

# **YLAL's Response to the Government's Review of Part 2 Legal Aid, Sentencing and Punishment of Offenders Act 2012**

**September 2018**



**YOUNG  
LEGAL  
AID  
LAWYERS**

## 1. Introduction

Young Legal Aid Lawyers ('YLAL') was formed in 2005 and has over 3,500 members.

We are a group of lawyers committed to practising in those areas of law, both criminal and civil, which have traditionally been publicly funded. YLAL's members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

YLAL's objectives are:

- To campaign for a sustainable legal aid system which provides good quality legal help to those who could not otherwise afford to pay for it.
- To increase social mobility and diversity within the legal aid sector.
- To promote the interests of new entrants and junior lawyers and provide a network for likeminded people beginning their careers in the legal aid sector.

## 2. Purpose of consultation

The Legal Aid, Sentencing and Punishment of Offenders Act Part II changed the way civil claims can be funded.

Within our response, YLAL has endorsed:

- Association of Personal Injury Lawyers' response<sup>1</sup>, dated 7 September 2018.
- Public Law Project's response<sup>2</sup>, dated 24 August 2018.
- Public Law Project's submission to Lord Justice Jackson's review of fixed recoverable costs.<sup>3</sup>

## 3. Responses to consultation questions

The majority of YLAL's members practise in areas which are currently funded via public funding, or have recently been removed from scope by the Legal Aid, Sentencing and Punishment of Offenders Act Part I.

---

<sup>1</sup> <https://www.apil.org.uk/files/pdf/ConsultationDocuments/3608.pdf>

<sup>2</sup> <https://publiclawproject.org.uk/wp-content/uploads/2018/08/180822-PLP-response-to-LASPO-Part-II-PIR-call-for-evidence.pdf>

<sup>3</sup> [https://publiclawproject.org.uk/wp-content/uploads/data/resources/253/170130-fixed-costs-recovery-review-PLP-submissions-FINAL\\_index.pdf](https://publiclawproject.org.uk/wp-content/uploads/data/resources/253/170130-fixed-costs-recovery-review-PLP-submissions-FINAL_index.pdf)

However, YLAL also has members who practise in those areas that were removed from scope of eligibility for legal aid funding in 1999, including personal injury, for example the vast majority of clinical negligence and child abuse claims.

YLAL has limited its response to the areas in which its members have relevant experience.

**Section 44 abolished the recoverability of Conditional Fee Agreement success fees. In your experience what have been the impacts of this reform, and the regulations made under it?**

YLAL endorses APIL's response in relation to the difficulties this has created in cases in which apportionment is at issue, such as industrial disease claims.

YLAL would go further from experience of our members, by stating that since the abolishment of success fees, lawyers have no choice but to take a strict and pragmatic view when assessing whether to investigate matters. Proportionality and apportionment of the legal costs are assessed at the outset of a case and if the likely legal costs would outweigh the compensation awarded to the Claimant, then such cases are unlikely to be investigated. This restricts access to justice for those individuals as lawyers take a careful balancing act. Every case is risk assessed at the outset, and success fees are charged so that every viable case can be investigated further. However, if the likely costs would outweigh the compensation, then lawyers are unable to assist without risk of the courts intervening to reduce the legal costs significantly, in order to comply with the principle of proportionality. While in some cases this can be beneficial for Claimants, in others it means that lawyers cannot afford to take the risk of acting. As such, much needed professional representation cannot be offered. This is now a harsh reality of the LASPO reforms, which ultimately impacts negatively on those seeking redress for the injuries they have suffered through the fault of others, impeding access to justice.

**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?**

YLAL endorses APIL's response in relation to QOCS.

YLAL also endorses Public Law Project's response to this question. YLAL agrees that QOCS protection should be extended to claims for judicial review. YLAL also endorses PLP's previous

submissions in relation to this issue, in *The Public Law Project's submission to Lord Justice Jackson's review of fixed recoverable costs*<sup>4</sup>.

In particular, YLAL seeks to highlight the following observation by PLP:

*“Legal aid provides protection against adverse costs risk (s. 26 of LASPO replacing s.11 of the Access to Justice Act). The underlying policy reason is the express recognition that access to justice cannot be achieved merely through providing the impecunious with representation they could not otherwise afford, but that it is also necessary to ensure that adverse costs risk does not act to inhibit meritorious claims.”*

Where legal aid is not available, claimants should still have an ability to access justice and obtain the costs protection. This is exactly what QOCS offers.

As a result, YLAL believes that QOCS should also be extended to claims of Actions Against the Police, as was proposed in Lord Justice Jackson's Final Report of the Review of Civil Litigation Costs and the Civil Justice Council's report on the scope of QOCS<sup>5</sup>. This is for the same reason that QOCS protection is already afforded to claimants in personal injury claims; that *“the parties are in an asymmetric relationship”*.

Actions Against the Police are often brought as “mixed claims”; including claims for personal injury along with other causes of action such as false imprisonment, misfeasance and malicious prosecution. QOCS attaches only to the personal injury part of the claim which means that an unsuccessful claimant is at risk of paying the defendant's costs associated with any non-personal injury elements of the claim. The costs judge has a discretion in respect of mixed claims, but to date this discretion has been exercised in the claimant's favour rarely.

In practice, this means that a claimant who has been unlawfully detained by a State agent is only protected by QOCS if an injury is suffered as a result of their detention (e.g. they are assaulted in custody or they suffer psychiatric injury), and even then, it is only that element of the claim for which they have costs protection. YLAL believes that this impedes access to justice in these types of claims.

YLAL believes that the same protection should also be afforded to claims brought under the Human Rights Act 1998. This would ultimately align with an individual's right to a fair trial protected by Article 6 European Convention on Human Rights; claimants are often unable to bring a Human Rights Act claim, on the basis that there may be a risk they will have to pay for some of their opponents' legal costs, even though their case was successful. This conflicts with the important principle of access to justice.

---

<sup>4</sup> [https://publiclawproject.org.uk/wp-content/uploads/data/resources/253/170130-fixed-costs-recovery-review-PLP-submissions-FINAL\\_index.pdf](https://publiclawproject.org.uk/wp-content/uploads/data/resources/253/170130-fixed-costs-recovery-review-PLP-submissions-FINAL_index.pdf)

<sup>5</sup> Civil Justice Council, *“The scope of qualified one way costs shifting: Issues for consideration”* (2016).

YLAL acknowledges that the Government may well be against such reform, as it would provide protection to litigants for challenges which the Government itself is generally defending. However, as referred to above, the inclusion of such protection would allow far greater participation in the civil justice system and an equality of arms in actions against the State.

The Government should now be in a position to better assess the impact of these reforms given they have been enacted within the personal injury sphere, and YLAL believes that they should be extended to the areas as stated above.

YLAL endorses APIL's submissions in relation to the use of ATE in clinical negligence cases, in particular its submissions that the amount of investigation required by claimant solicitors would be reduced if NHS Resolution complied with its duty of candour and was more open and transparent when mistakes are made. The reason why the majority of injured individuals approach solicitors is due to a lack of trust in their treating clinician. By complying with the duty of candour, the quantity of clinical negligence disputes would decrease, saving legal costs for all involved.

**Section 55 reformed Part 36 offers to settle. The statutory change introduced by LASPO Part 2 was primarily that where defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%. In your experience, what have been the impacts of this reform, and the regulations made under it?**

YLAL endorses the Public Law Project's response to this question.

YLAL believes that this change has encouraged defendants to consider claims at an early stage, and in turn, has encouraged them to make reasonable offers. The early settlement of a meritorious claim is positive for all parties, as well as the wider court system.

YLAL also endorses APIL's response, particularly in relation to defendants' late acceptance of claimants' Part 36 offers to settle, that Part 36.17(4) apply.

**Overall, what has been your experience of the combined impacts of the LASPO Part 2 reforms?**

YLAL's relevant experience of the impact of reforms is set out above.

YLAL endorses APIL's response to this section in relation to the issues of fundamental dishonesty, particularly when a litigant in person faces such allegations, and the likely increased impact on access to justice of them facing these without legal advice.

YLAL agrees that defendants should face the same consequences; that their defences should be struck out if they are found to be fundamentally dishonest in parts of their Defence.

Additionally, YLAL believes that Qualified One-Way Cost Shifting should be extended to the categories of work of Actions Against the Police, Judicial Review and Human Rights Act claims.

## 4. Conclusion

YLAL believes that access to justice is imperative to the proper functioning of a democratic society. As such, it is a right rather than a benefit to be distributed at the State's discretion. Although it is recognised that some of the LASPO Part 2 reforms do not appear to have impeded access to justice, a reconsideration of other areas and further reform is needed, as set out above.

September 2018

**Young Legal Aid Lawyers**

<http://www.younglegalaidlawyers.org>

[ylalinfo@gmail.com](mailto:ylalinfo@gmail.com)

[@YLALawyers](#)