

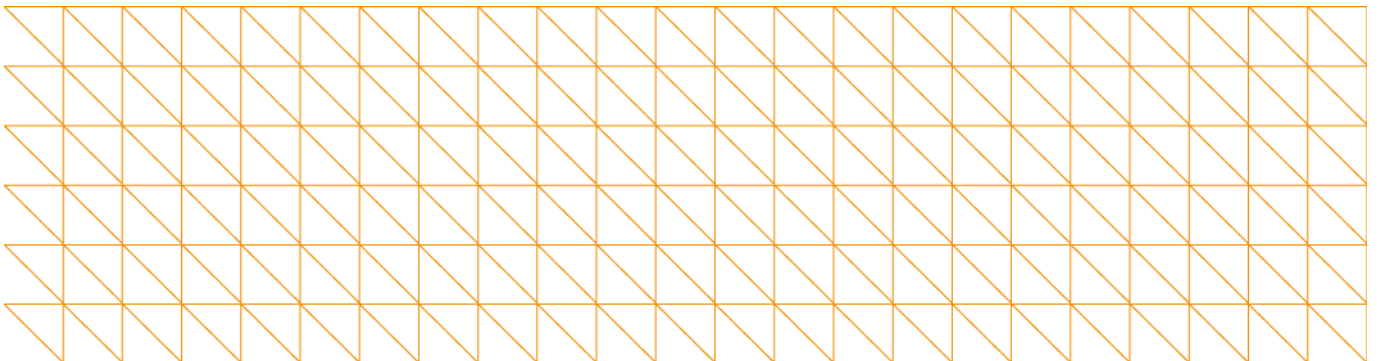


Controlling costs in defamation proceedings

Response to consultation

CP4/09

24 September 2009





Ministry of
JUSTICE

Controlling costs in defamation proceedings

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 consultation was aimed at legal representatives who conduct litigation in the area of defamation and other publication related proceedings, media organisations, insurers and those in England and Wales with an interest in, or views on, the proposals.

Duration: From 24 February 2009 to 06 May 2009

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Introduction and contact details

This document is the post-consultation report for the consultation paper, *Controlling costs in defamation proceedings*.

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 next steps following this consultation.

Further copies of this report and the consultation paper can be obtained by contacting **Jo Taylor** 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 Jo Taylor at 020 3334 3214.

Background

The consultation paper *Controlling costs in defamation proceedings* was published on 24 February 2009. It invited comments on a number of measures designed to control better the costs arising in defamation and possibly some other publication related proceedings where the level of costs might be considered too high. The high level of costs in publication proceedings has been raised in the courts and had been the subject of debate and consideration by Parliament. In particular it was considered by the Constitutional Affairs Select Committee's inquiry into Compensation Culture in 2006. During the course of this consultation it has also been considered by the Culture Media and Sport Select Committee's inquiry into Press Standards, Privacy and Libel.¹

Based on the responses to previous consultation exercises and representations made by media organisations over a number of years, Ministers believe that the litigation costs in publication proceedings are a problem that should be addressed. They are concerned in particular about the effect of the threat of high costs on the ability of the media, and local media in particular, to continue to investigate and publish stories in the public interest.

Views were sought on the following measures:

- A. Limiting recoverable hourly rates;
- B. Mandatory costs capping or mandatory consideration of costs capping;
- C. Linking recoverability of ATE insurance premiums to notification to the other party and introducing a period of non recoverability post notification; and
- D. Requiring the proportionality of total costs to be considered on cost assessment conducted by the court.

These measures took account of proposals submitted by media organisations and other interested parties in response to earlier consultations on related issues: *Conditional Fee Agreements in Publication Proceedings – Success Fees and After the Event Insurance*; and *Civil Procedure Rules – Costs Capping Orders*.²

The consultation period closed on 6 May 2009. This report summarises the responses and explains, in the light of these responses the decisions that the Ministry has taken on implementation of those proposals.

¹ Details of the inquiry and the evidence given are available at www.parliament.uk/parliamentary_committees/culture__media_and_sport/culture__media_and_sport_reports_and_publications.cfm

² Available on the Ministry of Justice website, www.justice.gov.uk

Summary of responses

1. There were 65 responses to the Consultation Paper. Of these the largest group of respondents was media companies and their representative organisations, which accounted for 51% (33 responses). 17 responses were received from legal professionals which included barristers and solicitors. Three responses were received from legal representative organisations, three from insurers, three from members of the judiciary and six from 'other respondents' which included academics, members of the public and the Association of Law Costs Draftsmen. A list of respondents is included at Annex B.
2. The majority of media respondents supported the response of one of the media representative organisations. This response, supported the majority of the proposals but indicated that some did not go far enough and made suggestions for further areas of reform.
3. Respondents from the legal profession, the insurance industry and 'other' respondents agreed with some of the proposals and disagreed with others, whilst on the whole the judiciary did not support the proposals.
4. The following section summarises the responses to questions 1–7 in the consultation paper about the proposed measures. The responses to questions 8 – 11, relate to the impact assessment prepared for the consultation and are summarised in the impact assessment attached at Annex A.

Responses to specific questions

Question 1: Do you agree that a maximum recoverable hourly rate should be introduced?

There were 61 responses to this question. 40 (66%) agreed with the proposals and 18 (29%) did not agree. Three (5%) respondents neither agreed nor disagreed with the proposals but gave general comments.

The respondents who agreed with this proposal included: 32 media respondents; 4 legal professionals; 2 insurers and 2 'other' respondents.

30 media respondents and 2 insurers supported the response given by one of the media representative organisations. This agreed that maximum recoverable hourly rates should be introduced, rather than fixed recoverable rates, as part of a package of reforms to control costs. It suggested that different hourly rates should be set for each of the four grades of legal representative, as in the guideline hourly rates and that a separate should also be set for counsel. These rates should be the minimum level necessary to ensure that there are sufficient lawyers available to provide access to justice and should be significantly lower than the rates currently allowed on assessment (said to be typically £400 plus VAT for a Grade A fee earner).

6 other respondents agreed that a maximum recoverable hourly rate should be set. 3 of these (2 'other' respondents and a legal professional) thought that such a rate would control the deterrent effect of high costs or reduce the overall costs of litigation. Another argued that many solicitors would be willing to work within limited rates and that such rates would limit claimants' exposure to adverse costs and enable them to assess their risk and/or obtain insurance.

The 18 respondents who disagreed with the proposals included: 11 legal professionals; three legal representative organisations; three 'other' respondents and a member of the judiciary.

11 respondents who disagreed with the proposals (six legal professionals, all three legal representative organisations, a member of the judiciary and an 'other' respondent) argued that there was no need for prescribed hourly rates because there were already systems in place to deal effectively with parties attempting to claim costs at unreasonable or disproportionate levels (for example the guideline hourly rates and the costs assessment procedure).

Six respondents (two legal representative organisations and four legal professionals) questioned why a special regime should be applied to defamation cases which is different from that which applies to all other areas of civil litigation. Several respondents questioned whether the hourly rate currently claimed was out of line with other commercial litigation, to which they felt defamation cases should be equated. Two legal professions also drew attention to the absence of provisions limiting the recoverability of counsel's rates.

Three respondents (two legal professionals and an 'other' respondent) considered that maximum hourly rates would lead to inflation, as the maximum would become the rate usually charged.

Several respondents raised concerns about applying a limited rate across all defamation proceedings. Two legal professionals noted that in defamation claims that are not funded by a conditional fee agreement (CFA), the client has an incentive to agree reasonable hourly rates. In these cases there was no reason to impose a limit and to do so would limit the client's freedom of choice. Another said that a limited rate would be inappropriate for cases that did not concern the media's freedom of speech, such as defamation claims brought between private companies and/or individuals.

Five respondents (including two 'other' respondents, a legal professional, a member of the judiciary and a legal representative organisation) commented on the effect of limited hourly rates on access to justice and the market for the provision of services for defamation cases. They said that claimants' choice of solicitor would be limited to those firms willing to provide representation at that rate. Alternatively, claimants may have to pay the difference between the recoverable hourly rate and solicitor's charging rate themselves. This may stop claimants bringing cases and be a threat to claimants' right to respect for private and family life under Article 8 of the European Convention on Human Rights.

Several respondents thought that limiting hourly rates would not have a substantial impact. One legal representative organisation noted that hourly rates were only a small part of the overall sum claimed and take little time to resolve on assessment. A legal professional said that a maximum rate would not end challenges or uncertainty. Several suggested that abolishing or capping success fees would achieve greater control of costs.

Media respondents' views on the appropriate rates to be adopted are set out above. A number of other respondents commented on this. Three legal professionals mentioned the need to take into account differences between defendant and claimant solicitor rates. They said that defendant solicitor rates are often lower than rates charged by claimant solicitors because they have ongoing relationships with media organisations and can obtain work on a volume basis. Two legal professionals noted that the rates must be proportionate to the experience or specialised skill set of the fee earner. One respondent, a legal professional, stated that to reduce the risk of market distortion they would have to reflect market rates, whilst several legal professionals noted that they should be updated regularly. A member of the judiciary commented that it was not surprising that hourly rates in publication proceedings are above the Guideline Hourly Rates as these are applicable only to summary assessment of costs. Higher rates are applicable in specialised litigation involving complex facts and law.

Two legal professionals argued that a limited hourly rate would be unworkable where solicitors with expertise outside the area of libel (for example in relation to company law or tax law) where significantly higher rates are the norm, are required to assist with specific legal issues. Another noted the difficulty in setting a rate that would apply to both straight forward and more complex claims.

Question 2: Do you agree that costs capping is likely to be appropriate in all or most defamation proceedings? If so, (a) do you think costs capping should be made mandatory or (b) should its consideration be made mandatory?

There were 61 responses to this question. Of these 36 (59%) agreed with option (a) that costs capping should be mandatory in all or most defamation proceedings, while five respondents (8%) agreed with option (b) that the consideration of cost capping should be made mandatory. 18 respondents (29%) disagreed with all the proposals. Two respondents commented on the proposal without indicating whether they agreed or disagreed.

The 36 respondents who agreed with option (a) were made up as follows: 32 media representatives; one 'other' respondent one legal representative and 2 insurers.

30 media respondents and two insurers supported the response submitted by one of the media representative organisations. This argued that mandatory costs capping is essential in all cases which bring into issue Article 10 of the European Convention on Human Rights (the right to freedom of expression) but will only work if judges are provided with a framework within which to set limits. A mandatory costs cap should reduce costs by controlling and reducing recoverable costs and helping the parties to save the 'often considerable' costs of detailed assessment. They disagreed with mandatory consideration of a costs cap on the basis that it will lead to satellite litigation and cost more than if a costs cap is simply imposed. One media respondent qualified their response by saying that mandatory costs capping should apply particularly where the case allocation questionnaire shows that costs are likely to exceed £50,000. Another suggested, as an alternative, that a cost cap be set by a judge in all cases where the parties have not agreed a mutual costs cap. Several others noted concerns with the present costs capping rules - the court would only make an order in exceptional circumstances and judges' reluctance to impose costs caps.

An 'other' respondent considered that a costs cap, within the parties' means, should be made in all cases.

Five respondents (four legal professionals and an 'other' respondent) supported mandatory consideration of a costs cap (option (b)). Two said that this would allow a costs cap to be imposed more readily when the circumstances of the case require it. One thought that a costs cap was necessary because costs assessment does not act as a brake on costs being incurred and because at a costs assessment, it was difficult to argue on often limited information and some time after the costs were incurred that they were unreasonable. One thought claimants would benefit from limited exposure to adverse costs, enabling them to better assess their risk and obtain insurance against that risk and considered that a costs cap should be made unless there were exceptional circumstances in the interest of justice not to do so. Several of these respondents also suggested that the means of the parties should be a relevant factor in deciding whether to impose a cap.

18 respondents disagreed with both mandatory costs capping and mandatory consideration of costs capping: 12 legal professionals; three legal representative organisations; two 'other' respondents; and a member of the judiciary.

Nine respondents (six legal professionals, three legal representative organisations and a member of the judiciary) said that costs assessment and the present procedures for costs capping as part of the court's case management function were sufficient.

Eight respondents argued that costs capping is likely to cause delay and expensive litigation about whether a costs cap should be imposed or varied and at what level it should be set. However one legal professional thought these costs should decrease as the process and likely costs of these cases became familiar. One legal professional argued that costs capping, because it only deals with base costs, will not avoid post proceedings detailed assessment in relation to additional liabilities.

Several respondents considered that the estimate of £3,000 per party for a one day costs capping hearing was too low. A legal representative organisation suggested that the costs would more likely be between £6,000 and £7,500 per party, not taking into account additional costs that would arise from any appeal or variation of the costs cap. One respondent gave an example of costs of over £73,000 having been incurred by the parties in relation to a single costs capping hearing.

Eight respondents (five legal professionals, a legal representative organisation and two 'other' respondents) said that tactical litigation behaviour would be used to drive up one party's costs above the cap, making it uneconomic for that party to continue with the case. Claimants, who were likely to have lesser financial resources, would be more at risk whilst media defendants would be more able to spend above the costs cap. This would lead to inequality of arms and a reduction in access to justice.

Two legal professionals said that costs capping would only be appropriate where one party could point to the other acting disproportionately or unreasonably. Two legal professionals noted that the quickly changing nature of defamation proceedings would make it difficult to assess an appropriate costs cap with any accuracy, particularly early in the proceedings.

Two legal professionals thought that tighter case management including proportionate directions on disclosure and witness statements would be a better solution.

Question 3: Do you agree that there should be a requirement to notify the other party that ATE insurance has been entered into in the letter before claim or at the earliest opportunity?

There were 58 responses to this question of which 40 respondents (69%) agreed with the proposal 13 (22%) disagreed with the proposals and five (9%) commented on the proposals but did not expressly agree or disagree.

Six respondents (five legal professionals and one insurer) considered that early notification of ATE insurance was already standard practice. Paragraph 9.3 of the Practice Direction – Pre-Action Conduct³ and the case of *Rogers v Merthyr Tydfil*⁴ were noted as already requiring early notification. Two respondents (both legal representative organisations) said that this requirement would be appropriate for all proceedings not just those contemplated in the consultation paper.

20 media respondents and two insurers indicated their support for the proposal if there could not be a requirement for the claimant to notify defendants in advance of an intention to take out an ATE insurance policy. However these respondents and 10 other media respondents generally supported the response of a media representative organisation, which disagreed with the proposal on the basis that there should be pre-notification of an intention to take out insurance. This response also questioned the need for ATE insurance when the vast majority of libel cases are won by claimants. Giving advance notice would, they said, allow the defendant to take the existence of the policy into account in responding to the claim. It would also give defendants an opportunity to object to the insurance if, for example, the policy is inadequate or they realise a mistake has been made and want to settle the matter quickly.

Three respondents (two legal professionals and a media representative organisation) argued that if the unsuccessful party is to be required to pay an ATE insurance premium, they should be able to take account of the insurance in deciding how to respond to the letter before claim.

Of the other respondents agreeing with the proposal for early notification, three legal professionals questioned whether ATE insurance should be allowed before a defendant had an opportunity to respond to the letter before claim. One suggested that the court should have a power to disallow the premium on ATE insurance taken out in these circumstances. Another suggested that in return for ATE insurance not being permitted before this point, the defendant should not be able to recover costs for work done during this period.

Three other respondents disagreed with the proposal. A legal professional argued that media defendants were more likely to take the risk of publishing material about a potential claimant who did not have ATE insurance and who could not therefore afford to bring a claim. An 'other' respondent thought that the current pre-action protocol should be more vigorously upheld.

³ This states that where a party enters into a funding arrangement within the meaning of rule 43.2(1) (k), that party should inform the other parties about this arrangement as soon as possible.

⁴ [2007] 1WLR 808

The response from a member of the judiciary questioned why insurance premiums in defamation cases should be treated differently from other areas of litigation adding that there was a 'perfectly respectable argument, applying to all cases, that until the response to a letter of claim is known, the degree of risk and therefore the level of any success fee or ATE insurance premium could not be assessed with accuracy.'

Question 4: Would it also be helpful to require early notice of (a) whether the premiums are staged and, if so, the points at which increased premiums become payable (b) the amount of insurance cover and (c) any exclusion clauses?

In total 59 responses were received for this question. 49 respondents (83%) considered that early notice should be given of all three elements of information. Four respondents (7%) agreed to the provision of one or two of the additional elements of information. Two (3%) considered none of the information should be provided. Four respondents (7%) commented on the proposals but did not indicate their agreement or otherwise.

32 respondents, 30 media representatives and two insurers supported the response of one of the media representative organisations that all the additional information proposed was essential for defendants to understand the nature of the cover involved and whether the ATE insurance would cover the claimant's recoverable costs if the defendant was successful. However, they thought that a copy of the policy itself should also be provided.

17 other respondents (13 legal professionals, two media representatives and two legal representative organisations) agreed that early notice of all three pieces of information should be given. Where reasons were given, it was generally said that the information would be helpful or essential to understand the nature of the cover obtained in these cases and in assessing the response to a claim. One legal professional said that it would allow the defendant to object or request additional cover as necessary.

Four respondents (two legal professionals, one insurer and one 'other' respondent) agreed that information about staged premiums should be given. One 'other' respondent agreed that information about exclusion clauses should be given and one legal professional agreed that the amount of insurance cover should be provided.

Some respondents qualified their agreement. Three (one legal professional and two legal representative organisations) thought that the proposals should apply to all civil litigation. Two legal professionals said that they agreed, provided that privileged information about the insured party's case would not be required to be disclosed. Four respondents (two legal professionals, one legal representative organisation and one insurer) said it was already common practice to provide this information. One legal professional said it was a legal requirement as a result of the case of *Rogers v Merthyr Tydfil*⁵ to provide information in relation to (a).

⁵ [2007] 1 WLR 808

Another considered it a legal requirement to provide a copy of the policy as a result of the case of *Henry v BBC*⁶.

Two respondents (one legal representative organisation and a legal professional) thought that none of the additional information should be provided. Two legal professionals disagreed with the proposals to disclose the amount of insurance cover and one 'other' respondent disagreed with the proposal to give notice of exclusion clauses. Reasons given were that the provision of this information would indicate the risk assessment made about the case and that defendants would use the amount of cover to threaten potential claimants rather than settle claims.

One respondent concluded that information about staged premium payments may hinder early settlement by encouraging defendants to pursue their defence tactically up until the deadline for the next payment.

Question 5 – Do you agree that the ATE insurance premium should not be recoverable where an offer of amends or admission of liability is made that leads to settlement of the substantive claim without court proceedings? If so (a) should a time period be specified during which the defendant must make an admission or offer of amends in order to avoid liability for an ATE insurance premium; (b) what should the period be?

58 respondents answered this question. 46 (79%) agreed with the proposal. Nine (16%) disagreed. In addition three respondents (5%) commented on the proposal without indicating agreement or otherwise.

32 media representatives, 10 legal professionals; one legal representative organisation; a member of the judiciary and two insurers, agreed with the proposals.

30 media respondents and two insurers supported the response submitted by one of the media representative organisations. This agreed the broad principle of a period during which no ATE insurance premium should be payable, indicating that a premium free period will encourage parties to settle claims promptly and will give defendants time to assess the merits of a claim before being required to pay any ATE insurance premium.

They considered that ATE insurance premiums should not be recoverable until proceedings were issued, and served, and then only if the claimant has complied with the relevant pre-action protocol. They argued that until the defendant has indicated an intention to dispute liability or proceedings are issued, there is no possibility of an adverse costs award, no financial risk to a claimant and therefore no need for claimant to have ATE insurance at this stage. They also suggested that the insurance premium should not be payable where, an offer of amends having been made, Part 8 court proceedings are required. This was because a claimant can obtain protection from costs by making an offer in accordance with Part 36 of the Civil Procedure Rules.

⁶ [2005] EWHC 2503 (QB) at paragraph 38.

A further 14 respondents agreed with the proposals: 10 legal professionals, two media respondents, a member of the judiciary and a legal representative organisation.

The majority of those agreeing the proposals went on to suggest an answer to question 5 (b) that service of proceedings should be the trigger for ATE insurance premiums to become recoverable. This would be consistent with the pre-action protocols which were thought to allow a reasonable time for defendants to respond. It was, they said, not always possible to respond to a letter before claim immediately because of the time needed to gather evidence to support a defence. A substantial amount of material from a range of sources, including sometimes abroad, may need to be evaluated and assessed. Also, complaints may not be received immediately after initial publication, making the investigation more difficult.

As an alternative, a period of 30 days was suggested, during which an admission or offer of amends, leading to a settlement of the substantive claim without court proceedings, could be made. A 30 day period was also suggested by a member of the judiciary and a legal professional. The legal professional also commented that 14 days was too short.

Other periods of time suggested include: seven days (a media respondent); 'not less than 28 days' (legal professional); 21 days (a legal professional and a legal representative organisation); not more than 14 days (legal professional); a reasonable period of time after receipt of the letter of claim (legal professional); and a reasonable time left to the court's discretion (one other respondent). One legal professional suggested that the period should be a short one as defamation issues need to be dealt with quickly. Another suggested there should be no time limit and that defendants solicitors should have time to undertake preliminary investigations and staged premiums would help encourage an early response. A legal representative organisation, who did not indicate agreement or otherwise with the proposal, suggested that the period should be the same as the time allowed for the defendant to respond to the letter of claim under the relevant pre-action protocol⁷. A legal professional, commented that if the proposal was implemented there must be certainty and suggested that there should be a time limit of 14 days for the admission of liability/offer of amends and 14 days thereafter to settle, otherwise the costs judge should be entitled to order payment of the ATE insurance premium on detailed assessment.

Nine respondents disagreed with the proposal for a variety of reasons: three legal professional, three 'other' respondents, one insurer and two legal representative organisations.

Two legal professionals said that it was not necessary because the court can already assess in costs assessment proceedings whether it was reasonable to take out ATE insurance and whether its cost was reasonable. One legal professional

⁷ The Pre-Action Protocol for Defamation provides that the Defendant should provide a full response to the Letter of Claim as soon as reasonably possible (paragraph 3.4). The Practice Direction on Pre-Action Conduct provides, for all other proceedings where no specific Pre-Action Protocol applies, that a Defendant should provide a full written response within a reasonable period.

thought that the defendant should be liable to pay the premium as it took the risk when it published the defamatory material.

Another legal professional simply stated that costs should be recoverable from the outset. Two respondents (a legal professional and one 'other' respondent) were concerned about not allowing the claimant to recover any ATE insurance premium and suggested that the costs of the relevant stage of the premium up to the stage of settlement should be permitted.

Concerns about the effect on access to justice were raised by two respondents (one legal professional and an insurer). In particular it was said that there was a risk that the claimant would not get ATE insurance once the defendant had investigated and refused to settle, which could lead to meritorious claims not being pursued. However one respondent, a legal professional, who agreed with the proposal, said that if a claim was a good one it should be possible to obtain ATE insurance and that the insurer will be better able to assess risks once the defendant's response is known.

These two respondents were also concerned that the proposal would have a negative impact on the sustainability of the ATE insurance market. The insurer noted that if reward was not sufficient to generate a potential profit, ATE providers would withdraw from the defamation market. Some claimants may not then be able to take the risk of pursuing their claim. Alternatively CFAs may be run without ATE insurance which would exacerbate the costs issues for defendants. The change would also mean an individual risk based approach to ATE insurance rather than the block rating approach currently adopted by ATE insurers.

Question 6: Do you agree that the courts should apply the proportionality test to total costs not just base costs?

There were 60 responses to this question. 44 respondents (73%) agreed with the proposal, 13 respondents (22%) disagreed and three respondents (5%) did not answer yes or no but provided comments.

All 32 media organisations responding to this question agreed with the proposal. Most supported the response of one of the media representative organisations who said that the courts should apply the proportionality test to total costs in all cases which brought into issue Article 10 of the European Convention on Human Rights. This was because in their view paragraph 11.9 of the Costs Practice Direction allows disproportionate costs to be recoverable and is incompatible with Article 10 to the extent that it applies to publication proceedings. Two insurers also supported this response.

One of the media organisations added that unless the success fee is made non-recoverable, legal costs in cases funded by a CFA will always be higher than in other cases and that where costs in a case without a success fee are reasonable and proportionate, adding a success fee will make them disproportionate.

10 respondents agreed with the proposal including eight legal professionals and two 'other' respondents. Various reasons were given. One legal professional agreed that the provisions of paragraph 11.9 of the Costs Practice Direction leads to the recovery of costs which are by definition disproportionate. Another thought the proposal would overcome criticism of the current arrangement for separate

consideration but argued that that proportionality should only be one factor governing the amount of costs to be allowed. One legal professional said that the courts should look at the overall figure as it is this which the unsuccessful party will be required to pay (this view was also noted by a media organisation). One legal professional agreed on the basis that clients in cases funded by a CFA have no incentive to scrutinise bills or exercise restraint on how litigation is conducted. One 'other' respondent thought proportionality should be applied to every aspect throughout proceedings, whilst another said it appeared to be a fairer way of attributing costs.

The 13 respondents that disagreed with this proposal were seven legal professionals, two legal representative organisations, two 'other' respondents, one insurer and one member of the judiciary.

Five of these (three legal professionals, one legal representative organisation and one 'other' respondent) considered that to apply the proportionality test to total costs as proposed would infringe the principles on which success fees operated. As one respondent put it, 'this confuses two different matters. The principle behind allowing a claimant to recover the additional liability (i.e. success fee and ATE premium) was to enable the success fees in successful cases to pay for the risks taken in cases that fail'. This view was supported by a member of the judiciary that commented on the proposal.

The member of the judiciary that answered 'no' to this question drew attention to the fact that the proposal is inconsistent with the court's current approach to avoid the problem of 'double jeopardy' (i.e. making a deduction when looking at costs on an item by item basis and a further deduction when looking at costs as a whole). The guidance set out in *Home Office v Lownds*⁸ requires the court to consider first whether the total costs appear disproportionate, and, if so, to apply a more stringent test of necessity rather than reasonableness of each item.

Two respondents (a legal representative organisation and one 'other' respondent) stated that if the total costs were not proportionate the individual elements must have been wrong. One added that if the proportionality test is properly applied to base costs and the success fee is properly linked to the level of risk, there could be no proper basis for applying a further test of reasonableness to the global figure and the outcome could only be arbitrary. An insurer noted that whilst proportionality is related to the conduct of the parties, ATE premiums take account of the litigation risk faced by the client. Introducing a test of proportionality to ATE premiums may undermine the market for ATE insurance in these cases. Two respondents thought that there was no reason to treat defamation cases as a special case and that costs were already controlled by detailed costs assessments and a cap on success fees.

Two respondents noted that the amount of damages should not be the primary consideration in a test of proportionality. Defamation proceedings are primarily about vindication and apology rather than damages and that the conduct of the parties and efforts made to resolve the dispute are also important considerations.

⁸ 2002 EWCA Civ 365

Question 7: Should the proposals apply to (a) defamation disputes only (b) a broader definition based on context or (c) disputes defined by way of a wider list of causes of action? Please say which option you prefer and why. If option (b) please suggest how you would define the scope and give reasons. If option (c) please say whether you agree with the definition suggested at paragraph 48 or propose an alternative definition.

There were 59 answers to this question. 45 (76%) respondents supported one of the proposed options and answered yes to the question. 41 (69%) of these respondents favoured option (c). Two respondents favoured (a) and two respondents favoured either option (b) or (c). 11 respondents (19%) did not agree with the proposals and three (5%) commented but did not state whether or not they agreed with the options proposed.

There were 32 responses from media organisations who all supported option (c). The majority supported the position of one of the media representative organisations who stated that all defamation and malicious falsehood claims, whether against the media, companies or individuals raise issues of freedom of expression, whilst in respect of proceedings relating, for example, to breach of confidence, misuse of personal information or the Data Protection Act 1998, only cases against the media are likely to raise issues of freedom of expression. Two insurers also supported this reasoning.

Nine other respondents favoured option (c) (five legal professionals, two insurers and two 'other' respondents) with two (both legal professionals) suggesting that the measures could be applied to all civil proceedings. One legal professional who supported option (c) nevertheless suggested that the outcome from the consultation should be reviewed in the light of Lord Justice Jackson's final report before any decisions were made. Two legal professionals supported either option (b) or (c).

Most of those not agreeing with the proposed definitions felt that the proposals should not apply at all or that there was no reason to treat defamation proceedings differently from other civil litigation. Three legal professionals and two legal representative organisations stated that if the proposals were thought to be beneficial they should apply to all civil litigation. One legal professional considered that to introduce the measures, even limited to defamation proceedings, would be contrary to a potential claimant's Article 8 right to respect for private and family life. Another legal professional stated that the proposals could only ever be appropriate for claims funded by way of CFAs against media organisations. This was on the basis that where there is no CFA the courts are equipped to ensure that costs recoverable against the losing party are proportionate.

Two legal professionals, who did not support the proposed reforms, considered that option (a), being the narrowest in scope, was the least bad option if any of the proposals were to be adopted.

Although only one specifically answered the question, all members of the judiciary commented that that consideration and implementation of the proposals should await the outcome of Lord Justice Jackson's review of civil litigation costs before any final decisions were made. This view was shared by a number of other respondents including two legal representative organisations who were concerned about treating costs in defamation or publication proceedings as a special case in isolation from other costs.

Conclusion and next steps

1. The Ministry of Justice having considered the responses to the consultation paper and recommendations from the Advisory Committee on Civil Costs asked the Civil Procedure Rule Committee (CPRC) to consider draft rules to implement a number of measures to control costs in publication proceedings. The CPRC met twice to consider these proposals, and has approved amendments to the Civil Procedure Rules, practice directions and pre-action protocol to:

in all civil proceedings

- require notice of ATE insurance to be given to the other party with the letter before claim or within 7 days of taking out insurance;
- require additional information to be given as to whether premiums are staged and if so the stage at which increased premiums become payable and the level of insurance cover;

in publication proceedings only

- introduce a period during which if the defendant admits liability and makes an offer leading to a settlement, the defendant is not liable for the ATE insurance premium.

In addition, the CPRC suggested and approved a practice direction to implement a mandatory 12 month costs budgeting pilot for defamation and malicious falsehood proceedings.

2. Rules to bring these measures into effect these have been included in the Civil Procedure (Amendment) Rules 2009 which has been laid before Parliament to come into effect on 1 October 2009. Necessary amendments to the pre-action protocols and practice directions will also come into effect on the same date. Annex C shows the amendments to be made to the relevant rules, practice directions and the pre-action protocols.

Costs budgeting pilot

3. The Civil Procedure Rule Committee proposed a mandatory costs budgeting pilot for all defamation and malicious falsehood proceedings from October 2009 as a more effective and less costly alternative to costs capping, along the lines of a voluntary pilot being conducted in the Birmingham Mercantile and Commercial Courts. As well as controlling the expenditure of the parties, the court will be required to manage the proceedings (for example the level of disclosure) to control costs. The costs estimates required are less detailed than those needed for a costs capping order and should not require much more than the level of information that solicitors are already obliged to provide their clients.
4. The aim of costs budgeting is that the court will manage the costs of the litigation as well as the case itself in a way which is proportionate to the value

of the claim and the reputational issues at stake. The Practice Direction which will give effect to the pilot is included at Annex C. The parties will prepare, exchange and lodge with the court before each hearing costs estimates for the whole proceedings. The parties will be required to monitor costs against the budget and to update each other on the position. The court may also call regular costs management conferences (by telephone where possible). At each hearing the court will consider and record its approval or disapproval of each party's budget, after representations where necessary. The court will also take account of the additional costs of each procedural step when giving case management directions. On any later costs assessment the court will only approve as reasonable and proportionate, costs claimed which fall within the last approved budget and not approve costs incurred outside the budget.

5. The government hopes that there will be close supervision of hourly rates which it considers are key to controlling costs in this area. The outcome of the pilot will be evaluated with a view to assessing whether it would be helpful to formalise costs budgeting for all publication proceedings in the future.
6. We will be monitoring the effect of the pilot carefully and considering whether further measures are needed to control costs in this area.

The remaining measures

7. The outcome of the consultation and the Ministry's decision on the way forward in relation to each of the remaining measures proposed in the consultation paper is set out below.
8. *Maximum or fixed recoverable hourly rates:* As indicated in the consultation paper, the Advisory Committee on Civil Costs (ACCC) were asked to consider appropriate maximum or fixed recoverable hourly rates, to be implemented depending on the outcome of the consultation responses. Having taken written and oral evidence from claimant solicitors and defendants, and seen a summary of the responses to Question 1 of the consultation paper, the ACCC concluded that they could not recommend an appropriate rate. They gave a number of reasons. A key difficulty was that they could identify no economic or financial basis on which to set a rate that departed from the Guideline Hourly Rates. They were also concerned that setting a fixed rate would lead to pressure to set similar discreet rates for other areas of which would undermine the Guideline Hourly Rates and create a complex and fragmented system.
9. They instead recommended expressly applying the Guideline Hourly Rates to all assessments in publication proceedings (including detailed costs assessments)⁹.
10. In the light of the ACCC's conclusions the Ministry has decided that it will not pursue the proposal for maximum or fixed recoverable hourly rates at this time. This could however be reconsidered in the light of recommendations arising from Lord Justice Jackson's review of the costs of civil litigation.

⁹ The Guideline Hourly Rates generally apply only on summary assessment of costs.

11. *Mandatory or Mandatory Consideration of Costs Capping*: A number of respondents to the consultation paper suggested that the process of obtaining a costs capping order and the additional litigation arising from applications to vary or appeal a costs cap would add significantly to the costs of publication proceedings and was only appropriate in a small number of cases. Others argued that further measures on costs capping were unnecessary. The court already has powers to order a costs cap in appropriate cases. The Civil Procedure Rule Committee raised similar concerns and also noted the potential for satellite litigation in other types of case from those seeking costs capping orders.
12. As a result of the responses to the consultation paper and the advice of the Civil Procedure Rule Committee, the Ministry has decided not to introduce either mandatory costs capping or mandatory consideration of costs capping at this stage. There is however a question as to whether the exceptionality test set out in the practice direction to the rules on costs capping, may go slightly further than the case law it intended to codify. The issue was highlighted in particular in the recent publication case of *Peacock V MGN*¹⁰ where the judge declined to make a costs capping order despite indicating that there was ‘a substantial risk that costs will be disproportionately incurred’. The CPRC has indicated that in its view there is insufficient evidence at present to decide that the rule is not operating as intended but has agreed to look at the exceptionality test again, in relation to all civil proceedings, in the light of recommendations made by Lord Justice Jackson’s review of civil litigation costs.
13. *Proportionality of total costs*: Having considered the consultation responses and the advice of the Civil Procedure Rule Committee we have concluded that there would be difficulties in introducing a requirement to consider the proportionality of total costs (including success fees and after the event insurance) in relation only to publication proceedings. In particular because of the likelihood of satellite litigation from the parties in publication proceedings and other civil litigation arguing that the new provisions either should or should not apply to their particular case. The Civil Procedure Rule Committee has agreed to consider the proposal further in the light of recommendations arising from Lord Justice Jackson’s review.

¹⁰ [2009] EWHC 769 (QB)

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 Ms 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
6.36, 6th Floor
102 Petty France
London
SW1H 9AJ

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.

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] Summary: Intervention & Options

Department /Agency: Ministry of Justice	Title: Impact Assessment of Controlling costs in Defamation Proceedings	
Stage: initial/consultation/final	Version: 1	Date: 11 August 2009
Related Publications: Conditional Fee Agreements in Publication Proceedings - Success Fees and After the Event Insurance; Civil Procedure Rules - Cost Capping Orders		

Available to view or download at:

www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm

Contact for enquiries: Kevin Westall

Telephone: 0203 334 3164

What is the problem under consideration? Why is government intervention necessary? Media organisations claim that the high costs in defamation proceedings and other proceedings relating to the publication of personal information, in particular those funded under conditional fee arrangements (CFAs) are a potential threat to their freedom of expression. The high legal costs, combined with high success fees and after the event (ATE) insurance premiums act as a heavy inducement to settle unmeritorious claims on commercial grounds leading to them being reluctant to publish information in the future that may lead to possible defamation proceedings - an unintended consequence with a "chilling effect" on society.

What are the policy objectives and the intended effects? The aim of these proposals is to introduce more certain and effective costs controls to litigation in defamation proceedings. The way in which this would be achieved is to require better exchange of information between the parties so that they are able to make more informed decisions and in publication proceedings to provide for more limited recovery of ATE insurance premiums when a case is settled.

What policy options have been considered? The following four options for reforming the law in this area have been considered:

- i) Option 0 – Base Case ("Do Nothing");
- ii) Option 1 – Two measures: Parties required to notify each other if an ATE insurance policy is taken out and a 42 day period during which the defendant may settle a case without having to pay the ATE insurance premium;
- iii) Option 2 – Three measures: As option 2 and in addition a 12 month cost budgeting pilot;
- iv) Option 3 – A package of 4 proposals: Maximum recoverable or fixed recoverable hourly rates, mandatory costs capping or mandatory consideration of costs capping, linking recoverability of ATE Insurance premiums to notification and introducing a period of non-recoverability post notification.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The costs budgeting pilot will be reviewed after 6 months. The measures relating to ATE insurance will be reviewed in the light of the recommendations arising from Lord Justice Jackson's review of civil litigation costs due to report in December 2009.

Ministerial Sign-off For Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



Bridget Prentice

Date: 12 August 2009

Summary: Analysis & Evidence					
Policy Option: 2		Description: Early notification of ATE insurance linked to recoverability, a period during which an admission of liability can be made incurring the ATE insurance premium and a 12 month cost budgeting pilot.			
COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'		
	One-off (Transition)	Yrs			
	£ N/A				
	Average Annual Cost (excluding one-off)		Total Cost (PV) £ N/A		
	£ N/A				
Other key non-monetised costs by 'main affected groups' The cost of providing additional information on staged premiums should be negligible. Claimants may have to pay the ATE premiums themselves if the defendant admits liability, which may result in fewer claimants taking out ATE Insurance; defendants may also have to cover their own costs of a successful defence if this happens. There would be administration burdens on both parties' solicitors and the justice system in terms of new hearings.					
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'		
	One-off	Yrs			
	£ N/A				
	Average Annual Benefit (excluding one-off)		Total Benefit (PV) £ N/A		
	£ N/A				
Other key non-monetised benefits by 'main affected groups' Both claimants and defendants will benefit from being better informed; benefits being greater for defendants as claimants are more likely to be funded by a CFA. The 42-day period would allow defendants more time to investigate a claim without undue pressure. Decisions made by defendants after fuller investigation should result in an outcome that makes society better off through a reduced "chilling effect" on freedom of expression. Both parties will benefit from greater certainty of costs and there would be less need for costs assessment post proceedings.					
Key Assumptions/Sensitivities/Risks					
Price Base Year	Time Period Years	Net Benefit Range (NPV) £ N/A		NET BENEFIT (NPV Best estimate) £ N/A	
What is the geographic coverage of the policy/option?			England & Wales		
On what date will the policy be implemented?			1 October 2009		
Which organisation(s) will enforce the policy?			MoJ		
What is the total annual cost of enforcement for these organisations?			£ N/A		
Does enforcement comply with Hampton principles?			Yes		
Will implementation go beyond minimum EU requirements?			No		
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	£	Decrease	£	Net	£
Key:					Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

- 1.1 This Impact Assessment looks at the costs and benefits of the options considered for controlling costs in defamation proceedings, and in particular the option being pursued in the light of responses to the consultation paper. The assessment is undertaken in line with the criteria set out in the Impact Assessment Guidance.¹
- 1.2 The aim of the proposals is to improve transparency in relation to after the event (ATE)² insurance and control better the costs of defamation proceedings and would be introduced in England and Wales only. Views were considered from legal professionals, the media, insurers, legal representative organisations, the judiciary, academics, the Association of Law Costs Draftsmen and members of the public.

Scope of the proposals

- 1.3 The consultation paper sought views on a package of measures, which will be discussed later on in the options. Following consultation the Ministry has decided to introduce the following measures:
- to link the recovery of ATE insurance to notification, for all civil litigation;
 - to introduce, in publication proceedings, a period during which the defendant may admit liability and make an offer leading to settlement of the case without having to pay the ATE insurance premium; and
 - to introduce a mandatory costs budgeting pilot for defamation and malicious falsehood proceedings.

Organisations in the scope of the legislation

- 1.4 The main groups affected by the proposals are:
- Solicitors, claimants and defendants in all civil proceedings where ATE insurance is taken out (usually those funded by a conditional fee agreement). The proportion of cases funded by conditional fee agreements varies depending on the type of case. They are for example often used in personal injury claims, but rarely if ever used in debt claims. Although any party may use Conditional Fee Agreement (CFA) arrangements, claimants most frequently use them. The proposals will have a greater effect in the types of case where costs and ATE insurance premiums are relatively high, such as publication proceedings.
 - ATE insurers - in particular those providing services for publication proceedings. Whilst there are a good number of insurance companies offering ATE insurance only a relative few, perhaps less than half a dozen, currently offer ATE insurance in publication proceedings on a regular basis.
 - The civil courts dealing with civil proceedings on costs assessment (including publication proceedings) where there is an issue as to whether there has been compliance with the new rules such that ATE insurance premiums should not be payable. There are 216

¹ <http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html>

² After the Event insurance provides insurance against a party having to pay the litigation costs of their opponent in the event that the insured party is unsuccessful. It may also cover the costs of the party's own Counsel's fees and disbursements against the event that they are not recovered from the other party. It is most often taken out in association with Conditional Fee Agreements (often referred to as no-win no-fee arrangements).

county courts in England and Wales. The measures would also apply to cases proceeding in the High Court, the Court of Appeal and the House of Lords. The costs budgeting pilot would affect only the Royal Courts of Justice and Manchester County Court, where the costs budgeting pilot will operate.

- The media, media organisations and other publishers involved in publication proceedings – this may include newspapers, magazines, book publishers, internet service providers, non-departmental public bodies, charities and any other organisation publishing reports or information.

2. Rationale for Government Intervention

- 2.1 The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way markets operate or it would like to correct existing institutional distortions e.g. existing laws or legislation. Government also intervenes for equity or fairness reasons. In this context the relevant “market” of interest is defamation proceedings, specifically in the context of the excessive costs associated with them. The question is whether the current situation leads to failures, which need to be corrected. In economic terms, we are essentially asking whether the high levels of legal costs in defamation and some other publication proceedings as they currently stand ignore the wider costs on society, that when properly corrected would be eliminated.
- 2.2 There are reasons to believe that the effect of the provisions on recoverable costs in publication proceedings does lead to some “market failures.”
- 2.3 The effect of the high costs of defamation proceedings are potentially two-fold:
 - Defendants, faced with the potential costs of a case if they lose, choose to settle a case rather than pursue the case to trial, even where they believe they have a reasonable chance of winning. The higher the potential costs the more risk averse defendants are likely to be. Lack of information about any ATE insurance that the claimant may have and therefore their chance of recovering costs if ultimately successful, exacerbates this risk as does lack of clarity about the defendants potential liability for costs, even once proceedings have commenced. In cases where the chance of success is not sufficiently high to risk a trial and liability for costs, they will try to settle the matter to limit their costs exposure even where there is a reasonable chance of success at trial.
 - The threat of high costs may also cause media organisations and other publishers to be more cautious in publishing information that could potentially be of a defamatory nature or for example a breach of confidence, which has a wider cost to society.
- 2.4 The high costs and the lack of information and uncertainty of the scale of the costs involved in defending defamation or other publication related proceedings could result in an increasing number of media organisations becoming reluctant to publish stories that may be in the public interest. As a result the whole of society may suffer from the “*chilling effect*,” due to the current costs of defamation proceedings potentially having the unintended consequence of reducing freedom of expression.
- 2.5 There is little incentive for a client with a CFA to seek to limit his or her solicitor’s hourly rates or the overall costs charged, therefore potentially increasing the costs for the defendant if they lose the case. In addition the area of defamation law is a small market in which a few solicitors operate and the hourly rates may be less affected by competition

than in other areas, resulting in higher costs in defamation proceedings than other types of proceedings.

- 2.6 The effect of high costs on the media's ability and willingness to investigate and publish stories in the public interest may be particularly acute in relation to the local media and small publishers, whose budgets are considerably smaller.
- 2.7 Overall the high levels of costs in publication proceedings is a concern for the government because excessive costs may force defendants to settle unmeritorious claims, which in turn threatens a more risk averse approach to reporting and some argue is a risk to freedom of expression for society.
- 2.8 In addition extending the information requirements on ATE insurance to all civil disputes, will mean that the parties are better informed at the outset about the risks of pursuing a dispute, in particular the risk of not recovering their costs in the event of success. This should help both parties make better decisions about whether and how to proceed.

3. Cost Benefit Analysis

- 3.1 This section sets out some potential costs and benefits of various options under consideration in relation to the high costs of defamation proceedings.

OPTION 0

BASE CASE (“Do nothing”)

Description

- 3.2 The Impact Assessment and HMT Treasury Green Book Guidance requires that all options are assessed relative to a common “base case.” The base case for this Impact Assessment has been assumed to “do nothing.”
- 3.3 Making no change would result in defendants continuing to be at risk of high costs and under financial pressure to settle disputes which on balance they believe they would have a reasonable chance of winning at trial. Where early settlement is agreed, defendants will continue to have to pay the amount of any insurance premium entered into by the claimant and due at the point of settlement, even where no or only modest damages are to be paid.
- 3.4 If no action is taken there may be a continuation, and in the present economic climate, a worsening of the present position in which newspapers and other organisations may either pull back from publishing stories that are in the public interest. They may also be forced to settle claims and retract stories because of the risk of having to pay the claimant's considerable costs if they lose.
- 3.5 The Media Lawyers Association has provided data on the costs arising in 154 libel and privacy cases resolved during 2008 both to Lord Justice Jackson for his review of civil litigation³ and to the Ministry of Justice. This data was provided by 9 national newspaper groups, broadcasters and news agencies and the Newspaper Society that represents the interests of local newspaper publishers. The average costs paid or claimed⁴ per case for both parties in these 154 cases was £94,211 (although total costs were £5,000 or below

³ This is included as Appendix 17 to the Review of Civil Litigation Costs: Preliminary Report published on 8 May 2009 and available at www.judiciary.gov.uk

⁴ In some cases costs had not yet been agreed or assessed

in just over 40% of cases). Total costs paid or claimed were just over three times the amount of damages paid.

- 3.6 There are around 220 defamation cases issued in the High Court at the Royal Courts of Justice every year. A few cases are also issued at other courts in England and Wales although the numbers are not recorded. No figures are available on either the number of defamation disputes that settle pre-proceedings or how many other publication proceedings are issued. For the purpose of the consultation paper we estimated that there were around 300 such disputes a year (i.e. that around 27% of cases settled pre-proceedings with court proceedings issued in 73% of cases)⁵. However, a solicitor's representative organisation responding to the consultation paper suggested that this figure was flawed in that the suggested percentage of disputes where court proceedings are issued is extremely high in comparison with other types of litigation. They thought it more likely that proceedings are issued in around 10% of defamation cases.

OPTION 1

- 3.7 This option considers a package of 2 measures where each component will be assessed individually.

Measure (a) Description

- 3.8 **The parties will be required to notify each other if they take out ATE insurance, with the letter of claim or within 7 days of taking out the insurance policy if later. Failure to do so will normally result in the insurance policy not being recoverable from the other party⁶. The parties will also be required to provide details of the level of cover, whether the premiums are staged and if so the points at which additional premiums become payable in addition to information which is already required⁷.**

Costs of Measure (a)

- 3.9 Early notification of ATE insurance, including the provision of the additional information on staged premiums is already common practice and in accordance with the guidance set out in the protocols supporting the Civil Procedure Rules. As the additional information required is limited and clearly defined it should not be onerous or costly to provide it.

Benefits of Measure (a)

Claimants

- 3.10 For the claimant to be given earlier notice of any funding arrangements entered into by the defendants' solicitors there is a benefit to them of being better informed before they commence proceedings. The claimant will be able to undertake a better risk assessment of the liabilities he/she faces if his claim is unsuccessful and greater certainty as to the powers of the court to disallow recovery of the ATE insurance premium if notice is not given. Information about the stages at which an ATE insurance premium becomes payable will focus the parties on the relevant dates and may, in particular where ATE insurance premiums are substantial, encourage early settlement.

Defendants

⁵ Based on the previous consultation *Conditional Fee Agreements in Publication Proceedings - Success fees and After the Event Insurance*

⁶ Although the party failing to recover the cost may apply for relief from sanction under CPR 3.8

⁷ Section 19.4 (3) (a) of the Costs Practice Direction requires the following to be provided: the name and address of the insurer, the policy number and the date of the policy; and the claim or claims to which the insurance relates.

- 3.11 As claimants above. However the benefits for defendants are likely to be more significant because claimants are more likely than defendants to be funded by way of a CFA.

Wider Society

- 3.12 Where the parties have better information about any ATE insurance that the other party has taken out, they will be able to make a more informed choice about the risks of pursuing the dispute. This may correct the information imperfection that exists and results in other unintended consequences, impacting the individuals concerned and those that affect that wider society such as the “chilling effect.”

Measure (b) Description

- 3.13 There would be a 42 day period during which the defendant may admit liability which if it leads to settlement of the case, the defendant will not be required to pay the insurance premium, which is relatively higher in publication proceedings than most other types of proceedings.**

Costs of Measure (b)

Claimants

- 3.14 Where settlement is reached as a result of an admission of liability and offer to settle within the 42-day period, claimants will not be able to recover the ATE insurance premium from the defendant. Claimants may have to pay the premium themselves. Alternatively ATE insurance providers may increase the premiums for other cases to cover the unrecovered premiums in cases that settle as a result of an admission within the 42-day period.
- 3.15 An alternative course, suggested by consultation respondents is that ATE insurance may in the future be taken out after the defendant has responded to the letter before claim. This too would be likely to increase insurance premiums, resulting in future defamation claims being more costly to bring to court. This would result in claimants potentially not making a claim. However most ATE insurance premiums are self insuring so that the premium is only payable if the insured party is successful in which case the premium would be recoverable from the losing party. This means that claimants would rarely have to pay an increased premium.
- 3.16 A further possibility is that ATE insurers would withdraw from the market for ATE insurance in publication proceedings. In this case, only claimants with sufficient means to pay for legal representation on a standard hourly basis and to take the risk of losing their case would be able to issue legal proceedings. Although several respondents to the consultation paper, including insurers raised this possibility, it was put no higher than a possibility.
- 3.17 At present, ATE insurance premiums in publication cases are generally staged, with stage 1 premiums of around £1,000 - £2,000 for cases that settle within 14 days of notification of the claim, up to £65,000 for cases settled at trial (in both cases for £100,000 of cover). Premiums for a new longer stage (up to 42 days from the date of notification) may be higher than the current £1,000 - £2,000.

Defendants

- 3.18 In the future, due to the increased premiums, claimants may choose not to take out ATE insurance, resulting in defendants having to cover their own costs of a successful defence.

Benefits of Measure (b)

Defendants

- 3.19 The 42-day period of non-recoverability will allow time for defendants to investigate the claim and where appropriate admit liability and offer to settle. The potential of lower costs should continue to provide an inducement for realistic early settlement of cases (so reducing costs without putting undue pressure on defendants to settle quickly).
- 3.20 At present different ATE insurers may set different periods for application of the stage 1 premium, so that even where defendants are aware of the period, they may have different times within which to respond if they are to avoid paying higher ATE insurance premiums for later stages. The new 42-day period rule will bring certainty, as it will apply to all publication disputes where the claimant has taken out ATE Insurance.

Wider Society

- 3.21 Decisions made by the defendants after fuller investigation, where necessary, using all the possible information available to them should result in an outcome that makes society better off through a reduced “chilling effect” on freedom of expression.

OPTION 2

This option considers a package of 3 measures. Measures (a) and (b) are as set out at option 1 above and measure (c) – a 12-month costs budgeting pilot.

Measure (c) Description

- 3.22 This is a 12-month mandatory costs budgeting pilot for defamation and malicious falsehood cases, where the judge will consider and approve or otherwise the parties’ updated costs budgets at each stage of the proceedings and take case management decisions in the light of those costs. The aim of the pilot is that the resulting costs are proportionate to the value of the claim and the reputational issues at stake.**

Costs of Measure (c)

Claimants and Defendants

- 3.23 The costs estimates provided by the parties will impose an administration burden on the solicitors, as they are required to submit extra information. These additional costs should not be substantial, as solicitors are already required to prepare and provide their clients with cost estimates as part of their on-going professional responsibilities. Additional costs will also be incurred from regular liaison between the parties’ solicitors as to progress against the budget and discussion of respective budgets before each hearing. These additional costs would add to the costs of the case to be borne by the unsuccessful party.
- 3.24 The level of additional costs that might be incurred by the parties will depend on the length of the proceedings, the number of additional costs management hearings required and the additional time taken to prepare and consider the costs aspects of the case at each hearing. For example, if monthly consideration of expenditure against budget and liaison with the other party were to take an hour of a Grade B fee earner’s time, at an average of London 1 and London 2 Guideline Hourly Rates, this would be £264 for each party. Over a period of 12 months this would add an additional £6,336 to the base costs of the case. A 30-minute costs management hearing by telephone that required 3 hours preparation by each side would cost around £1,700. The level of additional costs incurred by the parties and the court will be considered as part of the pilot evaluation.

The Justice System

- 3.25 There will be additional costs on the justice system. These will arise from (new) costs management hearings where these are necessary, additional preparation for these hearings and the additional hearing time required to consider the costs aspects of the case at the trial and conventional case management hearings.

Benefits of Measure (c)

Claimants and Defendants

- 3.26 Both parties will have greater certainty early in the proceedings as to the costs that they face if they lose the case, with their solicitors being able to provide better informed advice as to the risks of continuing to trial. Court scrutiny and case management should avoid unnecessary and unreasonable costs being accrued by either party or if accrued will prevent them from being recovered from the other party. When compared to the base-case scenario each party will be better informed and have more certainty at each stage of the court proceedings of the likely costs that they face if they lose and the court will avoid unnecessary or unreasonable costs through the directions that it gives.
- 3.27 There would also be less need for detailed costs assessments post proceedings, resulting in a saving for the parties and the justice system.

Wider Society

- 3.28 There are likely to be wider benefits to society from measure (c) from a reduced “chilling effect.” The current legal position may have the unintended consequence of reducing freedom of expression as publishers will often take a decision on the basis of financial risk. In so far as this measure prevents this from happening, on the basis of the costs threat rather than the strength of the defendant’s case, this would enhance greater freedom of expression.

OPTION 3

The consultation paper sought views on a package of measures as follows:

- 3.29 Measure A - Maximum recoverable or fixed recoverable hourly rate: This proposal would limit the hourly rate that solicitors may recover from the losing party. A claimant solicitor would be free to charge his client more than the hourly rate but, if the case were successful, would only then be able to recover the specified hourly rate from the losing party.
- 3.30 Measure B - Mandatory cost capping or mandatory consideration of cost capping: This would require the courts either to make or consider making an order specifying the total base costs, including disbursements that can be recovered from the other party. This would control the process of litigation so that only necessary and proportionate work is undertaken. It would also put each party in a better position to gauge the costs risk they face from an early stage in the proceedings.
- 3.31 Measure C - Linking recoverability of ATE insurance to notification and introducing a period of non-recoverability post notification: This proposal would require the parties to notify each other if they take out ATE insurance at the earliest possible point in the proceedings, including additional information about the ATE insurance, and ensure that the defendant will always have a period of time to admit liability without having to pay the

insurance premium (Option 1 above, is based on Measure C as adjusted to take account of responses to the consultation paper).

- 3.32 Measure D - Requiring the courts to consider proportionality of total costs on cost assessments, not just base costs. Currently there is no provision, which requires the court to consider the proportionality of total costs (including ATE insurance premiums and success fees). Introducing this test would allow the courts to disallow any costs that fell above the level of total costs that would be considered proportionate for the case.

Costs of Option 3

- 3.33 In addition to the costs and benefits set out for Option 1 (a) and (b) above, the successful party would have to meet any difference between the maximum recoverable hourly rate and the rate charged by their solicitor, and, their own legal costs and the amount awarded by the court as recoverable from the unsuccessful party under the new test of proportionality. To minimise their risks claimants would seek solicitors offering client rates at or near the level of the maximum recoverable hourly rates.
- 3.34 There would also be considerable additional costs to both parties as a result of costs capping hearings (at least double our original estimates of between £2,700 and £3,700) and applications to vary or appeal the cap.

Benefits of Option 3

- 3.35 In addition to the costs and benefits set out for Option 1 (a) and (b) above, a maximum recoverable hourly rate and formalised costs capping procedures would increase certainty for the parties, their solicitors and ATE insurers about the likely level of recoverable costs from an early stage in proceedings, allowing the risks of proceeding with the case to be better assessed. A maximum recoverable hourly rate would reduce the time taken to debate and agree or dispute through the court, the rate to be paid by the paying party. This would be a costs saving to both parties, their solicitors and the court. Costs capping would improve case management and costs control by the parties and should reduce the need for detailed post trial costs assessment. Requiring the courts to consider the proportionality of total costs (including success fees and ATE insurance) would act as a further deterrent to excessive costs to encourage tighter case management by the parties. All the measures would reduce or avoid excessive costs being recoverable from the media if they are unsuccessful in defending a claim, which would in turn reduce the threat of excessive costs and the potential risk to freedom of expression.

SUMMARY OF OPTIONS

- 3.36 Option 1 is a limited intervention, that (i) clarifies and extends a best practice in providing early and full information about ATE insurance and the sanctions that apply if the information is not provided and (ii) provides limited non-recoverability of an element of costs (ATE insurance premiums) in CFA funded publication proceedings. This element will go some way to controlling costs in publication proceedings whilst at the same time encouraging pre-trial settlements, so reducing costs for both parties. It will not however control all elements of litigation costs in the way that the implementation of the full package may have done.
- Benefits are that all parties to proceedings will have better information about the funding arrangements of a CFA funded opponent in a dispute and will be able to take account of these in deciding whether and how to proceed with the case. In publication proceedings the costs of defendants who settle early will be reduced, thus reducing the threat of high costs and earlier settlements may reduce the total costs

for both parties and have some impact on the threat of high costs to freedom of expression.

- However, the ATE premiums in cases that do not settle are likely to rise.

3.37 Option 2 is a package of measures that would better control more aspects of the costs of publication proceedings (base rates, including disbursements and ATE insurance).

- Benefits are as above. In addition for those cases covered by the pilot, costs should be better controlled and both parties will benefit from better information about the costs risks if they face if they lose. In so far as this option better controls the costs of publication proceedings there should be a greater reduction in the threat of excessive costs and less risk to freedom of expression than Option 1.
- Costs as above. However there will be additional costs to the parties in cases involved in the mandatory costs budgeting pilot for preparation, attendance at court and monitoring/liasing on costs monitoring.

3.38 Option 3 is a package of measures that would more fully control all aspects of the costs of publication proceedings (base rates, including disbursements, success fees and ATE insurance). On the basis of advice from the Advisory Committee on Civil Costs and considerations of the Civil Procedure Rule Committee, the Ministry have decided not to pursue measures A, B or D of Option 3.

- Benefits are as option 1. There would however be greater certainty for the parties their solicitors and ATE insurers about the likely level of recoverable costs allowing the risks of proceeding to be event better assessed. There should be tighter costs control by the parties as a result of costs capping and a reduced need for costs assessment post proceedings, so reducing costs for both parties. This package would potentially have the most impact on the threat that high costs pose to publishers' freedom of expression.
- Costs are as option 1. However there would be considerable additional costs arising from costs capping.

Enforcement and Implementation

3.39 The measures outlined in option 1 are included in amendments to the Civil Procedure (Amendment) Rules 2009 and associated practice directions and pre-action protocol and will come into effect on 1 October 2009. Sanctions for non-compliance are included within the Civil Procedure Rules and will be enforced by the court.

3.40 The additional measure in option 2 will be introduced by practice direction and will also come into effect on 1 October 2009. Sanctions for non-compliance are already included within the Civil Procedure Rules and will be enforced by the court

4. Impact Tests

4.0 A number of Impact Tests have been developed which need to be considered where applicable.

Competition Assessment

4.1 We asked in the consultation paper (question 11) whether there were any competition issues that should be take into account in implementing these proposals. There were 13

responses to this question. The main concern was that limiting recoverable costs (whether the hourly rates charged or more generally through the other measures proposed) would deter solicitors from taking on work, which would impair competition and reduce consumer choice. Reduced competition could, in the long term, increase costs for both claimants and defendants. However, one respondent (a media representative) noted the lack of a 'proper' market for ATE insurance and thought that once litigation costs were better controlled, other ATE providers would emerge, so increasing competition and reducing insurance costs.

- 4.2 One legal representative thought that costs capping would impact on the market shares of solicitors and barristers in that a costs-capped solicitor would be under pressure to keep work within the firm and less likely to instruct Counsel (changes to the rules on costs capping are not now being pursued). Whilst one respondent from the 'other' category, commented that CFA and ATE insurance markets did not appear to be functioning well currently and suggested that it might be time to refer them to the Competition Commission.
- 4.3 Two respondents to question 5 of the consultation paper were concerned that the introduction of a period of non-recoverability of ATE insurance premiums may cause an ATE provider to withdraw from the defamation/publication proceedings market if the reward was not sufficient to generate a potential profit. However insurers who responded included no more detail about the likelihood of this scenario. We anticipate that ATE insurers will adjust their charging regimes to take account of the period of non-recoverability i.e. by introducing staged premiums in all cases and/or reducing the insurance premiums at the early stages and increasing the later staged premiums. Therefore we do not think that there will be a significant effect on competition within the ATE insurance or legal provider markets.

Small Firms Impact Test

- 4.4 A number of solicitors firms, in particular those operating in the field of publication proceedings, are small to medium sized businesses.
- 4.5 There are likely to be minimal costs arising from the proposals for early notification of ATE insurance and we have not identified any obvious disadvantage or potential costs to small firms from these proposals. Small to medium sized legal businesses operating in the field of publication proceedings are more likely to be specialist firms dealing substantially with publication proceedings. They may be more affected by the proposals for non-recoverability of ATE insurance than other businesses.
- 4.6 To obtain information for the purpose of this impact assessment we asked respondents to the consultation paper what would be the potential costs/savings to their business of the proposals (question 10) and sent copies of the consultation paper specifically to legal firms acting in the field of publication proceedings who are small to medium sized businesses.. Twelve responses were received to this question. Six were from respondents who identified themselves as, or we have identified as being, small or medium sized businesses.
- 4.7 Of these, one, a legal representative, said that lower costs may mean more work as people would not be priced out of the market, but that lower hourly rates might mean that solicitors would be unwilling to take on this type of work or would do so but would not instruct Counsel. Two others noted that there would be no costs savings for the firm. One of these thought that additional court hearings that would be generated by the proposals would only add to the overhead costs for solicitors which are not usually recoverable as part of the costs of litigation. However this concern seems to relate

primarily to the costs capping proposals which are not being implemented., Others commented that the proposals would be costs neutral.

4.8 No data or concerns were raised about start up costs.

Legal Aid and Justice Impact Test

4.9 Defamation and other publication proceedings are an area of law which is excluded from legal aid. The proposals for a costs budgeting pilot and for a 42 day period of non-recoverability will have no impact on the legal aid fund. However, in other types of proceedings, where one of the parties is legally aided and the non-legally aided party has taken out ATE insurance, the solicitor acting for the legally aided party will have fuller and earlier information about any ATE insurance taken out by the opposing party on which to assess the risks of the case.

Equality Impact Assessment

4.10 The initial equality impact screening considered the impact on different groups in terms of: disability; gender; age; religion and belief or sexual orientation. We concluded that the proposals would not have any positive or adverse impacts. However we had no information on whether any of these groups are more likely to be involved in defamation proceedings, which could have affected our assessment. The consultation paper therefore asked whether respondents agreed with our initial view that the proposed changes would have no equality impacts (question 9).

4.11 15 respondents answered this question. 5 respondents agreed with our conclusion. One, legal representative, suggested that minority groups are more likely to be of limited means and more likely to benefit from the measure proposed, which in their view would prevent publishers from frightening claimants away from bringing genuine claims.

4.12 Those that disagreed generally did so on the basis that non-wealthy claimants would be disadvantaged by the proposals and that the current financial imbalance between defendant media organisations and individual claimants would be exacerbated by the proposals. Others argued that the measures would reduce access to justice.

4.13 There was no suggestion that any group would be particularly affected in respect of the factors noted above or that any one group would be more involved in defamation proceedings.

Human Rights

4.14 The policy aims to reduce the possibility that in some publication proceedings, the litigation costs could be so high as to constitute an interference with Article 10 rights and the threat that excessive costs may pose to the Article 10 rights of the media and other publishers.

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	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	No	No

Annex B – List of respondents

Media Organisations

Associated Newspapers Ltd
The British Broadcasting Association
British Sky Broadcasting Group
Channel 4 Television
Channel 5 Broadcasting Limited
CN Group
Economist Group
Express Newspapers
The Financial Times Ltd
Guardian News & Media Limited
Herald Times Group
Independent News and Media Limited
ITN (Independent Television News) Ltd
ITV PLC
KM Group
Macmillan Publishers Limited
Media Lawyers Association
National Magazine Company
Newsgroup Newspapers Ltd
Newspaper Publishers Association
The Newspaper Society
Newsquest Media Group Ltd
NI Free Newspapers Ltd
Northcliffe Media Limited
PPA (Periodical Publishers Association)
The Press Association
Private Eye
The Publishers Association Ltd
The Society of Editors
Telegraph Media Group
Thomson Reuters

Times Newspapers Limited

Trinity Mirror PLC

Legal Representatives

Adam Speker

Addleshaw Goddard LLP

Associated Newspapers Ltd

Beachcroft

Bell Lax

Carter Ruck

Clifford Chance LLP

Davenport Lyons

Eversheds LLP

Farrer & Co

Goodman Derrick LLP

Herbert Smith LLP

Jacob Dean

Jonathan Coad

Olswang

Reynolds Porter Chamberlain LLP

Schillings, Russell Jones & Walker, Swan Turton (joint response)

Wiggin LLP

Legal representative organisations

City of London Law Society

London Solicitors Litigation Association

The Law Society

Judiciary

Master Campbell

Master of the Rolls

HHJ Richard Holman

Insurers

AXIS Specialty Europe Limited

Hiscox

QBE Insurance (Europe) Ltd

Other Respondents

Association of Law Costs Draftsmen

Dr Adair Richards JP

Elaine Maria Decoulos

Michael Leo Johnson

Professor Alastair Mullis

Professor Gillian Douglas

Annex C – Amendments to Rules, Practice Directions and Pre-Action Protocols required to implement the measures

Amendments to CPR Part 44

Costs-only proceedings

44.12A

- (1) This rule sets out a procedure which may be followed where –
 - (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
 - (b) they have failed to agree the amount of those costs; and
 - (c) no proceedings have been started.
- (2) Either party to the agreement may start proceedings under this rule by issuing a claim form in accordance with Part 8.
- (3) The claim form must contain or be accompanied by the agreement or confirmation.
- (4) Except as provided in paragraph (4A) **(and subject to rule 44.12B)**, in proceedings to which this rule applies the court –
 - (a) may
 - (i) make an order for costs to be determined by detailed assessment; or
 - (ii) dismiss the claim; and
 - (b) must dismiss the claim if it is opposed.
- (4A) In proceedings to which Section II of Part 45 applies, the court shall assess the costs in the manner set out in that Section.

Costs-only proceedings – costs in respect of insurance premium in publication cases

44.12B

- (1) If in proceedings to which rule 44.12A applies it appears to the court that—**
- (a) if proceedings had been started, they would have been publication proceedings;**

(b) one party admitted liability and made an offer of settlement on the basis of that admission;

(c) agreement was reached after that admission of liability and offer of settlement; and

(d) either—

(i) the party making the admission of liability and offer of settlement was not provided by the other party with the information about an insurance policy as required by the Practice Direction on Pre-Action Conduct; or

(ii) that party made the admission of liability and offer of settlement before, or within 42 days of, being provided by the other party with that information,

no costs may be recovered by the other party in respect of the insurance premium.

(2) In this rule, “publication proceedings” means proceedings for—

(a) defamation; _____

(b) malicious falsehood; or

(c) breach of confidence involving publication to the public at large.

Amendments to the Practice Direction (Pre-Action Conduct) and the Costs Practice Direction – requiring information early information to be provided about ATE insurance premiums.

Practice Direction (Pre-Action Conduct)

Information about funding arrangements

9.3 Where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k), that party **must** inform the other parties about this arrangement as soon as possible, **and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim.**

(CPR rule 44.3B(1)(c) provides that a party may not recover certain additional costs where information about a funding arrangement was not provided.)

Costs Practice Direction (supplementing CPR Parts 43-48)

Method of giving information

19.2

- (1) In this paragraph, 'claim form' includes petition and application notice, and the notice of funding to be filed or served is a notice containing the information set out in Form N251.
- (2)
 - (a) A claimant who has entered into a funding arrangement before starting the proceedings to which it relates must provide information to the court by filing the notice when he issues the claim form.
 - (b) He must provide information to every other party by serving the notice. If he serves the claim form himself he must serve the notice with the claim form. If the court is to serve the claim form, the court will also serve the notice if the claimant provides it with sufficient copies for service.
- (3) A defendant who has entered into a funding arrangement before filing any document
 - (a) must provide information to the court by filing notice with his first document. A 'first document' may be an acknowledgement of service, a defence, or any other document, such as an application to set aside a default judgment.
 - (b) must provide information to every party by serving notice. If he serves his first document himself he must serve the notice with that document. If the court is to serve his first document the court will also serve the notice if the defendant provides it with sufficient copies for service.
- (4) In all other circumstances a party must file and serve notice within 7 days of entering into the funding arrangement concerned.

(Practice Direction (Pre-Action Conduct) provides that a party **must** inform any other party as soon as possible about a funding arrangement entered into prior to the start of proceedings.)

Information which must be provided

- (1) Unless the court otherwise orders, a party who is required to supply information about a funding arrangement must state whether he has –
entered into a conditional fee agreement which provides for a success fee within the meaning of section 58(2) of the Courts and Legal Services Act 1990;
taken out an insurance policy to which section 29 of the Access to Justice Act 1999 applies;
made an arrangement with a body which is prescribed for the purpose of section 30 of that Act;
or more than one of these.
- (2) Where the funding arrangement is a conditional fee agreement, the party must state the date of the agreement and identify the claim or claims to which it relates (including Part 20 claims if any).
- (3) Where the funding arrangement is an insurance policy, the party must
(a) state the name and address of the insurer, the policy number and the date of the policy, and identify the claim or claims to which it relates (including Part 20 claims if any);
(b) state the level of cover provided by the insurance; and
(c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable.
- (4) Where the funding arrangement is by way of an arrangement with a relevant body the party must state the name of the body and set out the date and terms of the undertaking it has given and must identify the claim or claims to which it relates (including Part 20 claims if any).
- (5) Where a party has entered into more than one funding arrangement in respect of a claim, for example a conditional fee agreement and an insurance policy, a single notice containing the information set out in Form N251 may contain the required information about both or all of them.

PRACTICE DIRECTION 51D – DEFAMATION PROCEEDINGS COSTS MANAGEMENT SCHEME

This Practice Direction supplements CPR Parts 29 and 44

Contents of the Practice Direction

General	Paragraph 1
Modifications of relevant practice directions	Paragraph 2

Detail of the scheme

Preparation of the costs budget	Paragraph 3
Discussions between parties and exchange of budgets	Paragraph 4
Effect of budget on case management and costs	Paragraph 5

General

- 1.1** This Practice Direction is made under rule 51.2. It provides for a pilot scheme (the Defamation Proceedings Costs Management Scheme) to—
- (1) operate from 1 October 2009 to 30 September 2010;
 - (2) operate in the Royal Courts of Justice and the District Registry at Manchester;
 - (3) apply to proceedings in which the claim was started on or after 1 October 2009.

(Rule 30.2(4) enables cases issued at other district registries to be transferred to London or Manchester if those court centres are more appropriate.)

- 1.2** The Defamation Proceedings Costs Management Scheme will apply to proceedings which include allegations of—
- (1) libel;
 - (2) slander; and/or
 - (3) malicious falsehood.

- 1.3** The Defamation Proceedings Costs Management Scheme provides for costs management based on the submission of detailed estimates of future base costs. The objective is to manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing. Solicitors are already required by paragraph 2.03 of the Solicitors Code of Conduct 2007 to provide costs budgets to their clients.

Accordingly, it should not be necessary for solicitors to incur substantial additional costs in providing costs budgets to the court.

Modifications of relevant practice directions

2 During the operation of the Defamation Proceedings Costs Management Scheme—

Use of costs budgets in case and costs management

- (1) The practice direction supplementing Part 29 is modified by inserting after paragraph 3A—

“Case management and costs in defamation proceedings

3B In cases within the scope of the Defamation Proceedings Costs Management Scheme provided for in practice direction 51D, the court will manage the costs of the litigation as well as the case itself, making use of case management conferences and costs management conferences in accordance with that practice direction.”

Estimates of costs to be detailed budgets

- (2) Paragraph 6.4(1)(a) of the Costs Practice Direction does not apply to proceedings within the scope of the Defamation Proceedings Costs Management Scheme.
- (3) Section 6 of the costs practice direction is modified by substituting for paragraph 6.5 the following—

“Costs budgets in defamation proceedings

6.5 In proceedings within the scope of the Defamation Proceedings Costs Management Scheme provided for in practice direction 51D the estimate of costs must be presented as a detailed budget setting out the estimated costs for the entire proceedings, in a standard template form following the precedent described as Precedent HA and annexed to that practice direction.”

Preparation of the costs budget

3.1 Each party must prepare a costs budget or revised costs budget in the form of Precedent HA—

- (1) in advance of any case management conference or costs management conference;

- (2) for service with the pre-trial checklist;
- (3) at any time as ordered to by the court.

3.2 A litigant in person shall not be required to prepare a costs budget unless the court otherwise orders.

3.3 Each party will include separately in its costs budget reasonable allowances for—

- (1) intended activities, for example: disclosure, preparation of witness statements, obtaining expert reports, mediation or any other steps which are deemed necessary for the particular case;
- (2) specified contingencies, for example: any application on meaning (if required); specific disclosure applications (if an opponent fails to give proper disclosure); resisting applications (if made inappropriately by opponent);
- (3) disbursements, in particular, court fees, counsel's fees and any mediator or expert fees.

3.4 Each party must update its budget for each subsequent case management conference or costs management conference and for the pre-trial review. This should enable the judge to review the updated figures, in order to ascertain what departures have occurred from each side's budget and why.

Discussions between parties and exchange of budgets

4.1 During the preparation of costs budgets the parties should discuss the assumptions and the timetable upon which their respective costs budgets are based.

4.2 The parties must exchange and lodge with the court their costs budgets in the form of Precedent HA not less than 7 days before the date of the hearing for which the costs budgets are required.

4.3 A budget provided to the court will not (unless the providing party consents) be released to any other party (except a litigant in person) until that party is ready to exchange.

Effect of budget on case management and costs

5.1 The court will manage the costs of the litigation as well as the case itself in a manner which is proportionate to the value of the claim and the reputational issues at stake. For this purpose, the court may order attendance at regular hearings ("costs

management conferences”) by telephone wherever possible, in order to monitor expenditure.

- 5.2** At any case management conference, costs management conference or pre-trial review, the court will have before it the detailed costs budgets of both parties for the litigation, updated as necessary, and will take into account the costs involved in each proposed procedural step when giving case management directions.
- 5.3** At any case management conference, costs management conference or pre-trial review, the court will, either by agreement between the parties or after hearing argument, record approval or disapproval of each side's budget and, in the event of disapproval, will record the court's view.
- 5.4** Directions orders produced at the end of case management conferences and/or costs management conferences must be given to the parties on each side by their respective lawyers, together with copies of the budgets which the court has approved or disapproved.
- 5.5** Solicitors must liaise monthly to check that the budget is not being exceeded. In the event that the budget is exceeded, either party may apply to the court to fix a costs management conference as described in paragraph 5.1 above.
- 5.6** The judge conducting a detailed or summary assessment will have regard to the budget estimates of the receiving party and to any view previously expressed by the court pursuant to paragraph 5.3. Unless there has been a significant change in circumstances the judge will approve as reasonable and proportionate any costs claimed which fall within the last previously approved budget. Save in exceptional circumstances the judge will not approve as reasonable and proportionate any costs claimed which do not fall within the last previously approved budget.

Controlling costs in defamation proceedings summary of responses

Claimant / Defendant's estimate of costs dated []

In the: [to be completed]
 Parties: [to be completed]
 Claim number: [to be completed]

Work done / to be done	Assumptions [to be completed as appropriate]	Disbursements	Profit Costs	Total
Pre-action costs		£0.00	£0.00	£0.00
Issue / pleadings		£0.00	£0.00	£0.00
CMC		£0.00	£0.00	£0.00
Any application on meaning		£0.00	£0.00	£0.00
Disclosure		£0.00	£0.00	£0.00
Witness statements		£0.00	£0.00	£0.00
Expert reports		£0.00	£0.00	£0.00
PTR		£0.00	£0.00	£0.00
Trial preparation		£0.00	£0.00	£0.00
Trial		£0.00	£0.00	£0.00
Settlement		£0.00	£0.00	£0.00
Contingent cost A: [explanation]		£0.00	£0.00	£0.00
Contingent cost B: [explanation]		£0.00	£0.00	£0.00
Contingent cost C: [explanation]		£0.00	£0.00	£0.00
[Insert additional contingent rows as required]		£0.00	£0.00	£0.00
GRAND TOTAL				£0.00

Assumed into the costs of each stage should be the time costs for (a) attendance on own client (b) correspondence with the other party and (c) the general project and strategy management of completing that stage

This estimate excludes:
 VAT [if applicable]
 Costs of detailed assessment
 Success fee [delete if no CFA]
 ATE insurance premium [delete if no ATE insurance]
 Other [to be completed as appropriate]

A breakdown of the above figures is found on the following pages.

In the: [to be completed]
 Parties: [to be completed]
 Claimant / Defendant's estimate of costs dated []
 Claim number: [to be completed]

Delete as applicable:	RATE (per hour)	Incurred / estimated		Incurred / estimated		Incurred / estimated		Incurred / estimated		Incurred / estimated		Incurred / estimated	
		Hours	Total	Hours	Total	Hours	Total	Hours	Total	Hours	Total	Hours	Total
Solicitors' time costs [descriptions to be amendable as applicable to retainer]													
	Partner		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
	Senior associate		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
	Mid level associate		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
	Junior associate		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
	Trainee		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
	Paralegal		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
Expert's costs													
	Fees												
	Disbursements												
Counsel's fees [indicate seniority]													
	Leading counsel		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
	Junior counsel		£0.00		£0.00		£0.00		£0.00		£0.00		£0.00
Court fees													
Disbursements													
Explanation of disbursements [details to be completed]													
Total		0	£0.00	0	£0.00	0	£0.00	0	£0.00	0	£0.00	0	£0.00

In the: [to be completed] **Claimant / Defendant's estimate of costs dated []**
 Parties: [to be completed]
 Claim number: [to be completed]

Delete as applicable:	Incurred / estimated		Incurred / estimated	
	RATE (per hour)	Hours	Contingent cost B: [explanation e.g. specific disclosure application inc. hearing]	Contingent cost C: [explanation]
		Total	Total	Total
Solicitors' time costs				
Partner		£0.00		£0.00
Senior associate		£0.00		£0.00
Mid level associate		£0.00		£0.00
Junior associate		£0.00		£0.00
Trainee		£0.00		£0.00
Paralegal		£0.00		£0.00
Expert's costs				
Fees				
Disbursements				
Counsel's fees				
Leading counsel		£0.00		£0.00
Junior counsel		£0.00		£0.00
Court fees				
Disbursements				
Explanation of disbursements [details to be completed]				
Total		0	£0.00	0 £0.00

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020 3334 3214 or jol.taylor@justice.gsi.gov.uk