Ministry of JUSTICE

Controlling Costs in Defamation Proceedings

Reducing Conditional Fee Agreement Success Fees

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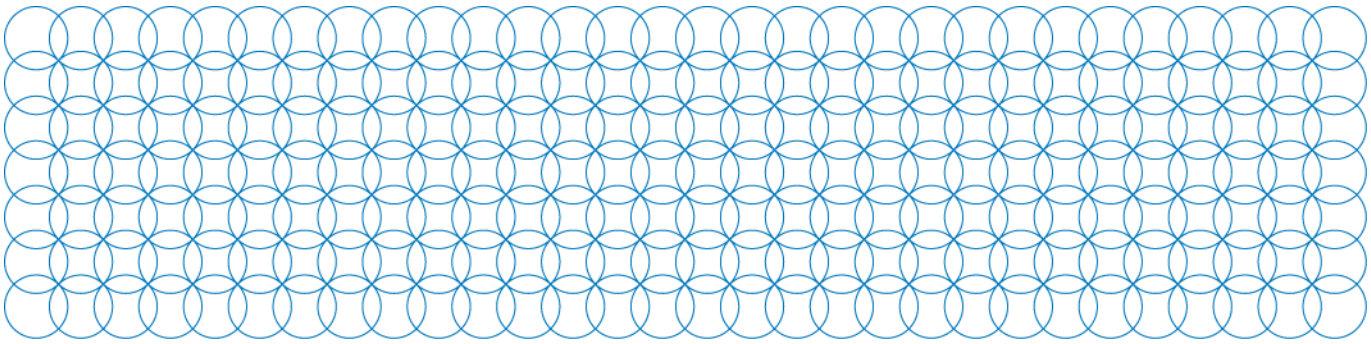

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Controlling Costs in Defamation Proceedings

Reducing Conditional Fee Agreement Success Fees

A consultation produced by the Ministry of Justice.

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

About this consultation

Duration:	From 19 January to 16 February 2010
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How to respond:	Please send your response by 16/02/2010 to: Natasha Zitcer Ministry of Justice 102 Petty France London SW1H 9AJ Tel: 020 3334 2987 Fax: 020 3334 4295 Email: privatefundingbranch@justice.gsi.gov.uk
Response paper:	A response to this consultation exercise is due to be published within 3 months of the closing date at: www.justice.gov.uk

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Foreword

Freedom of expression and investigative journalism are fundamental features of our democracy. The Government has therefore recently announced a review of the law of libel, with a working group to consider whether the law of libel, including the law relating to libel tourism, in England and Wales needs reform, and if so to make recommendations as to solutions.

I am, however, aware of the growing concern about the high legal costs involved in defamation and some other publication cases brought under conditional fee agreements (CFAs). It is of course important that people are able to sue publishers if they have been defamed, but I believe that the balance has now swung too far against publishers – including, for example, scientists and academics. Where defamation claims are funded under CFAs and are successful, the defendant can face having to pay more than double the legal costs incurred by the claimant's lawyers, as well as their own costs. On the other hand, where claimants fail, they can walk away without having to pay a penny to the defendant from their own pockets. There is an inherent unfairness in the current system, which impacts disproportionately on defendants in defamation cases and cries out for reform.

The Government has already taken a number of steps to control costs in defamation related proceedings, ensuring that, where After the Event insurance (ATE) is taken out, defendants are notified as early as possible, and given the opportunity to reach a settlement without being liable for the insurance premiums. Defamation proceedings are now part of a mandatory costs budgeting pilot, with Judges scrutinising costs as cases progress to ensure that they are proportionate and within the agreed budget. However, these are only the first steps, and more needs to be done.

Sir Rupert Jackson has spent the last year considering in detail the costs of civil litigation. He has now reported to the Master of the Rolls (who commissioned the review), and formally published his report on 14 January. Sir Rupert's review is a remarkable piece of work, which puts forward a broad range of recommendations for reform – including for making costs more proportionate while preserving access to justice. The Government welcomes Sir Rupert's report and will consider it in detail.

Sir Rupert's proposals on CFAs in particular – removing the recoverability of success fees and ATE premiums - are interesting and constructive proposals, which we are considering carefully. However, these recommendations apply to all civil cases where CFAs are used, not just defamation cases. The full implementation of his recommendations would

see significant changes in the existing costs regime for civil litigation, and would affect a wide variety of individuals and organisations – from members of the public to large businesses which bring and defend claims, their solicitors and barristers, judges, claims managers and insurers. Their implementation would therefore require primary legislation.

While I accept that Sir Rupert's recommendation could prove a viable option to deal with concerns around CFA costs in the longer term, it will inevitably take some time to assess their full impact. I strongly believe that immediate steps are needed in respect of defamation proceedings, even if they will only serve as an interim solution. For that reason, we are proposing to reduce the CFA success fee that may be charged in defamation and some other publication-related cases. This change can be introduced relatively quickly through secondary legislation, albeit with full Parliamentary scrutiny. It will allow us to protect access to justice for those who are defamed, while reducing the unreasonable and disproportionate impact of costs on defendants. It will also allow to consider how best to achieve Sir Rupert's long term objectives for dealing with CFA costs in the future.

The Rt Hon Jack Straw MP

Lord Chancellor and Secretary of State for Justice

Executive summary

The Government has for some time been concerned about the impact of high legal costs in defamation proceedings, particularly the impact of 100% success fees, which can double the costs to unsuccessful defendants in cases funded under conditional fee agreements (CFAs).

CFAs have increased access to justice for claimants in making it more possible to bring cases. However, the experience over the past decade suggests that – in defamation proceedings in particular – the balance has swung too far in favour of the interests of claimants, and against the interests of defendants. The current arrangements appear to permit lawyers acting under a CFA to charge a success fee that is out of proportion to the risks involved. Aside from the cost burden this places on the opposing side, this could encourage weaker and more speculative claims to be pursued.

The Government does not believe that the present maximum success fee in defamation proceedings is justifiable in the public interest. This is particularly the case because the evidence shows that many more defamation claims win than would substantiate such a generous success fee. This view is supported by Sir Rupert Jackson's report on civil litigation costs published on 14 January 2010.

The Government has previously consulted on proposals for a scheme on staged recoverable success fees and after the event insurance (ATE) premiums in defamation proceedings to reduce unreasonable and disproportionate costs. However, full agreement could not be reached on the details of the scheme and for that reason the Department was minded not to implement the scheme. Other measures aimed at reducing costs in individual cases were implemented on 1 October 2009, although these did not include specific action on success fees.

This consultation paper seeks views on a proposal to reduce the maximum success fee which lawyers can currently charge from 100% to 10% of the base costs. This is an interim measure for dealing with disproportionate costs while the Government considers Sir Rupert's wider proposals which seek to radically change the existing arrangements for all cases where CFAs are used. The proposal in this consultation paper would help reduce the costs for media defendants further and limit the potential harmful effect very high legal costs appear to have on the publication decisions of the media and others.

This proposed change is intended to complement changes already introduced on 1 October 2009 in respect of defamation proceedings which were designed to control the costs of individual cases.

The Culture, Media and Sport Select Committee is expected to conclude its inquiry into press standards, privacy and libel shortly. The Government will take into account any recommendations the Committee might make in their report, as well as Sir Rupert's recommendations in deciding the way ahead for CFAs that better balances access to justice with the need also for proportionate and reasonable costs.

Introduction

This paper sets out for consultation a proposal for reducing success fees in some defamation and some other publication related proceedings funded under conditional fee agreements. The consultation is aimed at those involved in defamation and some other publication proceedings in England and Wales.

This consultation is being conducted under the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 37, have been followed.

Although in the main this consultation follows the Government Code of Practice on Consultation, Jack Straw, the Secretary of State for Justice and Lord Chancellor, has decided that the following deviation from the Code is appropriate in the circumstances: in order to be in a position to implement the proposal as soon as possible (subject to consultation), it will be necessary to shorten the consultation period to four weeks.

An Impact Assessment has been completed and indicates that legal representatives, their clients and ATE insurance providers involved in claims in this area of the law, are likely to be particularly affected. The proposals are likely to lead to additional costs or savings for businesses and the public sector. An Impact Assessment is attached at page 22. Comments on the Impact Assessment and the specific questions it contains are particularly welcome.

Copies of the consultation paper are being sent to:

The Senior Judiciary through the Judicial Office of England and Wales

Sir Rupert Jackson

Council of Her Majesty's Circuit Judges

Association of Her Majesty's District Judges

High Court Masters Group

Master Hurst, Senior Costs Judge

Advisory Committee on Civil Costs

Civil Justice Council

Civil Procedure Rules Committee

Legal Services Board

Legal Expenses Insurers Group

Law Society

Solicitors Regulation Authority

Bar Council

Bar Standards Board

Institute of Legal Executives

Association of British Insurers

Association of Law Costs Draftsmen

Confederation of British Industry

Citizens Advice

Forum of Insurance Lawyers

Media Lawyers' Association

Newspaper Society

Publishers Association

Trades Union Congress

Society of Editors

English PEN

Better Regulation Commission

Office of Fair Trading

Equality and Human Rights Commission

To ensure that consultation on this proposed amendment to the relevant Statutory Instrument is as effective as possible, the consultation paper will in addition be brought to the attention of all those who contributed to the earlier consultation papers on related issues: *Conditional Fee Agreements in Defamation Proceedings – Success Fees and After the Event Insurance;* and *Controlling Costs in Defamation Proceedings.*

However, the above list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

The proposal

1. The Government has been concerned for some time about the high level of costs in some 'defamation proceedings'[1]. As was recognised in our consultation paper, *Controlling Costs in Defamation Proceedings*[2], published on 24 February 2009, *"(t)he Government agrees that there is a problem that should be addressed."* We published our response to that consultation on 24 September 2009[3] and set out what action we are taking. The response also indicated that 'we will be actively considering whether further measures are needed to control costs in this area'. The proposal outlined in this consultation paper is our next step. The aim is to set out the case for reducing the impact on costs of the success fees or uplifts which may be charged in defamations proceedings cases which are funded under a conditional fee agreement (CFA).

2. Sir Rupert Jackson published his report on civil litigation costs on 14 January 2010. Sir Rupert considered the present CFA arrangements in all areas where CFAs are currently used, their impact on costs and specifically whether additional liabilities (success fees and ATE insurance premiums[4]) should continue to be recoverable from the opposing party. Sir Rupert has discussed this issue at length with claimants and defendants in various meetings, forums, seminars and conferences, as well as receiving written submissions during the course of his review. Sir Rupert's view is that the costs burden placed upon opposing parties under the existing arrangements is excessive and can sometimes amount to a denial of justice and considers that '…*the proper course is to abolish recoverability and to revert to [style 1 CFAs] as they existed before April 2000*[5].'

3. In specifically considering the existing arrangements for defamation proceedings, Sir Rupert concluded that 'additional liabilities' including success fees ought to be borne by the party which incurs them and should not be recoverable by the opposing party. Sir Rupert considers, however, that if recoverability is abolished, other measures may be needed to assist claimants to meet the success fees which for which they would be liable. The measures Sir Rupert

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[1] See Annex A

[2] Ministry of Justice Consultation Paper CP4/09, published 24 February 2009

[3] http://www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm

[4] insurance taken out (by claimants and defendants) – for a premium - to cover the expense of having to pay the other side's costs.

[5] http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm

outlines for defamation and breach of privacy cases include an increase of 10% in the level of general damages and a regime of qualified one way cost shifting. The issues are discussed in detailed in Sir Rupert's final report[6]; their consideration and analysis by Government will inevitably take some time. While the Government accepts Sir Rupert's conclusion that the existing arrangements for CFAs in this area cannot continue, his recommendation on removing recoverability apply to all areas of civil litigation. This would require consultation and, if the Government is minded to proceed, primary legislation. The additional measures which Sir Rupert considers would be required to facilitate access to justice in the absence of recoverability will require detailed consideration to assess their potential impact.

4. This consultation paper focuses on the short term immediate measure which the Government believes is needed to deal with disproportionate costs in defamation proceedings while it considers in the longer term Sir Rupert Jackson's recommendation for removing recoverability of success fees and ATE premiums.

5. In deciding which proceedings should be covered by the proposal in this consultation paper, we propose to use the following definition of defamation proceedings, used in the amendments to the Civil Procedure Rules[7] introducing the 42 day 'cooling off' period[8] with effect from 1 October 2009:

"defamation proceedings" means proceedings for—

(a) defamation;
(b) malicious falsehood; or
(c) breach of confidence involving publication to the public at large.

All further reference to "defamation proceedings" in this paper should be read as including all types of case covered by the above definition.

Why does the current system need reform?

[6] Chapter 32

[7] In July 2009

[8] See paragraph 14 below for the measures implemented on 1 October

6. This section does not seek to set out comprehensive details of the current arrangements and the need for reform as Sir Rupert's report does this thoroughly and persuasively. However, a brief outline is included below to explain how the proposal in this consultation paper fits within the existing regime and with Sir Rupert's proposals.

7. The usual 'costs shifting' rule in civil proceedings is 'loser pays': the unsuccessful or losing party is required to pay not only that party's own costs, but also the reasonable costs of the successful or winning party. Prior to the Access to Justice Act 1999 the success fee and ATE insurance premium were not recoverable from the unsuccessful party in this way; but sections 27 (success fees) and 29 (ATE insurance premiums) of the Access to Justice Act 1999 changed that by providing that a success fee and ATE insurance premium due under a CFA were to be treated as part of the costs recoverable under an order for costs. These sections came into force in April 2000.

8. In civil cases where CFAs are permitted, including some defamation proceedings, the maximum success fee of 100% is regularly charged. The Conditional Fee Agreements Order 2000[9] enables the Lord Chancellor to prescribe the maximum permitted percentage success fee for any description of proceedings. The current maximum percentage of 100% was intended to maximise access to justice through CFAs for all cases with at least a 50% chance of success. The objective was to enable claimant lawyers to balance risk: to cover the costs of cases that failed with an uplift or success fee on those that won. This success fee was made recoverable from the opposing side in 2000, along with the premium on ATE insurance.

9. However, this approach of balancing risk across a large number of cases - is not effective in an area when the number of cases is relatively small and the vast majority of claims succeed. 100% success fees cannot be justified when the risk of losing any cases is low. We consider that this currently is the situation with defamation proceedings.

10. Access to justice covers not only the ability of claimants to bring reasonable actions; it also covers the ability of defendants to be able

[9] SI 2000/823 (made under section 58 of the Courts and Legal Services Act 1990 as amended by the Access to Justice Act 1999)

properly to resist those claims which should not succeed and at proportionate cost. As CFAs are available to everyone regardless of their financial means, the media have for some time questioned the use of CFAs with success fees (and ATE) by those who can afford to pursue litigation, and therefore do have access to justice without them.

11. Data was provided by the Media Lawyers Association to Sir Rupert Jackson based on a sample of 154 libel and privacy cases against the media which were resolved by settlement or judgment in 2008 involving nine national newspaper groups, broadcasters and news agencies as well as local newspaper publishers[10]. 27 of these (17.5%) were brought under CFAs, but that figure rises to 11 out of the 16 cases (almost 70%) where overall costs (sought by the claimant and the defence) exceeded £100,000. Almost all of the 154 cases settled before trial; none of the claims failed. Only three went to trial, all of which were won by the claimant. Of the three that went to trial, two were funded under a CFA. Although it is difficult to obtain data on the individual costs of defamation cases (there are relatively few of them, brought by a relatively small number of solicitors' firms), it is clear that the vast majority of defamation claims succeed, and that the more expensive cases tend to be funded under a CFA.

12. This has wider implications. National media in general – and regional and local media in particular – may feel that they cannot afford the costs involved in defending a claim brought under CFA, given the risk of significant costs that they might have to pay if they lose. The media say that this puts them under huge commercial pressure to make an early settlement in respect of an allegedly defamatory publication, which in their view was legitimate to publish. In the media's view this has a chilling effect on how the media operate; they will be less keen to defend cases which they would otherwise justifiably defend, purely because of the costs involved. In turn, they may be less willing to publish articles - which in the public interest ought to be published – because of the fear of potential costs involved if a claim is brought. The threat of defamation proceedings and the costs involved may also have a harmful effect on freedom of expression more generally, for example in relation to scientific and academic debate.

13. In view of the concerns which have been expressed about the possibility that our libel laws are having a chilling effect on freedom of

[10] *Review of Civil Litigation Costs: Preliminary Report*, Appendix 17, published 8.5.09

expression, the Justice Secretary is setting up a working group to consider whether the substantive law of libel, including the law relating to "libel tourism", in England and Wales needs reform, and if so to make recommendations for solutions. The working group is intended to have an intensive, short term focus and has been requested to make recommendations by mid-March. The scope of the group's considerations will extend to all aspects of substantive libel law in England and Wales, but will exclude issues relating to costs in defamation proceedings in view of the work that is already underway.

14. The Government made some progress recently in reducing costs in defamation cases[11]. On 24 September, the Government announced[12] its response to the consultation, *Controlling Costs in Defamation Proceedings*. It followed extensive consultation with the Civil Procedure Rule Committee and representatives from the media, legal profession, insurance industry and judiciary. The response sets out the first raft of measures aimed at making defamation and other costs in defamation proceedings more proportionate and reasonable from 1 October 2009:

- early provision of more detailed information to the other party if ATE insurance has been taken out
- a 42 day 'cooling off period' where, if the defendant admits liability and this leads to a settlement, the ATE premiums will not be recoverable from the defendant
- a mandatory cost budgeting pilot for defamation proceedings, aimed at ensuring that costs are proportionate and within the agreed budget, with close judicial supervision.

15. Jack Straw, the Justice Secretary, in announcing the above reforms, indicated that the Government would be 'actively considering whether further measures are needed to control costs in this area.' However, the Justice Secretary was minded to await the report from Sir Rupert when considering the next steps. Sir Rupert's report echoes the need for reform as outlined above. The proposals to reduce success fees or to abolish their recoverability are the next interim step the Government wishes to undertake while considering the long term objective recommended by Sir Rupert or reverting to the pre 2000

[11] See Annex A for previous measures and consultation http://www.justice.gov.uk/consultations/cp1607.htm

[12] http://www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm

position by removing recoverability of additional liabilities including success fees.

16. It is also worth noting that the Culture, Media and Sport Select Committee is currently conducting an inquiry into press standards, privacy and libel. The Committee is expected to report shortly and the Government will consider the report and any recommendations it may contain in respect of costs and other issues.

The proposal

17. The current law allows for maximum success fees of 100%, which doubles the cost of legal fees. Although 100% is the maximum level which is prescribed, 100% is regularly applied and appears to have become the norm. Previous proposals to control recoverability of success fees and ATE via staging proved unsuccessful[13].

18. Taking into account the fact that in the data sample provided by MLA none of the claims were successfully defended at trial, it is clear that, in defamation cases, 100% success fees are too high. This is compounded by the costs of ATE (which a claimant takes out to insure himself against having to pay the defendant's costs should he lose; the premium in these cases (which can amount to 65% of the sum insured in defamation cases) is currently recoverable from the opposing defendant as well as a 100% success fee.

19. In theory, the justification for 100% success fees is to allow lawyers to recover costs that would accrue from a privately paying client on the basis of taking two cases each with a 50:50 prospect of success, and winning one and losing the other. But it is known that, in defamation cases, claimants are winning a much higher proportion of cases suggesting that they have a much higher than 50% chance of success. Indeed the figures for relative proportions of successful and unsuccessful claims above indicate not a justification for 100% success fees, but rather the abolition of success fees in defamation proceedings altogether.

20. The impact of success fees could be lessened by reducing the success fees that may be charged or by limiting or abolishing the recoverability of success fees from the opposing party. Sir Rupert's report focuses on tackling recoverability, an issue to which the

[13] See background and history - Annex A

Government is giving detailed consideration with a view to tackling disproportionate costs in the longer term. In the interim, however, the impact of success fees can be reduced by amending the Conditional Fee Agreements Order 2000 which currently prescribes the maximum level at 100%. A draft Order to achieve this is included at Annex B. The Order requires the approval of both Houses of Parliament to take effect.

21. The Government is determined to level the playing field between the claimant and defendant in defamation proceedings and believes that there is a strong case for taking action now.

22. We therefore invite views on reducing the impact maximum success fee in defamation proceedings cases to 10% as an interim measures while the Government considers Sir Rupert's recommendation for removing the recoverability of success fees and ATE insurance premiums as the long term solution for dealing with high costs in CFAs.

23. We believe this measure is justified given the relatively small number of cases which would be affected and would help ensure that costs in these proceedings are more proportionate. It is consistent with our policy to ensure that the costs in all cases are reasonable and proportionate and keeping the existing arrangements for costs and funding under review

QUESTIONS

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

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

Q3: If you do not agree with the proposal on reducing success fees to 10%, what evidence would you offer in support of maintaining the status quo?

Additional questions are included in the impact assessment, see page 22.

Annex A

CFAs and defamation proceedings – background and history

1. The Courts and Legal Services Act 1990 (CLSA) allowed CFAs to be enforceable in England and Wales. Section 58 of the CLSA (as amended by section 27 of the Access to Justice Act 1999) set out the mandatory requirements for CFAs. The first Order in 1995[14] made it possible for CFAs to be enforceable in personal injury claims, insolvency proceedings and applications before the European Court of Human Rights. In 1998[15] this was extended to all types of case except criminal and family.

2. CFAs are used primarily in litigation before the courts, where rights of audience and rights to conduct litigation are restricted to qualified legal professionals such as barristers and solicitors. CFAs operate on the principle that a solicitor or barrister ("lawyer") will act for a client if he thinks there are sufficient prospects of success. If the case is lost, then the lawyer will not be paid. If the case is successful, the lawyer will be able to claim an 'uplift' on his normal fees. This uplift is also known as the 'success fee'. This maximum permitted uplift that lawyers can charge their clients is currently prescribed[16] at 100%. An 'After the Event' Insurance (ATE) market has developed to protect claimants against having to pay the opponent's costs if the case is unsuccessful.

3. CFAs can act as a mechanism for filtering out weak or unmeritorious claims. Before entering into a CFA a lawyer would assess the merits of a case, as the lawyer bears the risk of not being paid if the case is unsuccessful. This encourages lawyers to take on only those claims they think are meritorious and have a 50% or higher chance of success.

4. Under the scheme introduced in 1995, while the lawyer's normal fees could be recovered from the opposing side, the claimant was responsible for paying the uplift and ATE insurance premiums which were usually met from the damages recovered. In April 2000, following the reforms under the Access to Justice Act 1999, the Government changed the way in which personal injury cases were funded: personal injury cases were removed from the scope of legal aid due to the availability of CFAs. At the same time, changes were

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[14] The Conditional Fee Agreements Order 1995 (S.I 1995/1674)

[15] Conditional Fee Agreements Order 1998 (c)

[16] The Conditional Fee Agreements Order 2000 (SI 2000/823)

introduced in respect of CFAs to make them more attractive to lawyers in most categories of case including personal injury. The reforms provided for the uplift and ATE insurance premiums to be recoverable from the unsuccessful party, in the same way as other costs. The intention was to:

- ensure that the compensation awarded to a successful party is not eroded by any uplift or premium - the party in the wrong will bear the full burden of costs;

- make conditional fees more attractive, in particular to defendants and to plaintiffs seeking non-monetary redress - these litigants can rarely use conditional fees now, because they cannot rely on the prospect of recovering damages to meet the cost of the uplift and premium; and

- discourage weak cases and encourage settlements.

5. If parties cannot agree on costs under CFAs, it is generally for the court to decide what constitutes a reasonable level of success fee that may be recovered from the unsuccessful party; but in certain types of personal injury cases the recoverable success fee is fixed depending on the stage at which the case is concluded.[17] For example, for a case which concludes before trial a recoverable uplift of 12.5% is set for Road Traffic Accident claims and 25% or 27% for Employer's Liability Claims. The recoverability of success fees (up to 100%) from the other side has caused concerns in the public and private sector including in defamation and clinical negligence claims.

6. A successful party to litigation may only recover the costs of the litigation from the unsuccessful party if and to the extent that a court orders that he should do so. Whether an order for costs is made, and if an order for costs is made the amount of costs that are to be paid, are matters determined by the court in the exercise of its discretion and in accordance with the provisions of the Civil Procedure Rules 1998 ("the CPR"). The CPR are delegated legislation made under the provisions of the Civil Procedure Act 1997. The CPR apply to most litigation before the civil courts. The material provisions of the CPR which relate to such orders are contained in CPR Parts 43 – 48, in particular at CPR Part 44 (which sets out the general rules applicable when an order for costs is sought and made) and CPR Part 47 (which sets out the rules applicable in relation to the 'detailed assessment of costs', a process by which the amount of costs claimed by the successful party is scrutinised by the court).

[17] RTA claims, Employers' Liability Accident claims and Employers' Liability Disease claims

7. The introduction of CFAs is generally recognised as an important means of funding defamation proceedings as legal aid has never been available. Had CFAs not been available most people of modest income would simply be unable to bring proceedings and discharge their Article 6 rights (access to justice). In *Steel and Morris v UK* (the 'McLibel' case), the European Court of Human Rights held that legal aid was required to satisfy the fair trial requirements of Article 6 of the European Convention on Human Rights in that particular case. 'Exceptional funding' legal aid is now available under the Access to Justice Act 1999 but has never been needed in defamation cases in practice, not least because CFAs are available.

8. The use of CFAs in defamation proceedings emerged as a controversial issue during the 2003 CFA review paper '*Simplifying CFAs'*. Several national and regional media organisations took the opportunity provided by the review to raise a number of concerns about the impact of the use of CFAs in defamation proceedings. Media organisations claimed that CFAs inhibited the right to freedom of expression and encouraged unmeritorious claims. Claimant lawyers felt that the use of CFAs in defamation proceedings had greatly widened access to justice and placed claimants on an equal footing with their opponents.

9. In the 2004 consultation '*Making Simple CFAs a reality'*, media organisations reiterated the view that CFAs needed to be controlled in defamation proceedings. They stressed that funding these cases by CFAs (particularly where the claimant had significant personal wealth) impinged on the media's right to freedom of expression because the success fee could effectively double a claimant lawyer's cost. This resulted in the 'ransom' or 'chilling effect' (a term used by the Court in the *Musa King* judgment[15]) that forced the media to settle claims they might otherwise fight due to excessive costs. The media also expressed concerns there was no true ATE insurance market (because the very small number of cases does not ensure a competitive market), and the failure of the cost judges to effectively control CFA costs in defamation proceedings.

10. Claimant lawyers on the other hand believed that CFAs provided access to justice for all in an area of law where many would otherwise not be able to afford to seek redress. They also made the point that CFAs played an important role in discouraging irresponsible journalism. The sharp decline in the number of claims issued in this area, after the introduction of CFAs in defamation proceedings, indicated that lawyers were being more cautious when advising clients who were considering litigation. They believed that CFAs should not be banned or restricted in this area of law, but that

success fees should be staged – 100% for cases going to trial and less for cases that settle early.

11. The media put forward suggestions for controlling costs and a system for recovering success fees in defamation proceedings. The Department's view was that the existing powers at the court's disposal to control costs adequately dealt with cases where costs were considered to be unreasonable and/or disproportionate. The conclusion at that time was that there was no need to amend the legislation concerning the use of CFAs in defamation proceedings.

12. In April 2005, Lord Falconer of Thoroton, then Lord Chancellor, spoke about CFAs and costs at a Fleet Street Lawyers Society event. Lord Falconer called for proper control and proportionality in the costs-risks attached to defamation litigation and urged claimant and media lawyers to try to find a solution through discussion.

13. The judgment in *Musa King*[18] and the 2004 CFA consultation paper prompted media organisations and claimants' lawyer groups to try to reach an agreement on the way forward. Following the CFA round table hosted by the Department in July 2004, both sides approached the CJC to mediate. A pre-mediation forum was held in December 2004 to consider the main issues and there was general agreement that there should be mediation without prejudice to try to secure agreement from all parties on success fees and ATE insurance premiums.

14. The CJC mediation was suspended pending the outcome of the House of Lords' judgment in *Campbell v MGN Limited*[19]*.* The key issue in that case was the compatibility of CFAs with the European Convention of Human Rights (ECHR); it was suggested that the success fee under a CFA was disproportionate and infringed the media's freedom of expression as guaranteed by Article 10 of the ECHR. The House of Lords found that the existing CFA regime is compatible with ECHR, but expressed some reservations about the impact of disproportionate costs.

15. The Constitutional Affairs Select Committee, in its inquiry on the Compensation Culture in March 2006, concluded that CFAs play an important role in giving people access to a remedy if they have been defamed or their privacy has been invaded. It felt that Courts could address disproportionate costs through appropriate cost control measures. The Government agreed with the Committee's

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

[19] Campbell v MGN Ltd [2005] UKHL 61 MGN

suggestions, which included developing staged recoverable success fees (see below), where controls might help to make costs more proportionate.

16. At the Fleet Street Lawyers Society 2006 event Baroness Ashton, then civil justice Minister, spoke about CFAs and invited media lawyers to put forward proposals that would meet their concerns within the existing legislative framework. In late August, media lawyers submitted proposed rule amendments, and the Master of the Rolls recommended that the CJC host a Forum that would include appropriate representatives from the media, legal profession and insurance industry.

17. The CJC hosted a number of forums, the first one on 25 October 2006 at Theobalds Park to discuss the post *Campbell* position. There was agreement to consider matters in three stages: (1) Success fees and ATE insurance premiums; (2) Costs Control; and (3) Code of Behaviour.

18. At the first forum the CJC considered that an 'agreement in principle' was reached which it has called 'The Theobalds Park Agreement'. This included fixed levels of success fees and ATE insurance premiums that would be recoverable between the parties when the action was settled. If a case was settled and amends were agreed within 14 days, there would be no recoverability of either a success fee or an ATE insurance premium. Four technical issues relating to fixed periods, used to define the different stages, were still to be agreed. A smaller group drawn from representatives at the forum was remitted to try to resolve these issues. Little progress was made due to a dispute over whether an agreement in principle had actually been achieved at Theobalds Park. There had also been some reappraisal of the ATE insurance premium aspects of the initial agreement in principle.

19. Despite the disagreements considerable progress was made in the mediation towards finding a workable solution as an agreement in principle was reached. Subsequently Carter Ruck solicitors and News International agreed to work together to refine the original Theobalds Park agreement in principle and agreed a protocol known as the 'Theobalds Park Plus Agreement'.

20. Separately to that mediation process, the BBC and David Price Solicitors and Advocates agreed to a bilateral protocol. The Law Society's Law Gazette (28 June 2007) and Litigation Funding defamation (June 2007, issue 49) reported the agreement included no success fee would be recoverable if the case settled before proceedings were issued, and no ATE insurance would be taken out

unless and until the BBC rejected the claim. The protocol also included a cost cap of £250,000 inclusive of success fee and an agreement to mediate. The agreement was used to settle the claim of Inspector Ian Kibblewhite in relation to the book *Not One of Us*, written by Chief Superintendent Ali Dizaei and serialised in March as the BBC's book of the week.

21. The CJC recommended amendments should be made to the CPR in accordance with the 'Theobalds Park Plus agreement'. The Department agreed with the CJC's recommendations that the Theobalds Park Plus model agreement was workable and could help ensure that costs of litigation are proportionate and reasonable. The Department consulted on a scheme during 2007. The consultation paper, *Conditional fee agreements in defamation proceedings: Success Fees and After the Event Insurance,* sought views on proposals to implement recommendations from the CJC. A slightly revised scheme was published with responses to the consultation in July 2008. Some responses to the consultation supported in principle the introduction of fixed recoverable staged success fees and ATE insurance premiums; however, there was no consensus the details of the scheme. The media in particular did not support the scheme and strongly opposed its implementation and called for additional measures to address disproportionate and unreasonable costs in CFA cases. The scheme has not been implemented.

22. The Department commissioned a scoping project in light of some concerns around the use of 'no win no fee' agreements in England and Wales in June 2008. Professors Moorhead, Fenn and Rickman conducted the project which covered the use of 'no win no fee' agreements in personal injury, employment and defamation cases. The aim was to advise on the need for and feasibility of fuller research on 'no win no fee' agreements. The work was completed in October 2008.

23. Shortly after the scoping project was completed (autumn 2008), the Master of the Rolls appointed Sir Rupert Jackson (December 2008) to conduct a fundamental review of civil litigation costs including the operation of 'no win no fee'. No further work was therefore commissioned following the completion of the scoping project. It was not thought necessary to commission further research when a fundamental review of the current system was already under way.

Summary: Intervention & Options

Department /Agency:	Title:	
Ministry of Justice	**Impact Assessment of Controlling Costs in Defamation Proceedings – Reducing CFA Success Fees**	
Stage: **Consultation**	Version: **1**	Date: **12 January 2010**

Related Publications: **Controlling Costs in Defamation Proceedings & Conditional Fee Agreements in Publication Proceedings - Success Fees and After the Event Insurance.**

Available to view or download at:

http://www.justice.gov.uk

Contact for enquiries: **Natasha Zitcer** Telephone: **020 3334 2987**

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

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

What are the policy objectives and the intended effects?

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

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

The following options are being considered:

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

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The effect of the proposal will be reviewed after 12 months.

Ministerial Sign-off For Consultation Stage 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: 18 January 2010

Summary: Analysis & Evidence

Policy Option: 1	Description: Reduce the maximum success fee that may be charged in defamation and some other publication related proceedings from 100% to 10%

COSTS

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

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

BENEFITS

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

Other **key non-monetised benefits** by 'main affected groups' The media would be subject to fewer defamation cases and/or to reduced costs in defamation cases they lose. There would be judicial system cost savings from fewer defamation cases coming to court and an increased amount of related information published by the media.

Key Assumptions/Sensitivities/Risks Key assumptions are that CFA lawyers currently make excess profits as a result of 100% success fees, that the amount of information published by the media (which might possibly be open to challenge but is in the public interest to publish) is currently suboptimal, and that CFA lawyers only support claimants taking cases against the media.

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) £	**NET BENEFIT** (NPV Best estimate) £

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

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

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

Evidence Base (for summary sheets)

1. Scope of the Impact Assessment

1.1 This Impact Assessment relates to the consultation on a proposal for controlling costs in defamation proceedings[1] funded under Conditional Fee Arrangements (CFAs). CFAs are 'no win no fee' agreements which operate on the assumption that a lawyer (normally a solicitor) will usually act for a client only if he thinks there are sufficient prospects of success. If the case is lost, then the lawyer will not be paid. If the case is successful, the lawyer will be able to claim an 'uplift' on his normal fees. This uplift is also known as the 'success fee'. This maximum permitted uplift that lawyers can charge their client is currently prescribed[2] at 100%. An 'After the Event' (ATE) insurance market has developed to protect claimants against having to pay the opponent's costs and their own disbursements, if the case was unsuccessful. Both the success fee and ATE insurance premium can be recovered from the losing side.

1.2 This Impact Assessment considers the costs and benefits of the proposal in the consultation paper, *Controlling Costs in Defamation Proceedings – Reducing CFA Success Fees*. It is undertaken in line with the criteria set out in the Government's Impact Assessment guidance.[3]

Scope of the proposals

1.3 The consultation paper seeks views on the following options:

0. Do nothing.

1. Reducing the maximum success fee that may be charged in defamation proceedings from 100% to 10%.

Organisations affected

1.4 The main groups likely to be affected by the proposal are:

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

[1] As defined in the consultation paper at page 10, para 5
[2] The Conditional Fee Agreements Order 2000 (SI 2000/823)
[3] http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html

1.5 The Media Lawyers Association provided data on the costs arising in a sample 154 libel and privacy cases resolved during 2008 to Sir Rupert Jackson for his review of civil litigation[4]. 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 claimed[5] per case for both parties in these 154 cases was £94,211 (although total costs were £5,000 or below in just over 40% of cases). Total costs paid or claimed were just over three times the amount of damages paid. 17.5% of the cases included in this data sample were funded on a CFA. The total of both defendants' and claimants' cost in CFA cases in this sample was £7,219,009. It is impossible to identify what proportion of this total costs would be success fees, and what would be comprised of basic legal costs, ATE insurance premiums and other costs.

1.6 There are around 220 defamation proceedings 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 related disputes that settle pre-proceedings or how many other defamation proceedings are issued. For the purpose of a recent consultation paper[6] 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). However, a solicitor's representative organisation responding to that consultation paper believed that this figure was flawed in that the suggested percentage of disputes where court proceedings are issued was extremely high in comparison with other types of litigation. They thought it more likely that proceedings are issued in around 10% of defamation proceedings, which would suggest a figure of about 2,200 defamation related disputes per year.

2. Rationale for Government Intervention

2.1 In economics terms we are examining the market for publishing possibly defamatory information (as opposed to information which is clearly defamatory or clearly not defamatory, and whose publication we assume would not normally be subject to a court case).

2.2 In economics terms in this market the key outcomes we wish to see are (i) the publication of an optimal amount of such information from society's perspective, i.e. the media publishing information which might possibly be open to legal challenge but which is in the public interest to publish, and (ii) this optimal outcome being achieved as efficiently as possible.

2.3 In terms of probability if CFA lawyers focused evenly on all cases of possibly defamatory publication then in theory we might assume that they would win 50% of cases. If this were so, and if their standard fees reflected their costs, then these lawyers would recover their costs if they were able to charge a 100% 'uplift' or 'success fee' on their standard fees. This is the theoretical rationale for having 100% success fees. (This analysis also assumes that costs in all cases are identical. In practice if a CFA lawyer won cases where legal costs were high and lost cases where legal costs were low then they might break even with a case success ratio of less than 50%).

2.4 In practice there are a number of instances where charging a 100% success fee would enable the CFA lawyer to make excess profits. This would not be economically efficient. For example CFA lawyers might achieve case success ratios of over 50%. Or costs might not be the same in all cases and CFA lawyers might succeed in high cost cases

[4] http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm
[5] In some cases costs had not yet been agreed or assessed
[6] See the recent consultation paper *Controlling Costs in Publication Proceedings*

2.5 Reducing the maximum success fee might also increase the amount of possibly defamatory information which is published. This effect might work in two ways – in both cases we assume that CFA lawyers only support claimants taking cases out against the media.

2.6 First, a much lower maximum success fee might require CFA lawyers to achieve very high case success ratios in order to break even. As a result CFA lawyers might only focus on cases which they are very likely to win (and a 10% success fee would require a case success ratio of over 90% in order to break even if all cases had the same costs). Hence information which was closer to the border of being defamatory and which might have been challenged before might not be challenged in future. This might lead to a greater amount of such information being published.

2.7 Secondly if maximum success fees were lower then in cases where CFA lawyers were involved and were successful, total costs to the losing party, i.e. the media, would be lower. As a result there would be less potentially at stake at the outset for the (subsequently) losing party. This might lower the potential cost of publishing possibly defamatory information and lead to more such information being published.

2.8 The economic rationale for the proposal also hinges upon any potential downsides of the change being outweighed by the potential gains outlined above.

2.9 One potential downside is that CFA lawyers might no longer take on cases where the probability of winning is not very high. In the absence of legal aid for defamation cases this might be detrimental in terms of reduced access to justice for the potential claimants involved. In addition these might be the cases which legally test the boundary of what constitutes defamatory publication, and where there might be a wider common law public interest in cases being heard.

2.10 The economic rationale behind the proposal also reflects the view that CFA lawyers would not circumvent the effect of reducing the maximum success fee by cross-subsidising costs from unsuccessful to successful cases, or by inflating underlying costs themselves.

3. Cost Benefit Analysis

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

BASE CASE ("Do nothing")

Description

3.2 Making no change would result in a continuation of the status quo, as described earlier in this Impact Assessment.

3.3 Because the base case is compared with itself in this Impact Assessment its net costs and benefits are zero.

OPTION 1

Description

3.7 **This option would reduce the maximum success fee that can be charged in defamation proceedings from 100% of the lawyer's basic costs to 10%. This would be achieved via amending the Conditional Fee Arrangements Order 2000 which proscribes the maximum success fee at 100%. The 10% success fee could still be recoverable from the defendant in any case the claimant won, along with their legal representative's basic costs, disbursements and any ATE insurance premiums.**

3.8 The following analysis assumes that CFA lawyers only support claimants taking cases out against the media (rather than also supporting the media).

Costs

3.9 There may be reduced access to justice for potential claimants whose cases are less likely to succeed, as CFA lawyers may no longer take on such cases. These potential claimants might suffer detriment as a result of being unable to challenge information which they consider to be defamatory. This may reduce protection under Article 8 of the European Convention on Human Rights (the right to private and family life).

3.10 There may be reduced testing in court of the legal boundary of what constitutes defamatory publication as a result of CFA lawyers no longer getting involved in such cases. This might not be in the public interest.

3.11 CFA lawyers are likely to be worse off either because they have to charge lower success fees and/or because they get involved in fewer cases.

3.12 Although legal aid funding is not normally available for defamation proceedings, there could be an increase in applications for exceptional legal aid funding as fewer claimants would be able to fund their cases through CFAs. This could impose costs on the legal aid budget (see para 4.7 below).

Benefits

3.13 The media would benefit from being subject to fewer defamation proceedings, especially cases where the probability of the claimant winning are lower. In the event of losing a case the media would also benefit from paying lower CFA lawyer success fees. Of relevance to this is Article 10 of the European Convention on Human Rights (the right to freedom of expression).

3.14 The judicial system would benefit as a result of fewer cases coming to court.

3.15 If the current level of publication of possibly defamatory information is considered to be suboptimal then an increase in the amount of such information published would be in the public interest.

4. Enforcement and Implementation

3.16 Option 2 would be implemented by amending the Conditional Fee Agreements Order 2000.

5. Impact Tests

4.0 The following impact tests are considered applicable to these proposals:

Competition Assessment

4.1 We are aware from the findings from the earlier consultation *Controlling the Costs in Publication Proceedings,* which dealt with the same general subject area, that there is concern that limiting the recoverable costs under CFAs would deter solicitors from taking on defamation cases. This would impair competition and reduce consumer choice. Reduced competition could, in the long term, increase costs both for claimants and defendants. We are aware that this is a specialised area of the law in where the number of solicitors practising is already limited.

4.2 We seek further information during this consultation on any competition issues the proposal may raise and how these should be addressed. In particular we will consider whether the proposal might directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete, and limit suppliers' incentives to compete vigorously.

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

Small Firms Impact Test

4.3 A number of solicitors firms operating in the field of defamation proceedings are small to medium sized businesses. We are aware that some additional costs to small businesses may arise from limiting the success fees legal representatives can charge.

4.4 We have considered whether it would be possible to exempt small legal firms from these proposals. However we have concluded that this would be impossible both from a practical point of view and because it would reduce the efficacy of the proposals. It would also be likely to distort the market for legal services in this area.

4.5 The other small firms affected might be those involved in publishing material which might be subject to defamation proceedings. This might include local newspapers and not for profit organisations.

4.6 We seek further information during this consultation on any particular impact on small firms and the likely costs and effects to their businesses. We also seek views on what actions might be needed to avoid or reduce the impact on small business.

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

Legal Aid and Justice Impact Test

4.7 Although legal aid is not generally available for defamation proceedings, claimants may apply for exceptional legal aid funding in these cases. Any reduction in the availability of CFAs in this category of case may lead to an increase in applications for exceptional legal aid funding under Section 6(8)(b) of the Access to Justice Act 1999 which, if granted, would have an impact on the legal aid fund. We estimate that there would be only a small number of cases per year, however these could prove individually costly. The estimated impact on the legal aid budget is under £100,000 annually.

Equality Impact Assessment

4.8 The proposal will affect all claimants, defendants and businesses involved in legal proceedings funded by CFAs in this area of law. An initial equality impact screening considered their impact on different groups in terms of: disability; gender; age; religion and belief; and sexual orientation.

4.9 Taking into account the findings from the earlier consultation, *Controlling the Costs in Publication Proceedings,* which dealt with the same general subject area, there is no evidence that any group is more involved in defamation related proceedings than another.

4.10 We will consider carefully over the consultation period whether the proposal might have a disproportionate impact on any particular groups.

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

Human Rights

4.11 The proposal aims to reduce the risk that in some defamation proceedings funded under CFAs, the litigation costs could be so high as to restrict the media and other publishers' freedom to publish.

4.12 However, the proposal could potentially reduce the availability of CFAs in defamation proceedings. This could result in cases of defamation, libel and invasion of privacy not being addressed and may reduce protection for claimants under Article 8 of the Human Rights Act (right to respect for private and family life).

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

Other Specific Impact Tests

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

Specific Impact Tests: Checklist

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

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

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

Annex B

D R A F T S T A T U T O R Y I N S T R U M E N T S

2010 No.

LEGAL SERVICES

Conditional Fee Agreements (Amendment) Order 2010

Made - - - -	***
Laid before Parliament	***
Coming into force -	- ***

The Lord Chancellor, in exercise of the powers conferred upon him by section 58(4)(a) and (c) of the Courts and Legal Services Act 1990([20]), having consulted in accordance with section 58A(5) of that Act, makes the following Order, a draft of which has been laid before and approved by resolution of each House of Parliament:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Conditional Fee Agreements (Amendment) Order 2010 and comes into force on [1st April 2010].

(2) In this Order "the 2000 Order" means the Conditional Fee Agreements Order 2000([21]).

Amendment of the 2000 Order

2.—(1) The 2000 Order is amended as follows.

(2) In article 4 at the end insert "except as provided for in article 5".

(3) After article 4 insert—

([20]) 1990 c. 41.

([21]) S.I. 2000/823.

"**5.** In relation to defamation proceedi ngs (within the meaning of Part 53 of the Civil Pr ocedure Rules 1998([22])), the percentage specified for the purposes of section 58(4)(c) of the Act is 10%."

Signed by the authority of the Lord Chancellor

Name
Parliament ary Under Secretary of State
Date Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Order)

Under sections 58 and 58A of the Courts and Legal Services Act 1990 (c. 41), all proceedings may be the subjec t of an enforceable con ditional fee agreement except specifi ed family proceedings and c riminal proceedin gs (other than those under section 82 of the Environmental Protection Act 1990 (c. 43)). The Conditional Fee Agreements Order 2000 (S.I. 2000/823) specifies the proceedings to which a conditional fee agreement must relate it if is to provide for a success fee, and the maximum amount of such a fee. This Order, made under section 58(4) of the Courts and Legal Services Act 1990, amends the 2000 Order to set a maximum success fee percentage of 10% for all conditional fee agreement.

([22]) S.I. 1998/3132. Part 53 is amended by S.I. 2000/221.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

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

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

Q3: If you do not agree with the proposal on reducing success fees to 10%, what evidence would you offer in support of maintaining the status quo?

Q4: Do you think our proposal will affect competition in this area? If so please provide details.

Q5: Do you think our proposal to reduce success fee would have any particular impact on small firms? If so please give details of the likely costs and effects you believe they will have and what action might be taken to reduce this impact?

Q6: Do you agree with your initial assessment that the proposal will have no equality impact? If not, please detail what the impacts are and who they affect.

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

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 16 February 2010 to:

Natasha Zitcer
Ministry of Justice
Civil Justice and Legal Aid Division
4.10
102 Petty France
London SW1H 9AJ

Tel: 020 3334 2987
Fax: 020 3334 4295
Email: privatefundingbranch@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at www.justice.gov.uk

Alternative format versions of this defamation can be requested from the Civil Justice and Legal Aid Division on the above number.

Publication of response

A paper summarising the responses to this consultation will be published within three months of the closing date of the consultation. The response paper will be available on-line at www.justice.gov.uk

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if

you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

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 impac**t – 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 exercise**s – 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.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Julia Bradford, Ministry of Justice Consultation Co-ordinator, on 020 3334 4496, or email her consultation@justice.gsi.gov.uk.

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

Julia Bradford
Consultation Co-ordinator
Ministry of Justice
102 Petty France
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 under the **How to respond** section of this paper at page 26.

Produced by the Ministry of Justice

Alternative format versions of this report are available on request from the Civil Justice and Legal Aid Division: privatefundingbranch@justice.gsi.gov.uk