



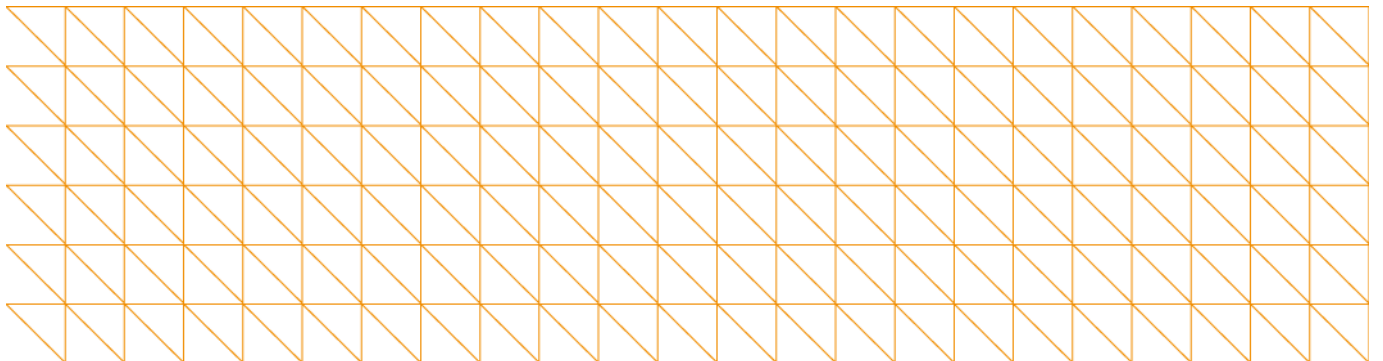
Controlling Costs in Defamation Proceedings

Reducing Conditional Fee Agreement Success Fees

Response to Consultation

CP(R) 1/2010

Published 3 March 2010





Ministry of
JUSTICE

Controlling Costs in Defamation Proceedings

Reducing Conditional Fee Agreement Success Fees

Response to consultation carried out by the Ministry of Justice.

**This information is also available on the Ministry of Justice website:
www.justice.gov.uk**

About this consultation

To: The legal profession, media organisations and other involved in defamation proceedings in England and Wales and all with an interest in this area

Duration: From 19 January to 16 February 2010

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Controlling Costs in Defamation Proceedings Summary of responses

Introduction and contact details

This document is the post-consultation report for the consultation paper, *Controlling Costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees*.

It will cover:

- the background to the report
- a summary of the responses to the report
- a detailed response to the specific questions raised in the report
- the conclusions next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Natasha Zitcer** at the address below:

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This report is also available on the Ministry's website: www.justice.gov.uk.

Alternative format versions of this publication can be requested from the above address.

Background

The consultation paper, '*Controlling Costs in Defamation Proceedings: Reducing Conditional Fee Agreement Success Fees*'¹, was published on 19 January 2010. It invited comments on a proposal to reduce the maximum success fee that lawyers can charge in defamation cases conducted under Conditional Fee Agreements (CFAs) from 100% to 10%.

The high level of costs in publication proceedings has been the subject of considerable debate. The Government has for some time been concerned about the impact of high legal costs in defamation proceedings, particularly the impact of 100% success fees, which can double the costs to unsuccessful defendants in cases funded under CFAs. The Government does not believe this level of success fee is justified in defamation cases, and the consultation sought views on a proposal to limit success fees in these cases to 10% of base costs. This proposal is an interim measure for dealing with disproportionate costs while the Government considers Sir Rupert Jackson's² wider proposals which seek to change radically the existing arrangements for all cases where CFAs are used.

The consultation period closed on 16 February and this report summarises the responses and sets out the government's conclusions and next steps following the consultation.

A list of respondents is at Annex A.

¹ <http://www.justice.gov.uk/consultations/costs-defamation-proceedings-consultation.htm>

² http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm.

Summary of responses

1. A total of 57 responses to the consultation were received. Of these, twenty five were from legal professionals (solicitors, barristers and legal firms), five were from legal representative groups, two were from members of the judiciary, twenty-two were from media organisations (including media representative groups), two were from legal insurance groups and one was from a Non-Governmental Organisation (NGO).
2. The responses were analysed to evaluate support or opposition to the proposal in the consultation paper, as well as any evidence presented to support the views expressed.
3. The majority of respondents (53%) supported the proposal in the consultation paper, including all media and NGO respondents and seven legal professional respondents. However, 47% of respondents, including eighteen legal professional respondents and all legal representative and judiciary respondents, opposed the proposal.
4. Some respondents questioned the timing of the consultation and whether an urgent interim solution was in fact needed to address the problems in defamation cases while Lord Justice Jackson's recommendations were being considered. Many of these respondents urged the Government to implement Lord Justice Jackson's proposals and argued that defamation cases should not be treated in isolation from other types of civil litigation. Other respondents suggested that the problems facing the media and publishing industry could not be attributed to high costs in defamation cases. Several respondents were also critical of the shortened timeframe for responding to this consultation.
5. Several respondents commented that the draft Conditional Fee Agreements (Amendment) Order 2010 included with the consultation paper did not make clear that the new requirements would only apply to CFAs entered into after the Order came into force. The Order has been amended to make it clear that it will apply to CFAs in respect of defamation cases entered into after the date on which the Order comes into force.
6. The majority of media respondents were critical of the definition of "defamation cases" offered in the consultation paper and argued the definition should be widened to include all cases where issues under Article 10 of the European Convention on Human Rights are relevant. However, the Government is minded to restrict the Order to the definition³ offered in the consultation paper which is limited to defamation, malicious falsehood or breach of confidence involving publication to the public at large.
7. A summary of specific responses to each question follows.

³ publication proceedings (within the meaning of rule 44.12B of the Civil Procedure Rules 1998)

Responses to specific questions

- 1. Do you agree that the Conditional Fee Agreements Order 2000 should be amended to reduce the maximum success fee to 10% in defamation and some other proceedings? If you disagree please give your reasons.**

All 57 respondents answered this question. 30 respondents (53%) agreed that the Conditional Fee Agreements Order 2000 should be amended to reduce the maximum success fee in defamation cases to 10%. This included all media and NGO respondents and seven legal professional respondents.

All these respondents supported the proposal as an interim measure while full consideration is given to Lord Justice Jackson's proposals for removing recoverability of success fees and After the Event (ATE) insurance premiums³. Many respondents expressed support for Lord Justice Jackson's proposals but recognised that they could not be implemented immediately.

Those in support argued that 100% success fees were not necessary to ensure access to justice for claimants in defamation cases. They suggested that access to justice was provided by the existence of CFAs without recoverable success fees, as was the case before 2000. They also claimed that 100% success fees had not allowed any additional claims to be brought which would not have been possible without recoverable success fees. One respondent provided data showing that since 2000 the average number of cases per year had decreased to 222 per year, compared with an average of 364 cases per year from 1992-2000. Most felt that very high costs and 100% success fees had a "chilling effect" on the media, something that was confirmed in judgments such as Musa King⁴.

These respondents argued that 100% success fees were unjustified because there was very little risk of losing defamation cases. They claimed there was no evidence that high success fees were encouraging lawyers to take on cases with an even chance of success – in fact, claimant lawyers themselves admit that they only take on cases they expect to win. Respondents argued that the risk of incurring liability for 100% success fees prevents defendants from defending meritorious cases and encourages them to settle when faced with frivolous claims which they would otherwise challenge. They believed this constitutes a threat to freedom of expression not only to the media but to all other publishers and NGOs. They felt that urgent reforms were necessary to restore the balance between claimants and defendants and preserve freedom of speech as protected by Article 10 of the European Convention of Human Rights

³ ATE insurance is taken out to cover litigants against the possibility of having to pay their opponents' costs if their case is unsuccessful

⁴ Musa King v Telegraph Group Ltd [2004] EWCA 613 (Civ).

Finally, these respondents argued that 100% success fees in CFA cases contributed to high costs in defamation, particularly as claimant lawyers had no incentive to keep their costs low. Respondents pointed to data showing that claimant costs in defamation cases were 230% of damages, whereas defendant costs were only 107% of damages⁵. They suggested that 100% success fees allowed excess profits for lawyers that were inefficient and unjustified.

Twenty-seven respondents (47%) opposed the proposal to reduce the maximum success fee in defamation proceedings to 10%. This included the majority of legal professional respondents as well as all legal representative, judicial and ATE provider respondents.

These respondents argued that reducing the maximum success fee in defamation cases to 10% would have a severe impact on access to justice. They felt that it would be uneconomical for solicitors and barristers to take on all but the most cast-iron cases with this level of success fee, and as a result many litigants who were unable to afford private representation would find themselves without a legal representative.

Some suggested that a 10% maximum success fee was the equivalent of abolishing CFAs in defamation – few if any lawyers would be prepared to offer them, given the complexities of the law in this area and the risks of taking cases with the possibility of receiving no payment. Respondents argued that many meritorious cases which are currently successfully pursued will not be brought because lawyers will not be willing to bear the risk of taking the case on a CFA. One legal professional respondent suggested that none of the 28 CFA defamation cases he acted on in the past year would have been brought with a maximum success fee of 10%. Others claimed that they would only be willing to take on a CFA with a success fee of 10% in cases they would otherwise be willing to undertake pro bono. Many respondents suggested that if access to justice for claimants were denied the media would be able to defame ordinary people with impunity, as some claimed was the case before CFAs were introduced in this area. Respondents argued that the debate in this area was overly influenced in favour of the media and that the disparities between well-resourced and powerful defendants and relatively weak claimants in many cases were ignored.

The majority of these respondents were critical of the evidence on which the consultation and proposal were based. They argued that the data provided by the Media Lawyers Association (MLA), was a self-selected sample which was too small, not representative and did not include any cases which were abandoned or failed pre-proceedings. Many respondents suggested that data should have been sought from the claimant side as well as media

⁵ Data submitted to Lord Justice Jackson's review of Civil Litigation Costs – see <http://www.justice.gov.uk/consultations/costs-defamation-proceedings-consultation.htm>

defendants. Respondents also pointed out that the data did not include any evidence about the level of success fees applied in each case.

Many respondents challenged the assumption that 100% success fees were routinely applied in all cases and pointed out that most operate under a system of staged or “stepped” success fees – under which for example a 25% success fee is applied for cases that settle before proceedings are issued, 50% up to a certain number of days after the defence has been served, and 100% if the case proceeds to trial. They said that 100% success fees were only applied in cases which proceed to trial where the risks of the case can be assumed to be more evenly balanced. Respondents argued that 100% success fees were necessary in cases which proceeded all the way to trial to compensate lawyers for the risks at this stage. Many also suggested that the costs of cases which proceed to trial were much higher than those which settle early, so several successful cases settling at an early stage were unlikely to compensate for the costs of one case lost at trial. Some respondents provided evidence that they had written off millions of pounds from unsuccessful cases over the past few years. Some respondents also pointed out that the success fee they charge is rarely, if ever, the fee they receive since costs are usually negotiated or assessed downwards on settlement, and there is no evidence of lawyers receiving excess profit from CFAs. Respondents argued that there were many ways for defendants in defamation cases to limit their cost liability.

Many respondents did not agree that CFAs and high success fees encourage weaker or frivolous claims to be brought against defendants who are forced to settle for fear of high costs. They argued that the CFA regime actually discouraged weak cases as the lawyer had an interest in the success of the case and was unlikely to agree to take on a case without merit. Some respondents provided evidence of the high number of cases they reject for each one they agree to take on a CFA. Respondents argued that the high success rate of defamation cases proved that only meritorious claims were taken on. Defendants were unsuccessful in many cases because they were improperly challenging cases in which they should have admitted liability at an early stage.

Respondents challenged the suggestion that success fees under CFAs constitute a “chilling effect” on the media and other publishers. Many argued that there was no evidence of stories which have not been published for fear of legal costs from subsequent defamation cases. Others suggested that if the media were deterred from publishing defamatory stories by the threat of legal action and associated costs this should be regarded as a benefit not a problem to be addressed. Other respondents argued that success fees could not have a significant effect on publication decisions because the MLA’s own data showed that CFAs were only used in 17.5% of cases in 2008. If so few cases were taken on CFAs they could not have a major impact on the freedom of expression of the media.

Respondents who opposed reducing the maximum success fee that can be charged in defamation cases to 10% argued that the proposal was an excessive response to a problem which had not been proven to be significant. Many respondents felt the proposal was overly beneficial to the media and other non-CFA funded defendants in defamation cases. They also questioned why reform was so urgently needed at this stage given the many other initiatives and debates which have recently been or are currently ongoing in this area. Respondents particularly pointed to the Theobalds Park and Theobalds Park Plus agreements, which many suggested should be implemented if urgent reform was required. Many also highlighted Lord Justice Jackson's recent review of Civil Litigation Costs which they argued was more balanced than the current proposal and dealt with defamation cases alongside other types of civil litigation. Both judicial respondents questioned why it was necessary to deal with defamation in isolation when CFAs were widely used across all types of litigation. Other respondents suggested that any problems with costs in defamation cases should be dealt with through more robust case management or changes to the substantive law.

2. What evidence would you offer in support of a maximum success fee in excess of 10%?

Fifty-three respondents answered this question. Of those, thirty respondents (57%) said that this question was not applicable to them as they did not support a maximum success fee in excess of 10%. This included all media and NGO respondents and seven legal professional respondents.

Twenty-three respondents (43% of those who answered the question) argued in favour of a maximum success fee in excess of 10%. This included the majority of legal professional and legal representative respondents, one ATE provider and one judicial respondent. Most challenged the data presented in the consultation paper and suggested that there was no evidence in support of the maximum success fee of 10%. Respondents were critical of the data provided by the MLA, pointing out that it was a self-selected sample which only covered on year's worth of cases against the media which were unsuccessfully defended. The sample did not include details of cases the media won or cases that were dropped, nor did it include non-media defamation cases. One respondent pointed out that the sample included details of only three trials when there were eleven defamation trials in that year (2008) of which the claimant won eight. Respondents said that the MLA data did not give any indication of the level of success fee paid in each case and did not appear to include all defendant costs including in-house legal costs (some respondents pointed out that the defence costs in some cases were claimed to be £0 which was highly unlikely unless in-house legal costs were excluded).

These respondents also challenged the suggestion that the majority of defamation cases were won by claimants. Several respondents provided data showing that between 1 January 2005 and 31 December 2009 there were 69 defamation trials in London, of which the claimant won 49 – a success rate for claimants of 71%. Using the “ready reckoner” calculation this rate of success would require an average success fee for claimant lawyers of 43% in order to achieve cost neutrality if all the cases were conducted under CFAs. Many respondents also pointed out that even if the overall success rate was higher than this data suggests when cases which settle pre-trial were considered, success fees would still need to be higher than 10% to achieve cost neutrality. They argued this was because costs in cases that are lost are generally higher than in those that win, as successful cases tend to be settled early while unsuccessful cases were often lost at trial after much more work. Respondents provided evidence of costs they had written off after unsuccessful CFA cases – one legal professional respondent showed that their firm had written off nearly £2.5 million of costs in the past five years and claimed that even though they win the majority of cases the success fees they have received have not covered these losses. An individual legal professional respondent had written off base costs of £130,000 in the past five years and showed that in order to achieve cost neutrality with a 10% success fee they would have had to conduct successful CFA cases worth £1.3 million – a figure that was claimed to be unrealistic.

Many respondents disagreed that 100% success fees were routinely applied and presented data showing that staged success fees are the norm in defamation cases. One respondent provided details of the 18 CFA defamation cases they completed in the past three years showing that their average success fee recovered was 23.33% and in only one case was a 100% success fee charged. Another respondent said that the largest success fee they had ever recovered in a CFA defamation case was 20%. Respondents also argued that costs judges usually assess success fees downwards on the completion of a case so the success fee agreed with the claimant is rarely that which is ultimately recovered.

The majority of respondents who offered evidence in support of a higher maximum success fee argued that a 10% success fee would not allow lawyers sufficient flexibility to reflect the risks of defamation cases, particularly those that progress to trial. Many argued that staged success fees would more properly reflect the risks in CFA cases while reducing the cost burden on defendants and these should be made mandatory. Several different schemes for staged success fees were suggested by respondents, including a division of 25%/50%/100% (with the latter only being applicable to cases which proceed to trial); and the percentages in CPR Part 45 Section V.

These respondents expressed concern that if a 10% maximum success fee were implemented, it would have a serious impact on access to justice for claimants and allow the media to print defamatory material without the threat of legal challenge.

3. If you do not agree with the proposal on reducing success fees to 10%, what evidence would you offer in support of maintaining the status quo?

Fifty-one respondents answered this question. Of those thirty respondents (59%) said that this question was not applicable to them as they did not support the maintenance of the status quo. This included all media and NGO respondents and seven legal professional respondents.

The remaining twenty-one respondents (41% of those who answered the question) included the majority of legal professional and legal representatives and all ATE providers. The majority stated that they did not support maintaining the status quo and agreed that change was necessary, but they believed that reducing the maximum success fee to 10% was not a proportionate or appropriate solution. Respondents rejected the suggestion that the only choice was between a maximum 10% success fee and maintaining the status quo, and many stated that if forced to make such a choice they would keep the status quo as the “lesser of two evils”. They suggested several alternative proposals including: mandatory staged success fees as set out in the Theobalds Park and Theobalds Park Plus Agreements; detailed costs assessment pre-proceedings; more active costs management by the courts; and the reforms suggested by Lord Justice Jackson in his Review of Civil Litigation Costs which many respondents felt were a more balanced set of proposals which would better preserve access to justice. Some respondents argued that recent reforms in this area, including those relating to ATE insurance premiums and early notification, should be given time to “bed down” before any further changes were made.

Several respondents argued again that the evidence basis for a 10% maximum success fee was weak and this level could not be justified. They claimed that if a 10% maximum success fee was introduced it would have a severe impact on access to justice and leave defamatory material unchallenged.

4. Do you think our proposal will affect competition in this area? If so please provide details.

Forty-six respondents answered this question.

Twenty-eight respondents (61% of those who answered) believed the proposal would not affect competition in this area. This included the majority of media respondents and seven legal professional respondents. They argued that the proposal would not result in any reduction in the availability of CFAs or any lawyers exiting this market. They pointed out that before recoverability of success fees was introduced in England and Wales there were many legal firms willing to act on CFAs. They suggest that there is no reason to suppose these firms will be unwilling to act on CFAs with a reduced maximum success fee. Many respondents also pointed to the example of Ireland where recoverability of success fees does not exist and CFAs are widely available. Some respondents argued that lawyers acting on CFAs for claimants would still recover 110% of their costs in successful cases, thus enabling them to continue offering CFAs.

Eighteen respondents (39% of those who answered) believed the proposal would affect competition in this area. This included the majority of legal professional and legal representative respondents and one ATE provider respondent. These respondents argued that a reduction in the maximum success fee to 10% would reduce or even remove competition as few if any lawyers and legal firms would offer CFAs in defamation cases. They argued that it would be uneconomical for lawyers to take on many cases with a 10% success fee as their profits would be severely reduced and they would not be rewarded for the risk of taking on the case. Many of these respondents argued that a reduction in the number of firms offering CFAs in defamation cases would restrict access to justice and reduce choice for clients.

5. **Do you think our proposal to reduce success fees would have any particular impact on small firms? If so please give details of the likely costs and effects you believe they will have and what action might be taken to reduce this impact?**

Forty-seven respondents answered this question.

Twenty-nine respondents (62% of those who answered) thought the proposal would have no particular impact on small firms. This included the majority of media respondents and seven legal professional respondents. Many of these argued that reducing costs in defamation proceedings would benefit small firms as it would allow them to bring and defend these cases at more reasonable costs. Others suggested that since the majority of legal firms offering CFAs in this area were small or medium sized business there would be no particular impact on small firms.

However, eighteen respondents (38% of those who answered) believed the proposal would have a particular effect on small businesses. This included the majority of legal professional and legal representative respondents and one ATE provider respondent. They argued that the majority of firms operating in this area were small firms and sole practitioners (including barristers) and they would no longer be able to afford to take on defamation cases on a CFA with a 10% maximum success fee. Some felt that the risks of taking a CFA case would not be compensated by a 10% success fee, particularly for small firms who cannot spread the risk over multiple cases. Some also claimed that small firms would be affected by the proposal because they would not have the resources to privately fund litigation and would no longer be able to find representation through a CFA if they were defamed.

6. Do you agree with our initial assessment that the proposal will have no equality impact? If not, please detail what the impacts are and who they affect.

Forty-seven respondents answered this question.

Twenty-nine respondents (62% of those who answered) agreed with the assessment that the proposal would have no equality impact. This included the majority of media respondents and seven legal professional respondents.

Eighteen respondents (38% of those who answered) disagreed and believed that the proposal would have an equality impact. These respondents argued that the proposal would discriminate against those of limited or modest means - who could not afford private representation but would not qualify for legal aid - as they would be unable to find legal representation. CFAs would not be available because legal firms would no longer offer these types of agreements, or would only offer them in very reduced circumstances. Some respondents argued that this would represent discrimination on "other status" grounds under the European Convention on Human Rights. Others expressed concern that the proposal would also indirectly discriminate against ethnic minority groups and disabled people as these groups were disproportionately of modest means.

7. Do you agree with our assessment of the Human Rights impact of the proposal? If not, please detail what other impact you think they will have.

Forty-seven respondents answered this question. Of those, three respondents (6%) agreed with the assessment of the Human Rights impact of the proposal. Forty-four respondents disagreed with the assessment, although they did so for different reasons.

Twenty-six respondents (55% of those who disagreed with the assessment), including the majority of media respondents, argued that the Human Rights assessment overstated the impact the proposal would have on the rights of claimants under Article 6 of the European Convention on Human Rights – the right to access to justice. They suggested the proposal would have no impact on Article 6 rights as it would not reduce the availability of CFAs and therefore would not reduce access to justice. Some of these respondents also believed that the existence of high success fees in defamation cases was contrary to Article 10 of the European Convention on Human Rights – the right to freedom of expression - and that that the Human Rights assessment should reflect this.

However, eighteen respondents (38% of those who answered the question) disagreed with the Human Rights assessment on the basis that it understated the threats the proposal represented to rights under both Article 6 and Article 8 – the right to private and family life. These respondents argued that the proposal would reduce the availability of CFAs and therefore would reduce access to justice for those unable to afford to pay privately for legal representation. Several respondents suggested the only way this could be addressed was through an expansion in the legal aid scheme. Respondents also argued that a reduction in availability of CFAs as a result of this proposal would weaken protection for the Article 8 rights of those who have been defamed as they would no longer be able to protect these rights through the courts. Several respondents suggested that the consultation paper gave undue and unjustified weight to the Article 10 rights of the media and other publishers above the Article 6 and 8 rights of claimants. Some also argued that the proposal would lead to an increase in the publication of defamatory material which would misinform society and therefore impact Article 10 rights of the general public.

Conclusion and next steps

1. We welcome all the responses we received to this consultation.
2. The Government has had particular concerns about the high costs in defamation cases. Defamation is a discrete area where we have already taken a number of steps to help control costs. Defamation proceedings are now part of a mandatory costs budgeting pilot, with Judges scrutinising costs as cases progress.
3. Lord Justice Jackson in his report, *Review of Civil Litigation Costs: Final Report published on 14 January 2010*, recommends the abolition of recoverability of success fees and after the event (ATE) insurance premiums across civil litigation. Sir Rupert's report is substantial with recommendations that are far reaching with potentially widespread impact on many areas. However, it sets out a clear case for CFA reform. Even those respondents who did not support our proposal of reducing defamation success fees to 10% agree that the status quo cannot be permitted to continue. The main flaw identified by Sir Rupert of the current regime is the costs burden placed upon the opposing side. He also points out that the CFA regime was working satisfactorily before recoverability of success fees and ATE was introduced – an assertion that is made by a large number of respondents to the consultation.
4. Previous attempts to control the success fees have proved unfruitful. For example during 2007 the Department published a consultation paper, *Conditional fee agreements in defamation proceedings: Success Fees and After the Event Insurance*, on a scheme of fixed recoverable staged success fees and ATE insurance premiums. However, there was no consensus on the details of the scheme and it could not be implemented. No new evidence was provided to Sir Rupert against his recommendation on abolishing recoverability of success fees and ATE.
5. We carefully considered all the responses. More than half (53%) of those who responded agreed with our proposal to reduce the defamation success fees to 10%. The Government also considered the report from the Culture Media and Sport Committee on press freedom libel and privacy published on 25 February 2010. Although the Committee did not agree with our proposal it recommends that the recoverability of success fees should be capped to 10%.
6. The Government is actively assessing the implications of Sir Rupert's proposals and will also consider the Committee's report and recommendations including those on costs. However, in the meantime we are minded to implement the proposal to reduce the maximum success fee in defamation cases to 10% immediately as an interim measure.
7. We have therefore today laid the Conditional Fee Agreements (Amendment) Order before Parliament with a view to having the maximum success fee of

10% in defamation cases in force as soon as possible subject to Parliamentary approval.

8. In light of the comments received, the Order has been amended to make clear that the new requirements will only apply to CFAs entered into after the date on which the Order comes into force. Defamation proceedings for the purpose of the Order means publication proceedings (within the meaning of rule 44.12B of the Civil Procedure Rules 1998) which includes defamation, malicious falsehood or breach of confidence involving publication to the public at large.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Julia Bradford, Ministry of Justice Consultation Co-ordinator, on 020 3334 4492, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Julia Bradford
Consultation Co-ordinator
Ministry of Justice
102 Petty France
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If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3 of this paper.

Summary: Intervention & Options

Department /Agency:
Ministry of Justice

Title:
Impact Assessment of Controlling Costs in Defamation Proceedings – Reducing CFA Success Fees

Stage: Final decision

Version: 1

Date: 1 March 2010

Related Publications: Controlling Costs in Defamation Proceedings (CP4/09) & Conditional Fee Agreements in Defamation Proceedings – Success Fees and After the Event insurance (CP1/2010)

Available to view or download at:

<http://www.justice.gov.uk>

Contact for enquiries: Natasha Zitcer

Telephone: 020 3334 2987

What is the problem under consideration? Why is government intervention necessary?

Media organisations claim that the high costs in defamation and some other publication-related proceedings funded under Conditional Fee Agreements (CFAs) are a potential threat to freedom of expression. The issue is whether high legal costs, combined with 100% success fees, which are currently recoverable from the losing side, put publishers under excessive pressure to settle weak and unmeritorious claims when doing so is not in the public interest. **This affects not only the media, but also scientific and academic debate.** Such an effect may be greater in relation to those with smaller budgets such as the local media and small publishers. Current measures, including voluntary arrangements adopted by some solicitors and media organisations, have proved inadequate to control the high costs in this area.

What are the policy objectives and the intended effects?

The aim of this proposal is to reduce legal costs in defamation and some other publication-related proceedings brought under CFAs, with a view to making them more proportionate and reasonable. The proposal aims to reduce the risk of disproportionate costs encouraging the press and other groups to settle cases in such a way as to restrict the freedom of expression unjustifiably.

What policy options have been considered? Please justify any preferred option.

The following options are being considered:

0. Base case (“do nothing”).
1. Reducing the maximum prescribed success fee that can be charged in defamation proceedings from 100% to 10%. This would be achieved by amending the Conditional Fee Agreements Order 2000, which sets the current maximum success fee at 100%.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The proposals should be reviewed after 12 months.

Ministerial sign-off For final decision stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:



.....Date: 3 March 2010

Summary: Analysis & Evidence

Policy Option: 1

Description: Reduce the maximum success fee that may be charged in defamation and some other publication related proceedings from 100% to 10%

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£		
	Average Annual Cost (excluding one-off)		
	£		Total Cost (PV) £ N/A

Other key non-monetised costs by 'main affected groups' Reduced access to justice for potential claimants, reduced testing of the legal boundary of what constitutes defamatory publication, reduced caseload and/or reduced income and/or reduced profits for CFA lawyers, possibly increased legal aid spending.

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£		Total Benefit (PV) £ N/A

Other key non-monetised benefits by 'main affected groups' The media and others would be subject to fewer defamation cases and/or to reduced costs in defamation cases they lose. This may lead to an increased amount of related information published.

Key Assumptions/Sensitivities/Risks The key assumption is that it would be in society's interests for the media and others to publish information which, whilst previously possibly being subject to legal challenge, is in the public interest to publish. The proposals seek to achieve this by reducing the prospects of legal challenge in all but the most certain cases, and to do so by reducing CFA success fees.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales	
On what date will the policy be implemented?		April 2010	
Which organisation(s) will enforce the policy?		Courts	
What is the total annual cost of enforcement for these organisations?		N/A	
Does enforcement comply with Hampton principles?		N/A	
Will implementation go beyond minimum EU requirements?		N/A	
What is the value of the proposed offsetting measure per year?		N/A	
What is the value of changes in greenhouse gas emissions?		N/A	
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium Large
Are any of these organisations exempt?	N/A	N/A	N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Key: Annual costs and benefits: Constant Prices (Net) Present Value

1. Scope of the Impact Assessment

- 1.1 This Impact Assessment relates to the consultation on a proposal for controlling costs in defamation proceedings¹ funded under Conditional Fee Arrangements (CFAs). CFAs are 'no win no fee' agreements which operate on the assumption that a lawyer (normally a solicitor) will usually act for a client only if he thinks there are sufficient prospects of success. If the case is lost, then the lawyer will not be paid. If the case is successful, the lawyer will be able to claim an 'uplift' on his normal fees. This uplift is also known as the 'success fee'. This maximum permitted uplift that lawyers can charge their client is currently prescribed² at 100%. An 'After the Event' (ATE) insurance market has developed to protect claimants against having to pay the opponent's costs and their own disbursements, if the case was unsuccessful. Both the success fee and ATE insurance premium can be recovered from the losing side.
- 1.2 This Impact Assessment considers the costs and benefits of the proposal in the consultation paper, *Controlling Costs in Defamation Proceedings – Reducing CFA Success Fees*. It is undertaken in line with the criteria set out in the Government's Impact Assessment guidance.³

Scope of the proposals

- 1.3 The consultation paper seeks views on the following options:
0. Do nothing.
 1. Reducing the maximum success fee that may be charged in defamation proceedings from 100% to 10%.

Organisations affected

- 1.4 The main groups likely to be affected by the proposal are:
- Claimants in defamation proceedings funded by CFAs. Defendants may use CFAs as well.
 - Publishers, in particular the media. Media organisations and other publishers are often involved as defendants in defamation proceedings. This may include national and regional newspapers, magazines, book publishers, internet service providers, non-departmental public bodies, academic/scientific bodies, charities and any other organisation publishing reports or information.
 - Legal representatives, particularly solicitors firms, specialising in this area of law, of which a significant number are small and medium size businesses but also barristers.
 - The civil courts dealing with defamation proceedings (including on costs assessment) where there may be an issue as to whether there has been compliance with any new rules. There are 216 County Courts in England and Wales. The measures would also apply to cases proceeding in the High Court, the Court of Appeal and the Supreme Court.

¹ As defined in the consultation paper, *Controlling costs in Defamation Proceedings – Reducing CFA Success Fees* at page 10, para 5

² The Conditional Fee Agreements Order 2000 (SI 2000/823)

³ <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html>

2. Rationale for Government Intervention

- 2.1 In terms of probability if CFA lawyers focused evenly on all cases of possibly defamatory publication then in theory we might assume that they would win 50% of cases. If this were so, and if their standard fees reflected their costs, then these lawyers would recover their costs if they were able to charge a 100% 'uplift' or 'success fee' on their standard fees. This is the theoretical rationale for having 100% success fees. This analysis also assumes that costs in all cases are identical.
- 2.2 A lower maximum success fee might require CFA lawyers to achieve higher case success ratios in order to break even. As a result CFA lawyers might only focus on cases which they are more likely to win. In the above scenario a 10% success fee would require a case success ratio of over 90% in order to break even. As a result CFA lawyers would probably not take on some cases which they might have taken on beforehand. Some of these cases are unlikely to be self-funded in the absence of a CFA.
- 2.3 If the claimant was supported by a CFA lawyer, and if the defendant was self-funded, then the outcome might be that more material is published. In particular, material which might have been subject to a legal challenge beforehand which was not very likely to succeed. Ministers consider that it would be in the public interest for such material to be published without the publisher being threatened by legal challenge. The rationale for the reforms is to achieve this Ministerial objective.

3. Cost Benefit Analysis

- 3.1 This section sets out some potential costs and benefits of various options under consideration.

BASE CASE ("Do nothing")

Description

- 3.2 **Making no change would result in a continuation of the status quo, as described earlier in this Impact Assessment.**
- 3.3 Because the base case is compared with itself in this Impact Assessment its net costs and benefits are zero.

OPTION 1

Description

- 3.7 **This option would reduce the maximum success fee that can be charged in defamation proceedings from 100% of the lawyer's basic costs to 10%. Defamation proceedings for the purpose of the Order means publication proceedings (within the meaning of rule 44.12B of the Civil Procedure Rules 1998) which includes defamation, malicious falsehood or breach of confidence involving publication to the public at large. This would be achieved via amending the Conditional Fee Arrangements Order 2000 which prescribes the maximum success fee at 100%. The 10% success fee could still be recoverable in defamation cases from the defendant in any case the claimant won, along with their legal representative's basic costs, disbursements and any ATE insurance premiums.**
- 3.8 The following analysis applies to situations where a claimant is supported by a CFA lawyer and a defendant is self-funded.

Costs

- 3.9 There may be reduced access to justice for potential claimants whose cases are less likely to succeed, as CFA lawyers may no longer take on such cases.
- 3.10 These potential claimants might also suffer detriment as a result of being unable to challenge information which they consider to be defamatory. This may reduce protection under Article 8 of the European Convention on Human Rights (the right to private and family life).
- 3.11 There may be reduced testing in court of the legal boundary of what constitutes defamatory publication as a result of CFA lawyers no longer getting involved in such cases. This might not be in the public interest.
- 3.12 CFA lawyers are likely to be worse off either because they have to charge lower success fees and/or because they get involved in fewer cases.
- 3.13 Although legal aid funding is not normally available for defamation proceedings, there could be an increase in applications for exceptional legal aid funding as fewer claimants would be able to fund their cases through CFAs. This could impose costs on the legal aid budget.
- 3.14 There may be increased costs to the public in terms of misleading published information, which might be challenged less in the future.

Benefits

- 3.15 The media and other publishers (including scientists and academics) would benefit from being subject to the threat of proceedings and fewer defamation proceedings, especially cases where the probability of the claimant winning are low. In the event of losing a case the media would also benefit from paying lower CFA lawyer success fees. Of relevance to this is Article 10 of the European Convention on Human Rights (the right to freedom of expression).
- 3.16 More material might be published which is in the public interest to see.

4. Enforcement and Implementation

- 4.1 Option 1 would be implemented by amending the Conditional Fee Agreements Order 2000.

5. Impact Tests

- 5.0 The following impact tests were considered applicable to the proposal:

Competition Assessment

- 5.1 It is likely that limiting the recoverable costs under CFAs would deter some solicitors from taking on defamation cases. This would impair competition and reduce consumer choice. Reduced competition could, in the long term, increase costs both for claimants and defendants. We are aware that this is a specialised area of the law where the number of solicitors practising is limited.
- 5.2 As such this proposal is unlikely to directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete, and limit suppliers' incentives to compete vigorously.

Small Firms Impact Test

- 5.3 Many solicitors firms operating in the field of defamation proceedings are small to medium sized businesses including self-employed barristers. As above, it is likely that limiting the recoverable costs under CFAs would deter some solicitors (and barristers) from taking on defamation cases. We have considered whether it would be possible to exempt small legal firms including the self-employed from these proposals. However we have concluded that this would be impossible both from a practical point of view and because it would reduce the efficacy of the proposals. It would also be likely to distort the market for legal services in this area. An open public consultation exercise sought views on what actions might be needed to avoid or reduce this adverse impact on small business. This did not lead to any proposals emerging.
- 5.4 The other small firms affected might be those involved in publishing material which might be subject to defamation proceedings. This might include local newspapers and not for profit organisations. They might be expected to benefit from the proposals as material which might have been legally challenged before might not be challenged in the future.
- 5.5 On the other hand other small firms which might wish to issue defamation proceedings might be worse off following these proposals, as it might be harder for them to find a CFA lawyer who wishes to take on their case. As above an open public consultation exercise sought views on what actions might be needed to avoid or reduce this adverse impact on small business. This did not lead to any proposals emerging.

Legal Aid and Justice Impact Test

- 5.6 Although legal aid is not generally available for defamation proceedings, claimants may apply for exceptional legal aid funding in these cases. Any reduction in the availability of CFAs in this category of case may lead to an increase in applications for exceptional legal aid funding under Section 6(8)(b) of the Access to Justice Act 1999 which, if granted, would have an impact on the legal aid fund. We estimate that there would be only a small number of cases per year, however these could prove individually costly.

Equality Impact Assessment

- 5.7 The proposal will affect all claimants, defendants and businesses involved in legal proceedings funded by CFAs in this area of law. An initial equality impact screening considered their impact on different groups in terms of; disability; gender; age; religion and belief; and sexual orientation.
- 5.8 As mentioned it is likely that limiting the recoverable costs under CFAs would deter some solicitors from taking on defamation cases. As such some people with lower financial means may no longer be able to pursue defamation cases. This cost in terms of reduced access to justice might fall disproportionately on ethnic minority groups and on disabled people as these groups are disproportionately of lower means.

Human Rights

- 5.9 The proposal aims to reduce the risk that in some defamation proceedings funded under CFAs, the litigation costs could be so high as to restrict the media and other publishers' freedom to publish. Of relevance to this is Article 10 of the European Convention on Human Rights (the right to freedom of expression).
- 5.10 However, the proposal could potentially reduce the availability of CFAs in defamation proceedings. This could result in cases of defamation, libel and invasion of privacy not being addressed. This may reduce protection for claimants under Article 8 of the Human Rights Act (right to respect for private and family life) and may also lead to the public being misinformed. The rights of claimants under Article 6 might also be affected (the right to access to justice).

Other Specific Impact Tests

5.11 The proposal should not involve impacts relating to the other specific impact tests.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Annex A – List of respondents

Adam Speker, Media and Entertainment Law, 5RB

Adrienne Page QC, Media and Entertainment Law, 5RB

Associated Newspapers

BBC

British Sky Broadcasting

Carter-Ruck

Channel 4

Channel 5 Broadcasting

Collyer Bristow LLP

Doughty Street Chambers Media team

Express Newspapers

Global Witness

Godwin Busuttil

Guardian News and Media Limited

Herbert Smith LLP

Hugh Tomlinson QC, Matrix Chambers

Independent News and Media Limited

ITN

ITV

Jacob Dean, Media and Entertainment Law, 5RB

Jonathan Steinberg, Law Office of J.R.Steinberg

Justin Rushbrooke, 5 Raymond Buildings, Gray's Inn

Kate Macmillan, Partner, Gallant Macmillan LLP

Lawyers for Media Standards
Legal Expenses Insurance Group
London Solicitors Litigation Authority
Malcolm Goodwin, Goodwin Malatesta Legal Costs Service
Lord Neuberger, Master of the Rolls
Media Lawyers Association
Michael Sandys and Philip Gray, Kirwans Solicitors
National Magazine Company
News Group Newspapers Limited
Newspaper Society and Newspaper Publishers Association
Paul Tweed, Johnsons Solicitors
Periodical Publishers Association
Press Association
Reynolds Porter Chamberlain LLP
Robin Shaw, Davenport Lyons
Russell Jones and Walker
S. William Lister, Media Unit, Pannone LLP
Schillings
Senior Costs Judge
Simons Muirhead and Burton
Society of Editors
Solicitors Regulation Authority
Stephen Nottridge, Moss Solicitors LLP
Telegraph Media Group Limited

Temple Legal Protection Ltd

The Bar Council's CFA Panel

The Economist Group

The Financial Times

The Law Society

The Publishers Association

Thomson Reuters

Tony Jaffa, Head of Media and Publishing Team, Foot Anstey

Trinity Mirror

William Bennet, 5RB

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