.	<i>In particular, to investigate and report to the Council on: (a) transitional questions in conditional fee agreement cases due to changes in the client's status or the lawyer's status, or basis of instruction, happening after commencement, (b) arguments for and against extending Qualified One-way Costs Shifting to other categories of case characterised by an asymmetric relationship between the parties, such as actions against the police and solicitors' professional negligence in injury claims.</i>
3.	<i>To consider any other relevant topics, including points brought to the Council's attention at its conference on 21st March 2014.</i>
4.	<i>To make, where relevant, proposals for improvement designed to smooth the process of implementation and to facilitate access to justice.</i>
Membership (* denotes current or former CJC member)	
Alistair Kinley* (chair) - BLM District Judge Ayers Steven Green – Irwin Mitchell Mark Harvey* - Hugh James David Johnson – FOIL (Weightmans) Maura McIntosh – Herbert Smith Freehills David Marshall – Law Society	John Mead - NHSLA Professor Rachael Mulheron* - Queen Mary University of London Andrew Ritchie QC - PIBA (until end of 2014) Jenny Screech – Zurich Insurance Peter Smith*

- 2.2 As will be understood from the terms above, the intention was that the report would primarily be a document for the Council's consideration. Nevertheless, it is recognised that its wider publication and online distribution will help to inform further debate on its subject matter.
- 2.3 In line with the terms of reference, the Working Group's discussions initially focused on potential problems that might arise in claims which engaged questions about transitional arrangements in conditional fee agreement cases. Investigations were also undertaken into a very broad range of matters brought to the Council's attention both at the 2014 conference and in subsequent months.
- 2.4 It became increasingly clear that dealing with the wide range of topics potentially under consideration due to term of reference 3 above would risk diluting the focus of the work. In addition, the complexity of possible solutions to transitional questions became ever-more apparent on closer examination.
- 2.5 On this aspect in particular it was observed that solutions to these points were likely either to involve parties reaching practical commercial agreements in cases so affected or to involve detailed points of interpretation of the statutory and procedural rules that came into effect on 1 April 2013. The decision of the Court of

Appeal in *Blankley v Central Manchester & Manchester Children's University Hospitals Trust* [2015] EWCA Civ 18 was noted as an example. [*Blankley* dealt with the effect of the claimant's supervening incapacity on the validity of a CFA entered into at an earlier date and the Court held, on the terms of the particular agreement it was asked to consider, that the CFA was not frustrated by the incapacity.]

3. Revised plan of work

- 3.1 At its April 2015 meeting the Council reviewed the Working Group's progress. Both the wide formulation "*any other relevant topics*" and the finer points of transitional arrangements were recognised, with the benefit of a degree of hindsight, as areas which were likely to require significant time and resource that would be difficult for the Working Group realistically to find. Moreover, the decision in *Blankley* served to emphasise that questions about transitional arrangements could be increasingly likely to come before appellate courts for determination. It was felt that it would not be productive or appropriate for the Group to engage in its own deliberations or to produce even tentative or interim views on matters which would seem likely to be the subject of litigation that could set precedent affecting significant numbers of stakeholders, whether as receiving parties or as paying parties.
- 3.2 The decision was therefore taken to prioritise the questions arising in respect of Qualified One-Way Costs Shifting. In effect, the scope of this paper is thus limited to 2(b) of the initial terms of reference. However, there are two potential vehicles via which consideration of other wider issues is likely to be taken forward in the immediate and medium terms.
- 3.3 First is the proposed successor to this Group within the Council - provisionally known as the Civil Litigation Review Working Group - which is set to look at the implementation of the Jackson reforms and to review matters in the Final Report which the CJC might usefully investigate further and/or monitor.
- 3.4 Second is the Ministry's proposed review of the LASPO Act, recently confirmed in a Written Ministerial Statement on 17 December 2015² entitled "*Insolvency Litigation*". It should be noted that the MoJ's review does not seem likely to take place for some time. The WMS said that: "*It has already been announced that there will be a Post Implementation Review of the LASPO Act Part 2 reforms between April 2016 and April 2018. The review will take place towards the end of that period.*"

² <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2015-12-17/HLWS410/>

CHAPTER 2. THE POSSIBLE EXTENSION OF QUALIFIED ONE-WAY COSTS SHIFTING (QOCS)?

1. A preliminary point: the exclusion of environmental claims

- 1.1 The two types of claims which the Group set out to examine with regard to QOCS were actions against the police and ‘follow on’ claims against solicitors³ arising from alleged professional negligence in the handling of a personal injury claim. Before these are examined, it is necessary to deal with a third subject area which arose during the Group’s deliberations: private nuisance claims for environmental harm or damage. Detailed consideration of the costs regime for such claims are, as explained below and because of subsequent activity, beyond the scope of this report.
- 1.2 Serious concerns about the effects on access to justice of the costs regime in part 2 of the LASPO Act applying in environmental claims were brought to the Group’s attention. Compliance proceedings had been instituted against the UK Government in which it was claimed that the provisions of part 2 of the Act contravened the UK’s obligations under the Aarhus Convention⁴. In the first quarter of 2015, the Convention’s Compliance Committee held that the UK had failed to comply with its obligations under the Convention.
- 1.3 The prospect of the UK being found in breach of the Convention had in fact been anticipated by Jackson LJ in chapter 31 of his Final Report and the link to QOCS had already been made then, in 2009. He observed that: *“If ... the abolition of recoverable ATE insurance premiums gives rise to a breach of the Aarhus Convention or an obstacle to access to justice for claimants in private nuisance, then a remedy is at hand. Qualified one way costs shifting could be introduced for private nuisance claims⁵”*.
- 1.4 In September 2015, the MoJ consulted about questions relating to the costs regime in environmental claims. The consultation⁶ closed on 10 December 2015 and the results have yet to be published. Having prepared and submitted a brief response⁷ to the MoJ, the Council decided that it would not be productive or necessary for this Group to seek to make other proposals here in respect of these cases. It should be noted that the CJC’s response raised *“particular concerns that the effect of the measures [proposed by MoJ] will be to increase demands and costs for parties, and fear the overall effect may be to make the process more complicated and prone to challenge”*.

³ And, very possibly, any other advisers involved in personal injury claims.

⁴ The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998

⁵ Final Report, page 318 at paragraph 4.2.

⁶ *Costs Protection in Environmental Claims: Proposals to revise the costs capping scheme for eligible environmental challenge*

⁷ The Council’s response is available at <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-response-on-environmental-costs-protection.pdf>

2. Jackson revisited: the policy justifications for one-way costs shifting (qualified or otherwise)

- 2.1 Jackson LJ recommended that QOCS should be introduced for personal injury claims. The intention is to protect claimants against the serious financial risks of having to meet adverse costs in the event that their claim fails.
- 2.2 The relevant provisions, which are to be found at CPR 44.13 – 44.17, came into force on 1 April 2013. The costs protection introduced by these provisions is limited to “*proceedings which include ... a claim for damages for personal injuries*”⁸. Before April 2013, injured claimants could recover the cost of protecting themselves against liability for adverse costs, either in the form of a premium for After-The-Event (ATE) insurance or in respect of the cost incurred by a membership organisation (such as a trade union) in arranging similar protection.
- 2.3 The recoverability of these elements of additional costs liabilities was brought to an end by ss 46 & 47 of LASPO (which end recovery between the parties of these elements but do not prevent claimants from continuing to enter into such arrangements at their own expense). These sections came into force on the same day as the CPR provisions - 1 April 2013 - and thus “*interlocking reforms*”⁹ were put in place in respect of adverse costs, at least in respect of claims for personal injuries.
- 2.4 The policy justification for adopting QOCS lies in the asymmetric relationship between the parties. Sir Rupert referred to “*personal injuries litigation as the paradigm instance of litigation in which the parties are in an asymmetric relationship*”¹⁰ and observed that without costs protection “*injured persons may be deterred from bringing claims for compensation*”¹¹. The purpose of introducing QOCS is therefore to ensure continued access to justice.
- 2.5 The prospect of QOCS (or something similar) being extended to other areas of civil litigation was identified in the Final Report, with the important rider that there should be consultation in advance of any such changes being made. These points are made in the passages below (to which **bold emphasis** has been added) from chapter 9 of the Final Report.

*5.10 Further consultation required if my recommendations are accepted in principle. The essential thrust of the present chapter is that recoverability of ATE insurance premiums should be abolished and that this should be replaced by **qualified one way costs shifting, targeted upon those who merit such protection on grounds of public policy. The question then arises as to which categories of litigant should benefit from qualified one way costs shifting. This is a question upon which further consultation will be required, in the event that***

⁸ CPR 44.13(1)(a)

⁹ From the well-known foreword to the Final Report: “...a coherent package of interlocking reforms, designed to control costs and promote access to justice.”

¹⁰ Final Report, chapter 19 paragraph 1.3(ii) (page 184)

¹¹ Final Report, chapter 9 paragraph 5.8 (page 89)

the recommendations made in this chapter are accepted as a matter of principle.

*5.11 Areas where qualified one way costs shifting may be appropriate. In my view qualified one way costs shifting may be appropriate on grounds of social policy, where the parties are in an asymmetric relationship. Examples of **parties who are generally in an asymmetric relationship with their opponents** are claimants in housing disrepair cases, **claimants in actions against the police**, claimants seeking judicial review and individuals making claims for defamation or breach of privacy against the media. If protection modelled upon section 11(1) of the 1999 Act is extended to claimants in such cases, it will not avail those who bring frivolous claims (because unreasonable conduct is taken into account). Nor will it avail those whose resources are such that they can afford to pay adverse costs if they lose.*

*5.13 Professional negligence litigation. **Whether qualified one way costs shifting should be introduced for any (and if so which) categories of professional negligence litigation should be the subject of consultation.** My own view is that this may be difficult to justify outside clinical negligence. Most persons who employ solicitors, accountants, architects etc could afford to take out before-the-event (“BTE”) insurance, if they chose to do so.*

*5.14 Private nuisance claims. I accept that **private nuisance claims sometimes involve parties in an asymmetric relationship**: for example local householders suing a sewage works. However, this is not always the case. Furthermore householders can take out BTE insurance against the costs of such claims, if they choose to do so. I would not positively support qualified one way costs shifting for private nuisance claims, but others may take a different view.*

3. The CPR effects an enforcement-based regime for QOCS protection

- 3.1 It should be pointed out that CPR Parts 44.13 – 44.17 introduce a regime of QOCS for claims for damages for personal injuries in which it is the *enforcement* of an order for adverse costs against an unsuccessful claimant that may be limited or controlled, rather than the *making* of such an order in the first place.
- 3.2 This protection against enforcement may be disapplied in certain instances which are, in essence, the qualifications to an overall regime of one-way costs shifting. Thus the style and acronym ‘QOCS’. How the protection afforded by QOCS may or may not apply to so-called ‘mixed claims’ (which is not a term used in the CPR) is set out at 44.16(2).

Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

- (a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the*

gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

- 3.3 Subparagraph (a) above is intended to permit enforcement of costs against a person who may have met the injured claimant's loss in some way - such as a credit hire organisation - and whose outlay is included in the total amount sought by the claimant. Subparagraph (b) relates to cases in which the claimant has another claim or seeks a remedy other than damages for personal injuries. An example of this was given in the previous CJC report¹², that being a claimant who had suffered injury due to housing disrepair and who claimed both damages for the injury and a remedy to repair the defect or bring an end to the nuisance that caused the injury. The drafting of CPR 44.16 does tend to suggest that an unsuccessful claimant in such a case may face adverse costs enforcement " *up to the full extent of such orders with the permission of the court, and to the extent that it considers just*".
- 3.4 This apparent potential for full enforcement at 44.16 is a different solution to that advocated, albeit tentatively, in the CJC's previous report in which such cases were referred to as type 1 mixed claims. The solution favoured there was that QOCS protection could be applied to all aspects of the mixed claim. The relevant passages of the 2012 report are quoted below.

Type 1 mixed claims

47. We must point out that in the short time available we did not consider type 1 in detail. The view taken in outline only was that in such cases both the damages and the other remedy are sought both by and for the claimant him or herself. If QOCS is to be widely interpreted so as to provide broad protection - which, as indicated at paragraph 6 above we would submit to be the preferred approach - then it would follow that QOCS would apply to all costs aspects of a type 1 mixed claim. We would tentatively suggest that there is probably no need to split the QOCS protection and allocate its benefit only to the personal injury element. The reasons for this tentative conclusion are

- first, that the action involves a genuine claim for personal injury, and*
- second, given that the same defendant is involved in both elements of the claim, there will necessarily be the appropriate asymmetry of position as between claimant and defendant which is at the heart of the justification for QOCS generally (see paragraph 9 above).*

48. A slight risk in the approach above is that sham claims for damages for personal injury claims might begin to appear in otherwise straightforward cases of disrepair or nuisance (etc). The point of doing that would be to benefit - unfairly- from QOCS protection in respect of the non-monetary

¹² <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/consultation+responses/CJC-response-to-MOJ-pt2-legal-aid-sentencing.pdf>

remedy at the heart of the case. We suggest that the courts will be able to control against this potential risk with their present powers, but the position will need to be monitored.

- 3.5 The purpose of quoting this part of the earlier report in full here is to draw attention to its possible relevance with regard to claims against the police. To the extent that those may involve personal injuries and other remedies (pursued in the same proceedings and arising out of the same events) it would appear that they could be regarded as what are termed above 'mixed claims' and hence - if QOCS was extended to these claims and if identical provision to CPR 44.16 was made for them - potentially subject to full enforcement of adverse costs.

CHAPTER 3: QOCS AND ACTIONS AGAINST THE POLICE

1. The arguments for extension in this field

- 1.1 As has already been noted, the Final Report identified actions against the police (see 5.11 quoted above) as a type of claim in which parties are in an asymmetric relationship. Such claims are not within the ambit of the current QOCS scheme unless they include damages for personal injuries.
- 1.2 The Police Actions Lawyers' Group (PALG), which is a national organisation of lawyers representing complainants against the police and other detaining authorities, presented a strongly-argued submission in support of including these cases in an extended QOCS regime. PALG argued that the loss of the recovery of ATE insurance in these cases created "*an insurmountable barrier to access to justice*" for claimants who did not qualify for legal aid.
- 1.3 The PALG argued that the prospect of ATE insurance being funded, by claimants, out of damages recovered was not a realistic one, given the comparatively low level of damages likely to be recovered and given that levels of ATE premium for supporting such claims to trial was said to be in the order of tens of thousands of pounds.
- 1.4 Examples of the sorts of cases against the police (and other detaining authorities) that in PALG's view ought to be considered for protection via QOCS (or a variant of it) include claims in the list below:
- claims relating to wrongful arrest or malicious prosecution
 - claims under the Human Rights Act 1998
 - claims arising from death in custody
 - claims alleging prohibited discrimination under the Equality Act 2010, and
 - claims by way of judicial review.
- 1.5 As can be readily seen from the list, these types of case do not necessarily include personal injuries and to the extent that they do not they will consequently be outside the remit of the existing QOCS scheme.
- 1.6 The costs position of these sorts of claims - ie lying against the police or detaining authorities and involving allegations of psychical or psychiatric harm - contrasts with 'mainstream' personal injury claims. The latter generally arise as a result of an accident, following which the forensic analysis of traumatic injuries sustained is likely to be more straightforward and in which the requirement for expert evidence is far more likely to be as to the extent, rather than the causation, of the harm.
- 1.7 There is also a notable contrast with clinical negligence claims, in respect of which a specific exception was made in April 2013 that allowed for the continued recovery of premium for ATE policies, albeit restricted to funding the cost of medical evidence. Regulation 3 of *The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013*¹³ is the critical provision. The explanatory note to

¹³ <http://www.legislation.gov.uk/uksi/2013/739/contents/made>

this SI states that " *the relevant insurance policy must insure against the risk of incurring a liability to pay for an expert report relating to liability or causation in respect of clinical negligence.*" The PALG points out that there is no equivalent exception that would allow for the recovery even of limited 'ATE for experts' in claims against the police.

1.8 PALG argued further that where actions against the police involve personal injuries and other claims the rules on mixed claims (CPR 44.16) could operate unfairly and to the detriment of the claimant, in that the entire adverse costs liability may attach to the unsuccessful claimant because such cases would be classified as 44.16(2)(b) 'mixed claims'. A regime for these cases that was closer to that tentatively proposed in the 2012 CJC report at 47 (set out in chapter 2 above, in particular at paragraphs 3.4 & 3.5) could alleviate such outcome.

1.9 On the basis of these points, the PALG submission¹⁴ concluded with two specific calls for action, those being that QOCS should apply

- *"to all private and public law claims against the police and other detaining authorities, so that costs protection is not tied to the question of whether the proceedings include a claim for personal injury", and*
- *"to the entirety of the proceedings in 'mixed claims' where a claimant pursues both injury and non-injury damages arising from a single set of circumstances which are litigated together against the same defendant".*

1.10 Similar arguments were made more directly by Professor Peysner in his research paper¹⁵ for the 2014 conference, in which he drew from the PALG submission. In his words:

"...on the grounds of justice in a classic 'David and Goliath' situation [there is] an unstoppable argument for QOCS relief in claims against the police. The Police Actions Lawyers Group in a cogent submission pointed out that an individual wrongly arrested and, possibly, imprisoned is only protected by QOCS if insult is added to injury and they are assaulted as well. The Independent Police Complaints has acknowledged its resourcing difficulties in investigating police wrongdoing. Citizens need lawyers to represent them and ATE is hard to obtain: QOCS must be extended."

2. Discussion

2.1 The PALG's proposal to extend QOCS protection to claims against the police clearly stems from the asymmetry in the relationship of the parties, an attribute which Jackson LJ clearly regarded as a pre-requisite for extending the protection it (QOCS) affords into areas beyond personal injury. The Working Group was broadly supportive of the proposal and recognised the strong case made on the point of principle.

¹⁴<http://webarchive.nationalarchives.gov.uk/20140423161113/http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/consultation%20responses/Police%20Actions%20Lawyers%20Group.pdf>

¹⁵ <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/impact-of-the-jackson-reforms.pdf>

- 2.2 It proved difficult to obtain an opposing view to balance these arguments, although comments were sought on several occasions from the Association of Police Lawyers (APL, the organisation which brings together in-house legal teams that act for police forces in England & Wales). That said, the Group and the APL recognised that if proposals to extend QOCS to claims against the police were to be made there would - as envisaged in the Final Report - have to be a consultation brought forward by Government as a matter of policy. Were that to happen, it would present an opportunity for views from APL and other similar stakeholders to be drawn out.
- 2.3 On the practical side, data that might assist in understanding the impact and effect of any change appears to be extremely scarce. The lack of data cuts both ways, with virtually no information about (a) the extent of what may be a 'justice gap' if claims against the police are not pursued because of costs risks and about (b) the estimated financial cost and behavioural effects on the police of introducing QOCS for cases against them. If there were to be consultation on this point - accepting that there is no indication that the matter is regarded by the present Government as a priority - it is suggested that further attempts should be made with stakeholders to collect evidence to inform any such consultation and associated impact assessment.
- 2.4 The absence of 'hard' data with regard to the effects of claims against the police was touched on by the Supreme Court on *Michael v CC of South Wales* [2015] UKSC 2, which was decided by a majority of 5:2. The case raised, but the Court rejected, the possibility of the expansion of police liability in negligence.
- 2.5 Lord Toulson, for the majority, observed (at paragraph 122) that: *"The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two."* On the other hand, Lord Kerr - in the minority - agreed that operational consequences for the police were difficult to predict, but took the view (in paragraph 184) that *"Set against the poverty - or complete absence - of evidence to support the claims of dire consequences should liability for police negligence be recognised is the fundamental principle that legal wrongs should be remedied."*
- 2.6 Given the lack of evidence available to the Group, it is suggested that consideration of extending the scope of costs protection, by QOCS, to claims made against the police is almost certain to throw up an identical set of competing views. Any decision between them would very clearly seem to be a matter of public policy¹⁶ and therefore a matter for the Government to resolve.

3. Conclusions about police claims

¹⁶ Lord Kerr's next sentence at paragraph 184 of *Michael* makes the following point. *"Sir Thomas Bingham MR in X (Minors) v Bedfordshire County Council [1995] 2 AC 633 said that the rule of public policy which has first claim on the loyalty of the law was that wrongs should be remedied."*

3.1 Based on the material covered by the Group, the stark limitations as to available data and the recognition that public policy issues are engaged, the key findings of the Group may be summarised as follows.

- There are strong, if not compelling, arguments of principle - based on access to justice and on the asymmetry of the relationship between the parties - weighing in favour of extending the scope of QOCS protection (or something very similar) to claims against the police.
- Principled arguments for not doing so do not appear to have been made out.
- The decision whether to take matters forward is a matter for Government. If it were minded to do so, specific proposals and an impact assessment should be prepared.
- Consideration of claims against the police raises a technical question about QOCS protection: the extent to which it should apply in 'mixed claims'. This appears to be an issue which may require further consideration, either in the context of police claims or in mainstream personal injury cases.
- Should matter progress, the CJC would be prepared to assist in whatever way might be thought appropriate.

CHAPTER 4: QOCS AND CLAIMS ARISING FROM NEGLIGENTLY-HANDLED INJURY CASES

1. The arguments for extension in this field

- 1.1 The type of case envisaged here is a claim for personal injuries in which the claimant alleges that his or her solicitor (or other adviser) acted negligently and therefore starts a new claim against the solicitor. Both the personal injury claim and the professional negligence claim involve asymmetric relationships between the parties. As has been seen above (at chapter 2 section 2) this is viewed as a necessary, but not of itself sufficient, condition for the application of a regime of costs protection.
- 1.2 The personal injury claimant acts against a motor or liability insurer. The dissatisfied client acts against an expert professional adviser who will also have the benefit of compulsory insurance. It is no doubt trite to say that this second claim is a professional negligence matter. It does not *"include a claim for damages for personal injuries"*¹⁷ and is therefore not protected by the present QOCS regime.
- 1.3 Being excluded from QOCS, the follow-on claim in professional negligence will therefore be subject to the ordinary 'loser pays' costs regime with the result that the claimant is potentially fully exposed to the risk of adverse costs should he or she fail. It could be said - not necessarily in loose terms - that the alleged negligence in the personal injury claim has caused the loss of QOCS protection. Under part 2 of the LASPO Act, the claimant would be unable to recover, if successful, the cost of any premium that might have been paid for an ATE insurance policy to protect against the risk of adverse costs.
- 1.4 It should be noted that the arguments for extending QOCS here were not put forward by an organised group such as PALG in the instance of claims against the police. The arguments of principle were set out concisely by Professor Peysner in the research paper referred to earlier.

"... if a lawyer is pursuing a personal injury case and through negligence loses the cases or under-settles QOCS does not cover any resulting professional negligence case. The claimant is potentially injured three times: one in the accident; twice in losing compensation and thrice in being deprived of an effective remedy against incompetence. This situation is completely illogical and needs to be addressed. Such an extension would not open the floodgates as damages are often low in such cases. As such they may well be unattractive to lawyers acting on risk based arrangements."

- 1.5 Looking at the matter from a lay perspective, it is likely that the claimant would fail to appreciate the distinction between the personal injury action and his or her professional negligence claim. It also seems unlikely that the distinction between the basis of a damages award for personal injury and the 'loss of chance' basis of an award in professional negligence would be readily understood. Finally the nuances of the different costs treatment of both types of claim are also unlikely to be

¹⁷ CPR 44.13(1).

understood. Note that consideration of the lay viewpoint is not suggested as an argument in favour of extending costs protection here. It is merely put forward to highlight the likely perception of the different legal treatment that applies to these types of claims; something which Professor Peysner characterises as “*illogical*”.

- 1.6 Any proposal to deal with the costs position, via extending QOCS, could realistically deal only with the third of the harms he identifies in the passage above, ie “*being deprived of an effective remedy*”. This statement in itself presupposes that the costs position - the risk of having to meet adverse costs in full if the follow-on case fails and the likely absence of protective ATE cover due to the inability to recover the cost of buying it - operates to deter the pursuit of cases of this type. This may be an entirely reasonable assumption in the circumstances. It would therefore follow that the principled argument in favour of extending QOCS (or a variant of it) to these cases is one of preserving access to justice (as it was in the previous chapter dealing with claims against the police).

2. The opposing view

- 2.1 Insurers active in the specialist market for solicitors’ professional indemnity insurance (PII) were consulted by the Group. The proposal to extend QOCS to these claims, even if restricted to matters arising from personal injury claims, raised concerns. The view was expressed that the present (ie post LASPO) arrangements do not, it appears, impact adversely on access to justice. PII insurers reported that professional negligence claims are simply not defended ‘for the sake of it’, given the expense that would be involved in doing so. It was also stated that where the underlying matter triggering the PII claim involves personal injury, the question of liability will very often be clear given that the most common error in this field is a failure to issue proceedings before the expiry of limitation.
- 2.2 Furthermore, PII insurers argue that the Pre-action Protocol for Professional Negligence Claims provides a strong framework to facilitate the resolution of PII matters and that most claims settle within the Protocol, with few matters resulting in proceedings (where the liability for adverse costs would bite).
- 2.3 In addition, the Group was informed that a significant proportion of follow-on PII claims resulting from personal injury cases would be likely to fall within the £10,000 small claims limit for non-injury claims. Given the limited costs liabilities in small claims, it would follow that the prospect of adverse costs in these small claims may not be a strong deterrent to their being pursued.
- 2.4 For cases above this level, reference was made to schemes such as that set up by the Professional Negligence Lawyers’ Association, which is designed to provide adjudication in cases against solicitors. It is not, however, clear what numbers of claims have been dealt with via this particular mechanism.
- 2.5 PII insurers also identified possible unintended consequences of extending QOCS here. First is the prospect that the costs of successfully defending the solicitor - ie where the follow-on PII claim fails - would, *ex hypothesi*, not be recoverable because of QOCS but would nevertheless have to be paid by the PII insurer. This could drive

increased premiums for solicitors in the personal injury market generally. For the particular solicitor against whom the claim was made it is likely that unrecovered costs could be added to claims experience and could have an adverse effect on premium.

- 2.6 A second area of concern was the risk of creating a secondary market for 'claims farming' of cases based on failed personal injury actions. There is said to be a real risk of growth in advertising for purportedly under-settled or mishandled injury claims.
- 2.7 On one hand, this might be regarded as a negative development which raises the prospect of unmeritorious or speculative follow-on PII cases being presented by a range of intermediaries with an interest in securing income from them, even if only to secure 'nuisance value' settlements. On the other, some may see it as an access to justice matter which improves the prospect of effective redress if claimants have suffered loss as a consequence of poor advice or service.

3. Discussion

- 3.1 The possible extension of QOCS to follow-on PII claims following allegedly negligent handling of personal injury claims raises questions similar to those raised by police claims.
- 3.2 On the face of it, there appears to be an arguable case in principle for the possible extension. If a decision were taken to extend QOCS in this way, it would appear practical for it to be congruent with that in substantive personal injury claims: meaning that the protection afforded by QOCS could only attach to follow-on PII claims resulting from injury claims which themselves were protected by QOCS.
- 3.3 The topic is also one in which accessible data about claims numbers, costs involved and unrecovered costs is difficult to come by; perhaps more so than in police claims, given that the key data is held by commercial concerns operating in a competitive market.
- 3.4 The likelihood appears to be that the lay consumer may fail to appreciate the legal distinctions between PII and injury claims. He or she may regard the follow on PII claim as a continuation, as part and parcel, of the same matter for which redress was initially sought. This would tend to support the case for change and to underline what Professor Peysner referred to as a "*completely illogical*" situation.
- 3.5 In contrast to police claims, there does not - at present, at least - appear to be an organised body that is advocating change in the interest of the consumer. But in common with police claims, consideration of follow-on PII claims and QOCS does raise issues of public policy. In particular, the risk of a secondary market emerging cannot easily be discounted and would need to be investigated should any proposals be taken forward. Neither of these points would be determinative when considering any extension, but they remain relevant considerations.

4. Conclusions on about PII claims and QOCS

- 4.1 The arguments for extending QOCS to this particular area have not been raised as vocally or as tenaciously as in the case of police claims. It does not necessarily follow from this that the arguments are inherently weaker (even if their presentation may have been).
- 4.2 Some six years ago, Lord Justice Jackson was not in favour of extending QOCS into these claims. He argued that those who might instruct professionals such as solicitors *"could afford to buy before-the-event ("BTE") insurance, if they chose to do so"*¹⁸. If matters were to be taken forward, this statement would be worthy of further investigation in order to establish the scope of the cover of such BTE insurance as is readily available in the market.
- 4.3 However, as has been seen already, it is clear that any decision to extend QOCS is a matter for Government and would probably necessitate a consultation, as Jackson LJ had envisaged. The Government's appetite to do so is unknown. What can only be described tentative conclusions in this area are set out below.

- There is an argument of principle - described above as a 'fair case' - that would support the extension of QOCS to professional negligence claims made against solicitors in respect of failed personal injury cases.
- The practical points raised against doing so, and in particular the risk of a secondary market in these claims, may be thought to carry some weight in the present environment.
- The decision whether to take matters forward is a matter for Government. If it were minded to do so, specific proposals and an impact assessment should be prepared.
- Should matters progress:
 - (i) the availability of other routes for either funding these claims (such as BTE insurance) or for resolving them (such as schemes operated by lawyer associations) should be investigated; and
 - (ii) the CJC would be prepared to assist in whatever way might be thought appropriate.

¹⁸ At 5.13 of chapter 9 of the Final Report, which has already been quoted at chapter 2 section 2 of this report.