



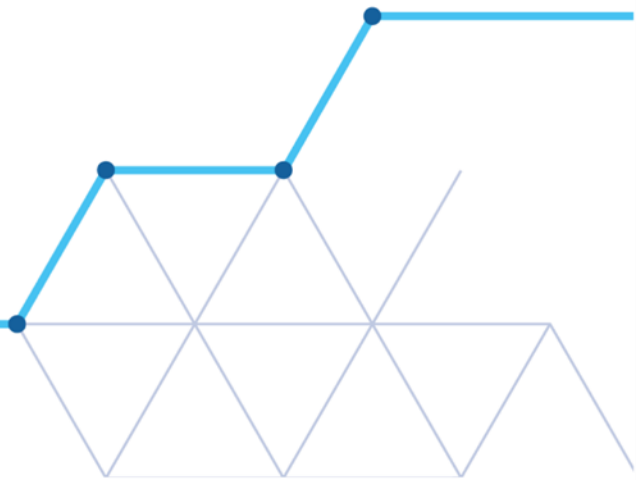
Ministry  
of Justice

# Costs protection in defamation and privacy claims: the Government's proposals

## The Government Response

This response is published on 29 November 2018

Protecting and advancing the principles of justice





Ministry  
of Justice

**The Government's response to '*Costs protection in defamation and privacy claims: The Government's proposals*'**

Response to consultation carried out by the Ministry of Justice.

This information is also available at <https://consult.justice.gov.uk/>

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## Contact details

This document is the Government response to the consultation paper: *Costs protection in defamation and privacy claims: The Government's proposals*.

It will cover:

- the background and way forward following this consultation;
- a summary and detailed response to the specific questions raised in the report; and
- annex of the list of respondents to this consultation

Further copies of this report and the consultation paper can be obtained by contacting the Civil Litigation Funding and Costs Team at the address below:

**Civil Litigation Funding and Costs Team**  
**Ministry of Justice**  
**9.20, 102 Petty France**  
**London SW1H 9AJ**

**Email: [Tajinder.Bhamra1@justice.gov.uk](mailto:Tajinder.Bhamra1@justice.gov.uk)**

This report is also available at <https://consult.justice.gov.uk/>

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

## Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

## Introduction

This is the Government response to the consultation paper, *Costs protection in defamation and privacy claims: The Government's proposals*<sup>1</sup>. The Government's principal conclusions, including the way forward, are set out below.

Following the publication of Sir Brian Leveson's Report in November 2012<sup>2</sup>, the Coalition Government accepted his recommendation<sup>3</sup> – endorsing that of Lord Justice Jackson – that costs protection should be extended to 'publication and privacy cases' as defined<sup>4</sup> (for ease of reference they are referred to here as 'defamation cases'). In respect of civil litigation, costs protection protects parties from the risk of having to pay the other side's legal costs.

Costs protection in the form of 'qualified one-way costs shifting' (QOCS) was introduced in April 2013 for personal injury cases when the Government reformed the way in which 'no win no fee' conditional fee agreements (CFAs) operate. QOCS means that claimants are generally protected from paying the other side's costs if the case is lost. This general protection is subject to the claimant's behaviour (the protection is lost if the claim is 'fundamentally dishonest'), and their acceptance of appropriate offers to settle. Those reforms, contained in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which abolished the payment of a lawyer's success fee by losing defendants, was delayed for defamation cases while the Government sought to develop a bespoke costs protection regime as recommended by the Leveson Report.

The Government asked the Civil Justice Council (CJC) to make recommendations on an appropriate regime. The CJC's report was published on 18 April 2013<sup>5</sup>, and the Government used this as a starting basis for developing the proposals further.

The consultation paper set out the rationale – and detailed proposals - for a new bespoke costs protection regime in defamation<sup>6</sup>, following Sir Brian's recommendations. The costs protection proposals sought to ensure that claimants of modest means would be able to bring claims without the fear of not being able to pay the substantial costs to the other side if the claim is unsuccessful. Likewise, poorer defendants would be able to defend claims on a similar basis. The consultation further proposed that those of substantial means (whether individuals or organisations, such as national newspapers) would be excluded from the costs protection regime, while those of less modest means might have to pay

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<sup>1</sup> [consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/](http://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/)

<sup>2</sup> The Leveson Inquiry - An Inquiry into the Culture, Practices and Ethics of the Press: [www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press](http://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press)

<sup>3</sup> Inquiry Report, chapter 3, para 6.10.

<sup>4</sup> As set out at page 8, para 21 of the consultation paper, the cases covered are defined as:

“(a) “publication and privacy proceedings” means proceedings for—

(a) defamation; (b) malicious falsehood; (c) breach of confidence involving publication to the general public; (d) misuse of private information; or (e) harassment, where the defendant is a news publisher.

“news publisher” means a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs.

<sup>5</sup> [www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/costs-in-defamation-proceedings/](http://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/costs-in-defamation-proceedings/)

something towards the legal costs of the other side if the claim fails. The consultation also invited comments on the draft rules of court.

The consultation was published on 13 September 2013 and closed on 8 November 2013. 48 responses were received. A list of respondents is at Annex A.

While there was some agreement about the case for reform, many respondents cautioned against the introduction of the proposed regime. Concerns included that: that it was overly complicated – particularly in relation to means assessment - and would give rise to satellite litigation; it might encourage speculative or trivial cases being brought by poorer litigants; and it would have a ‘chilling effect’ on investigative journalism.

## Way forward

In light of those concerns, including the potential implications of the new costs protection arrangements as proposed, the Government does not believe that introducing a new bespoke costs protection regime as proposed in the consultation in place of the existing costs protection arrangements is the right way forward.

That said, the Government has decided that section 44 of the LASPO Act – which makes the lawyer’s success fee non-recoverable (that is, no longer payable by losing defendants) should now be commenced in relation to defamation cases. This will further help to control the costs of these cases and will also give effect to our legal obligations under the *MGN v UK*<sup>7</sup> judgment of the European Court of Human Rights. However, given that the Government agrees there is merit in having a costs protection regime in place for these cases, we will maintain, at least for the time being, the regime of recoverable after the event (ATE) insurance premiums. This means that ATE insurance premiums will remain recoverable for these cases when the CFA success fee reforms come into force for new cases on 6 April 2019. The ATE regime enables parties with a good case to litigate and discharge their Article 10 rights (freedom of expression) without the fear of having to pay potentially ruinous legal costs if their case fails.

The Government believes that this approach – of abolishing recoverability of CFA success fees, but retaining it for ATE insurance premiums - is a pragmatic way forward for defamation cases. It not only delivers on our obligations under international law, but will also protect access to justice, since parties should not be deterred from bringing or defending a defamation claim to uphold their rights, because of the fear of having to pay unaffordable legal costs.

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<sup>7</sup> In that case, the court concluded that the obligation for the defendant (MGN Ltd) to pay a 100% ‘success fee’ (that is, the uplift that a successful claimant under a ‘no win no fee’ CFA can recover from the losing party) to the claimant was disproportionate, and that the CFA regime was therefore in breach of the defendant’s rights under Article 10 (freedom of expression) of the European Convention on Human Rights.

## Responses to specific questions

### **Q 1 - Do you agree with the scope of the protection? If not, what should it cover?**

This question was answered by 39 respondents, 23 (59%) of whom agreed with the scope of cases covered. Some respondents stated that claims brought under the Data Protection Act 1998 should also be covered.

### **Q 2 - Do you agree with this process? If not, how should it be improved?**

This question was answered by 38 respondents, 19 (50%) of whom agreed with the process for costs protection. Some of those who disagreed were concerned that the proposed process favoured claimants over defendants. Others stated that costs protection would encourage trivial and vexatious claims being brought against the press, including regional and local press, which would have a financial impact because of the need to deploy resources to respond to each and every claim.

Other points raised by respondents included that the process was overly complex and could lead to satellite litigation concerning issues of means. Some stated that detailed guidance should be provided on means and what constituted a 'reasonable' sum or 'severe financial hardship'. Others suggested that a standard form for the statement of assets should be available, so that information is presented in a clear and consistent way. It was suggested that arbitration or another form of alternative dispute resolution be included in the process, so that the meaning of what is said or published can be resolved at the earliest opportunity.

There was general agreement that parties should agree the costs protection position at the outset. Where this was not possible, it should be dealt with on the papers rather than at a hearing. The media, in particular, favoured an approach whereby the application for costs protection is made at the earliest opportunity and the court should be able to review the position if a party's financial circumstances changed.

The majority of respondents stated that the statement of assets should not be confidential (as was proposed in the consultation), and that the opposing party should have the opportunity to see - and challenge where necessary - the information provided by the party seeking a costs protection order.

### **Q 3 - Do you agree with the approach of allowing full costs protection for those of modest means, partial (capped) protection for those in the 'mid' group, and no costs protection for those with substantial means? If not, what alternative regime should be adopted?**

This question was answered by 37 respondents, 26 (70%) of whom agreed with this approach, but some felt more clarity was needed on how the three groups should be assessed, otherwise there would be a period of uncertainty, which could result in delays, added costs and satellite litigation. Other respondents suggested that the court should take into account the parties' prospects of success when considering an application for a costs protection order, and that this would filter out weak cases.

Some respondents also suggested that, to simplify matters, there should either be full costs protection or no costs protection.

**Q 4 - Should there be any further clarification of the level of means for each group? If so, what levels of means would be appropriate?**

This question was answered by 33 respondents, 23 (70%) of whom agreed that further clarification should be available, and that this would also be useful for lawyers in advising their clients on what they might be expected to pay if the claim failed. However, others stated that it should be left to the court's discretion.

**Q 5 - Do you agree that the test of 'severe financial hardship' is the right test to exclude the very wealthy – whether individuals or bodies (including, for example, national newspapers that report a loss)? If not, what is the appropriate test?**

This question was answered by 35 respondents, 21 (60%) of whom agreed that the test of 'severe financial hardship' is the right test to exclude the very wealthy, but wanted some guidance available which sets out what amounts to 'severe financial hardship'. Some suggested that national newspapers should not be automatically excluded from the costs protection regime, but that the court should decide. A few respondents suggested that 'financial hardship' is the better test but did not give any clear reasoning for that view.

**Q 6 - Do you agree that a party in the 'mid' group should pay a 'reasonable amount'? If not, what is the appropriate test?**

This question was answered by 34 respondents, 23 (68%) of whom agreed with this proposal but some wanted further guidance on what constituted a 'reasonable amount'.

**Q 7 - What factors should be taken into account in determining what is a 'reasonable amount' for a party in the 'mid' group to be liable for?**

This question was answered by 28 respondents suggesting a variety of relevant factors to be considered, such as: income; expenditure; any dependants; party's behaviour; applicant's partner's assets; and that the assets of both parties to the dispute.

The factors listed in the Civil Justice Council's response to the consultation paper<sup>8</sup> were also mentioned as being relevant.

**Q 8 - What evidence do you have on the legal costs for claimants and defendants in defamation cases? We would be particularly interested in information on the average level of costs for each party and how this varies across cases.**

**Q 9 - What evidence do you have on the financial means of claimants and defendants in defamation cases?**

In relation to questions 8 and 9, respondents were generally unable to provide any evidence on either the legal costs or financial means for claimants and defendants. Most

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<sup>8</sup> See response to question 7 at: [www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fconsultation+responses%2fCJC+response+Defamation+costs+1st+November+2013.pdf](http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fconsultation+responses%2fCJC+response+Defamation+costs+1st+November+2013.pdf)



respondents who answered this question stated that costs can vary greatly depending on whether the case goes to trial, which could be in excess of £200,000.

Some respondents stated that the data provided by the Media Lawyers Association to Lord Justice Jackson during his Review of Civil Litigation Costs was still relevant. The only additional evidence provided by respondents was anecdotal and not substantiated.

**Q 10 - What impact do you think the proposals will have on businesses? We would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses, as both claimants and defendants.**

Although 29 respondents answered this question very little information was received about the potential impacts.

**Q 11 - Do you agree with the proposed additional provisions? If not, how should they be improved?**

This question was answered by 33 respondents, 16 (48%) of whom agreed with the proposed additional provisions, including the removal and variation of a costs protection order. Some respondents felt that the threat of costs protection being lost retrospectively would mean that parties would have to think carefully about their behaviour and conduct.

Some respondents stated that the additional provisions would only raise the prospect of satellite litigation because wealthy opponents (claimant and defendant) would use every opportunity to challenge an application for costs protection.

The issue of confidentiality was also raised. There were mixed views amongst the legal profession and the judiciary on whether the statement of assets should be served on the other party. The majority of those felt that in the interests of open justice the opposing party should be able to see what evidence was being relied upon (see also summary of responses to question 2).

**Q 12 - Should there be any specific provision in the rules concerning which party should pay the costs of an application for costs protection? If so, what should the provision be?**

This question was answered by 30 respondents, 16 (53%) of whom agreed that there should be a specific provision governing which party should pay the costs of an application for costs protection. However, there was no real consensus about which party it should be. Some respondents felt it should be left to the court's discretion, while others felt that each party should bear its own costs, and others felt that the party unsuccessfully opposing the application should be penalised.

There was a suggestion that the party challenging the applicant should pay the costs every time, regardless of whether it was successful or not; it was argued that this would act as a disincentive to make such applications.

**Q 13 - Should the Pre-Action Protocol for Defamation be amended to take account of these new provisions? If so, how?**

This question was answered by 28 respondents, 26 (93%) of whom agreed that the Pre-Action Protocol for Defamation should be amended. It was suggested that parties should

be required to state in the initial letter of claim whether or not they intended to seek a costs protection order and the means group they considered themselves to be in. Other respondents said there should a stronger requirement to use some form of alternative dispute resolution.

**Q 14 - Do you have any comments on how the drafting of the rules might be improved?**

This question was not answered by all respondents because some drafting suggestions had already been included in the responses given to the other questions.

**Q 15 - From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?**

This question was answered by very few respondents, but no further information was given about the impact on groups or individuals with protected characteristics.

## **Consultation principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<https://www.gov.uk/government/publications/consultation-principles-guidance>

## **Annex A – List of respondents**

The respondents who gave details included individual members of the judiciary, individual solicitors and barristers, academics, members of the public and the following organisations:

Addleshaw Goddard LLP

BLM Law LLP

Berwin Leighton Paisner LLP

Brett Wilson LLP

Carter-Ruck Solicitors

Chartered Institute of Journalists

City of London Law Society

Civil Justice Council (CJC)

Clifford Chance LLP

Collyer Bristow LLP

Early Resolution

Farrer & Co.

Foot Anstey LLP

Global Witness

Hacked-Off

Hill Dickinson LLP

Irwin Mitchell LLP

ITN

Johnsons Solicitors

Law Society

Lawyers for Media Standards

Libel Reform Campaign

London Solicitors Litigation Association

Michael Simkins LLP

Mishcon de Reya LLP

Media Lawyers Association (MLA)

National Union of Journalists

News Media Association

Professional Negligence Lawyers Association (PNLA)

Professional Publishers Association (PPA)

Sahota Solicitors

Society of Editors

Wiggin LLP





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