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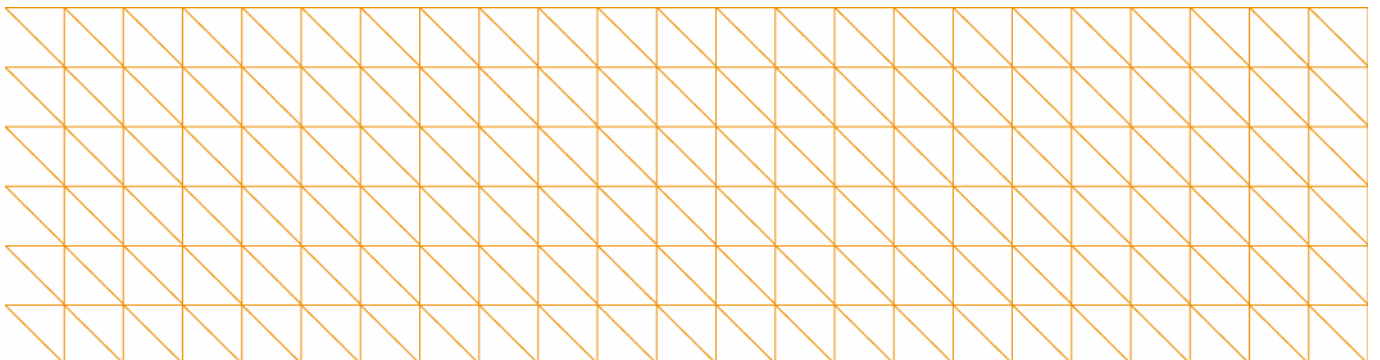
# **Conditional Fee Agreements in Publication Proceedings**

## **Success Fees and After the Event Insurance**

**Summary of responses**

CP(R) 16/07

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Ministry of  
**JUSTICE**

## **Conditional Fee Agreements in Publication Proceedings**

Success Fees and After the Event Insurance

**Summary of responses to consultation carried out by the Ministry of Justice.**

**This information is also available on the Ministry of Justice website:  
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**Conditional Fee Agreements in Publication Proceedings - Success Fees and After the Event Insurance: Summary of responses and conclusions**

## **Introduction**

This document is the summary of responses to the consultation paper **Conditional Fee Agreements in Publication Proceedings – Success Fees and After the Event Insurance**

It will cover:

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

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

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## **Background**

1. This paper provides a summary of responses and conclusions to the consultation paper, 'Conditional Fee Agreements in Publication Proceedings – Success Fees and After the Event Insurance', published in August 2007. The consultation period was extended to 8 November 2007. A list of respondents is at Annex A.

## **The 2007 consultation paper**

2. The consultation was based on recommendations made to the Department by the Civil Justice Council (CJC) to introduce a scheme of fixed recoverable success fees and capped recoverability on after the event insurance (ATE) premiums. The proposals were aimed at providing a more predictable, transparent and proportionate costs recovery regime in CFA cases. The consultation paper defined publication proceedings as those including defamation and 'privacy' disputes but excluding intellectual property and Data Protection Act proceedings.
3. The success fee/ATE model proposed was developed through a series of mediated forums held between representatives from leading media organisations, claimant lawyers and legal expenses insurers who provide after the event insurance cover. The CJC led the mediation process between October 2005 and early 2007. Substantial progress was made during this period, particularly in respect of fixed recoverable success fees; however, full agreement could not be reached between the representatives. Following post mediation consideration, during which time Carter Ruck and News International developed a voluntary protocol based on the near agreement achieved during the mediation, the CJC recommended that the Department should consult on a fixed success fee

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and capped ATE scheme which was called the Theobalds Park Plus scheme for possible implementation through the Civil Procedure Rules. In accepting the CJC's recommendation the Department published the consultation paper, Conditional Fee Agreements in Publication Proceedings – Success Fees and After the Event Insurance on 9 August 2007.

## **Summary of responses**

1. Twenty formal responses to the consultation were received. Those responding included the main legal professional bodies, the judiciary, insurance industry and individual practitioners. A joint submission on behalf of 22 media organisations (listed at Annex A) was made by Reynolds Porter Chamberlain.
2. The majority of respondents expressed support in principle for the proposed introduction of fixed recoverable staged success fees and ATE insurance premiums, some subject to a few reservations. Most respondents considered that the current system was in need of reform and that the proposed scheme would represent a degree of progress towards ensuring costs recovery is reasonable and proportionate in CFA funded cases and it would also help reduce the satellite litigation over costs. Generally claimant lawyers considered that the proposed scheme offered a more accurate method of assessing the level of success fee and an appropriate model for encouraging compliance and better regulating the behaviour of defending parties through the litigation process. Russell Jones and Walker were concerned that there was no reference in the Theobalds Park Plus Agreement to mediation although it was an increasingly common method of resolving disputes.
3. The media organisations welcomed the commitment to achieving reasonable and proportionate costs control and considered that more effective procedures were necessary to bring this about and that the proposed scheme should help reduce some of the excesses with success fees. The media were however, concerned that the Department was putting forward a scheme based on the terms of the voluntary protocol entered into between Times Newspapers Limited and Carter-Ruck, which did not have the support of all claimant and media lawyers. The media felt that significant changes and additional measures were needed to the proposed scheme to adequately address disproportionate and

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unreasonable costs in CFA cases. The media groups also argued that the current system was incompatible with the media's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) and even if the proposals were to be implemented, the costs problems would continue and UK law would remain incompatible. They identified certain key costs issues which they felt needed to be addressed to ensure that the costs regime in publication proceedings complies with Article 10. They suggested that any rule changes resulting from the consultation should apply to all publication proceedings including claims under the Data Protection Act 1984. A complete summary of the national media organisations' suggested reforms is attached at Annex B.

4. The Bar Council expressed support for the proposals on fixed staged success fees (although not for capped ATE insurance premiums). They felt that fixed success fees in road traffic accident and employers liability and disease cases were working effectively to reduce the disproportionate and costly satellite litigation over costs recovery.
5. The Costs Judges of the Supreme Courts Costs Office (SCCO) felt that the proposed model could only be seen as a step along the way to achieving a just costs regime where CFAs and ATE are used in publication proceedings. Other respondents highlighted the need for some further encouragement for both parties to attempt to settle by alternate dispute resolutions, noting that such mediation should be without prejudice.
6. Professor Cyril Glasser concluded that the proposed model would not reduce, remove or settle the complaints and disputes which had arisen over the last few years in CFA publication proceedings cases, relating to either the amount of the base costs or the percentage uplift claimed for the success fee. He felt that the proposed model if applied to the three cases, *Campbell*<sup>1</sup>, *Turcu*<sup>2</sup> and *King*<sup>3</sup>, thought to be the basis of difficulties

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<sup>1</sup> *Campbell v Mirror Group Newspapers* [2005] UKHL 61

would not have had any real effect. Professor Glasser believed a two staged success fee as referred to by Lord Woolf in *Callery v Gray*<sup>4</sup>, would be more appropriate. He commented the proposed model would lead to satellite litigation with the defendants arguing that the claimant lawyers could have settled at an earlier stage. He also suggested that the subject of cost capping deserved more attention.

7. A representative of the regional media was concerned that small publishers would not be able to deal with a complaint within the timescale of a 0% success fee and would therefore be prejudiced. They also commented that some claimant lawyers applied specified timescale rigidly, because by doing so they were able to trigger an increased success fee at the earliest opportunity. They felt that specifying a fixed 14-day period would encourage such conduct. However, another law firm supported the initial period of a nil recoverable success fee.

### **Summary conclusions**

8. Since the consultation was undertaken there have been a number of important developments around the CFA regime. The Department has been considering the general operation of CFAs and their role in giving people effective access to justice. On 25 June 2008 we commissioned a new scoping and feasibility study<sup>5</sup> into the operation of CFAs and contingency fees in personal injury, employment and defamation and 'privacy'. The study is looking at whether 'no win no fee', covering both contingency and conditional fees, provide appropriate levels of access to justice and whether they are too expensive. The wide range and complexity of the issues and concerns raised in the consultation paper

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<sup>2</sup> Turcu v News Group Newspapers Limited [2005] EWHC 799 (QB)

<sup>3</sup> Musa King v Telegraph Group Ltd [2004] EWCA (Civ) 613

<sup>4</sup> Callery v Gray [2001] EWCA Civ 1117

<sup>5</sup>

[www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080625/wmstext/80625m0002.htm#08062565000014](http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080625/wmstext/80625m0002.htm#08062565000014)

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which are not limited to the specific proposals highlighted the need for a more detailed consideration of these issues. The scoping study therefore provides a further opportunity for a more informed and evidence based consideration of the operation of CFAs including in relation to defamation and 'privacy' cases.

9. The Civil Procedure Rule Committee (CPRC) is planning to consult on draft rules for cost capping orders. A number of responses raised issues relating to costs capping in publication proceedings, however we believe that these would be best considered in the context of the CPRC consultation. The Master of the Rolls is also expected to confirm the terms of reference for his proposed review of the civil costs system which could be relevant to many of the issues raised in relation to this consultation.
10. The Department will therefore not be implementing the scheme of fixed recoverable success fees and capped recoverability on after the event insurance (ATE) premiums at this stage. However, we would encourage parties to litigation to adopt the revised model on a voluntary basis in the interim. The proposed approach would give all interested parties further time and opportunity to consider the proposals and their impact. It would also allow for further consideration and discussion on other related issues raised in the responses such as costs capping and controlled hourly fees.

## **Responses to specific questions**

### **Q.1 Do you agree that the Theobalds Park Plus model should be given statutory force and incorporated into rules of court?**

1. Nineteen responses were received to this question: five respondents agreed that the Theobalds Park Plus model should be given statutory force. Two respondents supported the proposal but reserved their agreement subject to the draft protocol being piloted first, another agreed to the proposal as a temporary measure only. One respondent expressed concern about the unintended consequences of the protocol. Two supported the need for a change in the rules but felt that the Theobalds Park Plus model does not adequately address the current problems. Three respondents disagreed with the proposal.
2. The Bar Council agreed that the proposed fixed success fees (Part 1 of the Protocol at Annex A) should be incorporated into rules. In their experience fixed success fees in road traffic accident, employers liability and disease cases were working well and reducing disproportionate costs and satellite litigation over costs recovery that had been prevalent in recent years. The Bar Council pointed out that the Theobalds Park Plus Agreement contains no provision for the court to allow higher success fees in any circumstances. They noted that under the provisions of the fixed success fees set out in CPR Part 45 the amount of success were different for counsel than for solicitors which reflected the different risk portfolio that the Bar Council had compared to that of solicitors. However, the Bar Council was content to accept that the success fees proposed in the 'Agreement' should apply in the same amount and trigger times to Counsel's base costs fees as they would to solicitors subject to a similar provision to that contained within CPR 45.12, CPR 45.18-19 is provided for Counsel only. The Bar Council suggested the claims for success fees in respect of stages 1- 4 in excess of the proposed fixed success fees should be permitted in "exceptional circumstances".

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3. The media organisations agreed that the recoverability of success fees and ATE insurance needed to be controlled through new rules of court. However, they felt the proposed scheme would not adequately address the serious problem of increasingly disproportionate and unreasonable costs. The media were concerned that the Department was putting forward proposals without considering any statistical data on the use of CFAs in defamation and related proceedings. The media suggested a number of amendments to the proposed scheme and additional costs control measures to ensure that the costs regime was compliant with Article 10 ECHR. Associated Newspapers Limited commented that the proposed scheme although a small step in the right direction was not close to bringing the answer to the major threat that freedom of expression was facing.
4. Clifford Chance LLP agreed that the proposed model would bring clarity and be beneficial to all parties involved in publication proceedings. They believed that the proposals provided an appropriate model for compliance and for better regulating the behaviour of defendants throughout subsequent stages of the litigation process. They also commented that the model would provide for a more accurate method of assessing the appropriate level of success fee claimed.
5. Group Litigation Costs Services commented there were obvious benefits of certainty but that there did not appear to be a wide consensus as evidenced by the difficulties to date. A better way would be, in the interim, for all parties who agreed to sign up to the agreement to review the scheme after a year. This would provide for any refinement to the model to be added and to consider how the ATE market would develop.
6. A number of cost judges at the SCCO felt that the agreement should be given statutory force and suggested that the rules could impose costs cap for these cases. QBE Insurance (Europe) Limited disagreed that the model should be given statutory force. They felt that in any suggestion of capping ATE insurance there is a fundamental flaw in any concept of success fees and ATE insurance premiums tracking each other in the way

envisaged, or ATE insurance premiums being fixed or capped. QBE were also concerned that the CJC forums did not involve any ATE insurers but intermediaries. Professor Cyril Glasser commented that incorporating the proposed model into rules of court would have no effect in reducing, removing or settling the complaints and disputes which had arisen over the last few years in CFA publication proceedings, either relating to the amount of base costs or percentage uplift claimed for success fees.

**Q.2 Do you agree with the detailed stages specified and fixed recoverable success fees set out in the Theobalds Park Plus Agreement? If not please state why and alternative proposals?**

7. Nineteen respondents answered this question with ten agreeing with the detailed stages specified and success fees set out in the agreement. Three agreed to the proposal subject to a number of reservations including a nil recoverable success fee being triggered by an offer or amends or admissions being made within 14 days of a claims, without 3(c). The majority of respondents agreed with the detailed staged fixed recoverable success fees set out in the proposed scheme. The proposed stages were considered to be reasonable and a fairer and more accurate method of assessing the appropriate level of success fee claimed.
8. The Bar Council commented that the proposed stages were sensible and could not be significantly improved and that the provisions of paragraph 6 of the proposals (relating to extension of time and Part 36 Offer cases) should be retained to allow for some flexibility where the case demands it.
9. The Defamation Legal Expenses Insurance Providers Forum agreed with the proposed stages for success fees but did not agree that it was appropriate to fix the level of ATE premiums and rebates at the same level or at the same stages. They commented that there was considerable flexibility in the exact timing of the success stages, which might result in disputes in more individual cases. They suggested that a mediation

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clause should be built in for such disputes and that the scheme should be piloted.

10. The Times Newspapers Limited said that the stages were reasonable, subject to the 14 day period for a nil recovery success fee being triggered by an offer of amends or an admission of liability being made within 14 days of a claim. The actual terms of an apology or anything else should not have to be agreed within the 14-day period.
11. Thompsons Solicitors agreed with the proposed stages but believed that the success fees should be capped rather than fixed. They felt that the detailed stages and the levels of recoverable success fee set out in the scheme appeared to be fairer than the current recoverable success fee regime. Group Litigation Costs Services agreed with the detailed stages proposed apart from 3(c) - They commented that a trial of a preliminary issue would often 'stand in place' of a full trial and that a 75% success fee should apply to any matter where a trial of a preliminary issue took place, regardless of timescales. They believed that there should be provision for increasing the success fees where there were multiple claimants and/or defendants.
12. The media had some detailed concerns about the proposed stages, which are set out in Annex B. Associated Newspapers Limited commented that the proposed model was insufficient and ought, subject to amendments as suggested in the joint media submission, to be no more than a temporary measure while the Department considered overhauling the complete system.
13. Farrer & Co LLP expressed strong support for the initial period of nil recoverable success fee and the need for the initial 14-day period following the defendant's receipt of a letter of claim to be extended by agreement. They commented that Cost Judges should be given power through rules of court to apply the 0% success fee (1) where the claimant's letter of claim failed to comply with the pre-action protocol and/or reasonably caused the defendant to require further and better

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particulars of the complaint before the defendant could properly assess the merits of the complaint; (2) where there would be an unreasonable refusal by the claimant agree to extend the 14-day period.

14. Foot Anstey Solicitors objected to the proposal that 0% success fee only applied in the 14 days following receipt of a notice that a CFA had been entered into. They believed small publishers would not be able to deal with a complaint within this timescale and would be prejudiced. They argued that specifying a fixed 14-day period would only encourage some claimant solicitors to apply the specified timescales rigidly resulting in an increased success fee at the earliest opportunity. They suggested a preferred option would be Section C of the bilateral protocol between David Price Solicitors & Advocates and the BBC where a specified fixed period is not required for success fees to be set at 0%, 50% and 100% respectively with a defendant being able to challenge the reasonableness of a claim in the first instance and not the rates at which a success fee is set.
15. Beachcroft LLP disagreed with the proposed success fee stages of 25% or 50% being applied to detailed assessment proceedings. They argued there was no reasoned basis for setting success fees at the levels stated or at any level for the purposes of detailed assessment proceedings. They considered that there were powerful arguments that a success fee would not be recoverable during detailed assessment including the receiving party having already won prior to detailed assessment proceedings and section 45 of the Costs Practice Directions setting out the 'liability for costs of detailed assessment proceedings'.
16. QBE Insurance (Europe) Limited disagreed with the proposal that that ATE premiums should track the proposed staged success fees. They believed the tracking of ATE premiums with success fees ignored the case law on the recoverability of ATE premiums. They opined that success fees were meant to be 'revenue neutral', whereas ATE premiums had to be set at a level to ensure a viable underwriting arrangement.

**Q.3 Do you agree that ATE insurance should not be recoverable if cases settle or an offer of amends is agreed within 14 days?**

17. Fifteen responses were received to this question. Seven respondents agreed with the proposals, one supported the principle of recoverability but did not agree to the 14 days timescale. Five respondents disagreed while others did not answer the question directly. Most that responded to this question agreed that ATE insurance should not be recoverable if cases settled or offer of amends was made within the 14 days.
18. Times Newspaper Limited felt that the question wrongly suggests that an offer of amends or terms of settlement have to be agreed within 14 days - only an offer of amends or admission of liability should have to be made within the 14 days. Times also argued that if solicitors acting on a CFA basis could agree to a nil recoverable success fee, ATE insurers should be able to agree the same in terms of ATE insurance premiums, as there was no risk to insure. They believed that ATE premiums were illusory and were never paid by the claimant lawyer to the insurance company and that ATE premiums were exceptionally high with premium ranging from £60,000 to £70,000 for indemnity of £100,000. The media organisations generally agreed that a 0% period needed to apply in all defamation cases where a claim was settled or offer of amends was made prior to the issue of substantive proceedings and that the offer was accepted, and to cases that settled in the period up to either the defendant responding to the letter of claim with denial of liability or proceedings were issued or served.
19. Thompsons Solicitors commented that unlike personal injury cases where the many pay for the few, a 14-day period would be appropriate in publication proceedings. They also believed that a claimant on a CFA should not be able to issue proceedings without commitment to covering the defendant's costs through ATE in the event that the claim failed.
20. The Institute of Legal Executives (ILEX) accepted that a zero rated recoverable period should be achievable within the market, together with

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staged ATE premium discounts tracking the success fee figures. They commented that it might not be appropriate to take out ATE insurance within 14 days of a claim and as such the premiums should not be recoverable. They believed that the proposals would not undermine access to justice and should not fetter the discretion of the court under s.51 of the Supreme Court Act 1981 and CPR 44(3)(1) to determine costs between the parties subject to the principle that costs follow the event.

21. The Defamation Legal Expenses Insurance Providers Forum said that a party to the dispute should have the right to insure a risk as soon as possible and if an ATE free period of 14 days was implemented and it is assumed insurance was already incepted, the insurance premium would have to be rebated and the subsequent stage premiums would have to be increased. They felt there had been no considered discussion with the ATE providers as to whether the staging of premiums should be linked to the success fee stages. They submitted that there were very different risk considerations for ATE insurers, which would not necessarily coincide with the proposed stages.
22. The Forum said that one insurer, to address concerns about high level of ATE premiums at the earlier stages, had already introduced an earlier stage to its premiums where it was felt that it was possible for the opponent to make an early offer of amends. The Forum felt this was a viable and reasonable option instead of limiting the recoverability of ATE premiums. The further stages would become effective by the end of the 14-day period, which included the issue of proceedings; a specified period before trial with increased premium payable at each stage. They believed the option of introducing an earlier stage to premiums would provide for a much-reduced premium for the initial 14-day period and would adopt a clearer stepped premium mechanism.
23. QBE Insurance (Europe) Limited said that it would not agree to issue an ATE policy with an indemnity of £500,000 in return for no premium. QBE felt that ATE policies for Defamation cases currently tend to have limits of indemnity of between £250,000 and £500,000. This policy gives a

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claimant certainty and comfort that their dispute will be insured all the way to trial, if required. The proposed scheme envisages that no premium is payable if the case settles or is agreed within 14 days. As a major ATE insurer, QBE has written a significant number of defamation cases and continues to do so. They believed the proposal would not support the CPR's overriding objective of equality, as the parties would not be on an equal footing. They argued there would be a risk of claimants failing to obtain ATE insurance since the insurer would know that the defendant had investigated liability and refusal to settle or agree an offer of amends was based on their assessment of the claim. The proposals if implemented could lead to meritorious claims not being pursued. They believed this inequality would be contrary to Parliament's intention in enacting Access to Justice Act 1999.

24. The Bar Council was concerned that access to justice would be likely to be compromised if ATE was not recoverable in cases that settle early. They argued that there was no similar provision in any of the other fixed cost regimes within the CPR which permitted the parties to take out ATE insurance at any stage including at the outset. To move the starting point by 14 days will inevitably make the ATE premium more expensive. In a scheme under which a case became 'defended' after 14 days would make it more difficult to obtain ATE insurance in those defended cases with higher premiums. The introduction of CFAs was always intended to run in tandem with ATE insurance. A solicitor under a CFA should be entitled to insure himself against the risk of incurring his own disbursements and the other side's costs from the outset of the CFAs.

**Q.4 What will be the impact on the ATE market for publication proceedings of this proposal?**

25. Nine responses were received to this question. The media organisations suggested that there was no real market for ATE insurance in defamation cases, with only two main insurers. They argued that lack of interest in the

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cost of the insurance product from claimant lawyers and insufficient competition together with market distortion meant that ATE insurance in publication proceedings needed to be treated differently. The media groups commented that ATE premiums were excessive and did not provide adequate cover.

26. The Defamation Legal Expenses Insurance Providers Forum argued that if a 0% recoverable ATE premium within the 14 day period is implemented, access to justice would be reduced and there would be no equality of arms. They felt that there would be a reduced number of potential risks to insure and those cases that would require ATE insurance would be riskier with a reasoned denial of liability and/or proceeding to trial. They also believed that the fragile ATE market would continue and there would be no incentive for other insurers to join the market.
27. QBE Insurance (Europe) Limited considered that the proposals would have a significant negative impact on the sustainability of the ATE market and access to justice. They argued that the proposals would create a different profile of cases and replace the current ATE model, 'the block rating approach', with a risk based approach leading to higher premiums as the premiums would have to be individually assessed. If the insurers decide that it is no longer commercially viable to write cover for defamation cases, then access to justice would be affected.
28. Thompsons Solicitors commented that as costs become more proportionate ATE premiums should be cheaper and would see claims settling at reasonable amounts rather than the defendants settling for fear of unpredictability and having to pay the other side's huge costs. Judges at the SCCO commented that premiums might increase initially.
29. The Bar Council suggested that the principle that 'the many pay for the few' was central to ensuring that premiums were kept to their minimum. They believed that the proposals would reduce the 'basket of cases' from

which premiums were taken, lead to the collapse of the ATE market and impact on access to justice.

**Q.5 What would be the potential costs/savings to your business of this option? Please indicate the size of your business: micro (1-9), small (10-49), medium (50-250) and also which sector you operate in?**

30. The majority of respondents felt unable to comment on this question. Four respondees who did answer indicated that there would be no costs or savings to business of this proposal. Russell Jones & Walker said that they did envisage some savings however were not in a position to quantify the savings. The Defamation Legal Expenses Insurance Providers Forum commented that a significant reduction in business would be inevitable.

**Q.6 What would be the potential consequences to your business of this option?**

31. The majority of respondents did not comment on this question. Clifford Chance LLP and Russell Jones & Walker commented they would not envisage any significant consequence either positive or negative if the proposed model was implemented. Clifford Chance LLP believed they would benefit from the ability to advise clients with more certainty about the likely outcome of a case in which the opposing party had a CFA and ATE insurance.

## Other issues raised in the responses

32. Some respondents in responding to the specific questions asked in the consultation paper also raised other issues not within the specific scope of the consultation.

### Cost capping

33. Associated Newspapers Limited believed that there should be a direction that the parties submit to a mutual cost cap in all publication proceedings irrespective of whether a case was funded under a conditional fee agreement and/or have ATE insurance. They suggested that provisions for cost-capping should be made within the proposed model if implemented and a cost judge should set the level of the cap if parties to proceedings disagreed. Associated Newspapers Limited also believed that the courts should, when fixing the level of the cost cap, consider the proportionality and reasonableness of base costs combined with any uplift. Associated Newspapers Limited also advocated the proactive management of costs by the court at an early stage in the litigation.

34. The media organisations commented that *Musa King v Telegraph* established that the current CPR allowed for the making of costs capping orders in publication proceedings and that costs capping orders had since been made in some cases. They also suggested in their response to the DCA's 2004 consultation paper '*Making Simple CFAs a Reality*' that:

"Suggestion 4 - In determining the specific figures to which costs should be limited, the court must have regard to the maximum likely financial compensation which the claimant may recover, if successful, in determining a figure which is both reasonable and proportionate. To this extent, in proceedings initiated or pursued under a Conditional Fee Agreement, CPD 11.9 is disapplied. In making any cost-capping order in any circumstances, the court must have regard to the principles set out in CPR 44.3.

This reflects the last sentence of paragraph 101 of *Musa King*, which we read as clearly stating that CPD 11.9 should not be applied in CFA cases where there is no appropriate ATE insurance in place. However, as with Suggestion 3 and for the reasons set out in footnote [1] thereunder, we propose that the direction should encompass all CFA cases, whether or not ATE insurance is in place. The last sentence reflects paragraph 85 of the *Musa King* judgement”.

35. The media also believed that in cases without a cost cap an automatic and mandatory cost management should be introduced at an early stage, irrespective of whether a case is funded under a CFA. The media groups provided some judicial authority in support of prospective budget control rather than retrospective assessment when a case is concluded, for example, *Musa King v Telegraph* and *Henry v BBC*<sup>6</sup>. They also quoted Master O’Hare’s response to a question about defamation claims to the DCA’s 2004 consultation paper which supported prospective budget control.
36. Some respondents commented that CFA clients had no interest in costs and costs-capping offered some control. Farrer & Co LLP noted that the cost-capping regime would not cure the chilling effect of the CFA system in publication proceeding cases. Foot Anstey Solicitors commented, amongst other things, that the absence of any reference to cost capping made the model unacceptable. Professor Cyril Glasser commented that a clear policy was needed in terms of costs-capping since it was clear that the Court of Appeal differed from the current procedural code in relation to a number of issues. The costs judges said that it would be better if the rules could impose a costs cap for publication proceedings cases.

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<sup>6</sup> [2005] EWHC 2503 (QB)

**Fixed recoverable hourly rates**

37. Associated Newspapers Limited agreed that conditional fee agreements were necessary to allow impecunious claimants access to justice but felt that the amount of underlying base costs was unacceptable. They advocated instead the introduction of fixed hourly rates recoverable from the losing party. They commented that the most expensive senior partners and QCs could take publication CFA cases on ‘scale rates’ basis. They argued that a scaled rate regime would also address the current ‘postcode lottery’ resulting in solicitors recovering differing rates based on their postcodes. They believed that claimant lawyers in publication proceedings should not be able to recover city/central London rates in Article 10 publication proceedings cases.

38. The media organisations believed that high base costs impacted on costs estimates, cost caps and the amount of additional liability payable under a CFA and suggested base costs should be appropriate to the level of work involved. They also commented that in CFA cases clients were removed from any interest in the rates set, which had led to some firms charging rates equal to, or higher than, the maximum amount that would likely be recoverable. The media groups suggested that greater control of hourly rates was needed. They argued that this would not have an effect on the availability of lawyers undertaking media work and that hourly rates management would not have a knock-on effect on costs and would ensure that overall costs were proportionate and reasonable.

**Wealthy claimants**

39. Associated Newspaper believed that CFAs should not be available to wealthy claimants. Trinity Mirror PLC felt that CFAs should not be available to those claimants who could afford to pursue litigation without employing lawyers on CFAs with success fees. Without CFAs access to justice would not be denied to such claimants. Times Newspapers Limited were of the view that there could be “no pressing social need” for wealthy claimants to be allowed to enter into CFA arrangements whereby their solicitors could charge double the amount if they won the case. Wealthy

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claimants, who could afford their solicitor's normal hourly rates, did not need to enter into CFAs to gain access to justice. The fact that wealthy claimants could enter into CFAs could easily lead to the CFA regime being seriously abused and declared incompatible with Article 10 rights.

**Amendments made to the proposed model scheme for fixing recoverable success fees and ATE insurance**

**Escape clauses**

40. The Bar Council suggested including similar provisions to that contained within the existing CPR 45.12 (claims for an amount of costs exceeding fixed recoverable costs in exceptional circumstances), CPR 45.18 (application for an alternative percentage increase) and CPR 45.19 (assessment of alternative percentage increase) for counsel only. They also felt that a 'penalty' clause should be included in cases where the applicant fails to increase the success fees in stages 1-4 of the model.

41. CPR 45.12, CPR 45.18 and CPR 45.19 were designed products of agreements between parties under the CJC's mediation process. The schemes were specifically developed for Road Traffic Accident claims and Employers Liability claims. The additional rules suggested by the Bar Council were not part of any mediation or agreement between the parties to the proposed model and therefore out of scope of the consultation. We have explored the Bar Council's suggestions with the costs judges and believe it would be more appropriate to consider amendments to the Costs Practice Direction after further consultation with representatives from both parties to litigation, the Bar Council and cost judges on what criteria would be required. This would be consistent with similar processes we undertook in road traffic accident and employers liability and employers liability disease cases.

**Multiple claimants/defendants**

42. The model scheme will not include special provision for increasing success fees where there are multiple claimants/defendants. The purpose for charging a success fee was to compensate for the risk taken by a solicitor to litigate and regardless of whether a claim involved an individual or multiple claimants or defendants the level of risk would not change.

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**Trial of a preliminary issue**

43. Group Litigation Costs Services suggested that a 75% success fee should apply to any matter where a trial of a preliminary issue took place. The proposed model is consistent with CPR 45.15 (6) (b), which does not differentiate between a full trial and a preliminary trial.

## **Conclusions**

### **The proposed scheme of fixed recoverable success fees and capped recoverability of ATE insurance premiums**

44. The responses to the consultation have been very helpful in relation to the draft proposals for a scheme of fixed success fees and capped ATE insurance premiums in publication proceedings. On the definition of 'publication proceedings' the media groups suggested that it could be defined as "defamation; malicious falsehood; breach of confidence or misuse of personal/private information; applications for disclosure of sources, and claims under the Data Protection Act 1998 in relation to the publication by or to the media of allegedly personal or sensitive personal data". However, as was indicated in the consultation paper, we consider that the revised model of fixed success fees and capped ATE insurance premiums should apply in defamation and 'privacy' cases.
45. The responses to the consultation confirmed support in principle for the proposed model in respect of fixed recoverable success fees, however, there were objections from legal expenses insurers and the Bar in relation to capping recoverable ATE premiums generally and particularly in relation to a 14-day nil recovery stage.
46. In light of the specific comments received we have made some amendments to the model scheme. The revised model scheme continues to build on the expert inputs provided by the claimant lawyers, media organisations and legal expense insurers which originally worked under the auspices of the CJC to try to devise an agreed model. The model would benefit consumers, solicitors and defendants as agreements should be more transparent and the length of time claimants' solicitors and defendants need to spend on agreeing success fees and ATE premiums would be reduced. The scheme should also benefit the administration of

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justice, as there would be less satellite litigation on costs recovery issues in CFA cases.

47. The relevant changes suggested by the respondents were made to sections 1, 2, 3, 6 and 8 of the revised model (Annex C) and are summarised in a table at Annex D.

48. At a meeting held between the Department and cost judges from the SCCO, the issue of '*extension of time*' (paragraph 6 of the original model) was raised. It was proposed that in the absence of agreement between the parties on extending time, the matter should be referred to the court, and as such a provision to that effect may be necessary. Concern was raised that if an explicit provision is included in the proposed model for the parties to go to court, it may be interpreted as a necessary step to be fulfilled in the protocol, thereby fuelling more satellite litigation. As such no change was made to this paragraph.

49. We wish to retain the proposed limits on the recoverability of ATE insurance premiums for the initial 14-day period and for ATE premiums to track the success fee stages as set out in the consultation paper. Many respondents argued that a zero rated recoverable period should be achievable within the market together with staged ATE premiums tracking the success fee. We considered the objections from the ATE insurance industry including a concern that new insurers would be less likely to join the market and the arguments presented by them that these proposals would not be appropriate.

**Wider conclusions and next steps**

50. The responses also raised a range of issues and concerns other than those specific to the practical proposals consulted on. For example the second part of the media's joint response identified 'other' key cost issues which they felt needed to be tackled in order to adequately address the costs issues in publication proceedings. This included costs capping and the control of lawyers' hourly fees in publication proceedings.

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51. Since the consultation the Department has been considering the need for a wider review into the operation of CFAs in personal injury, employment and defamation and 'privacy' cases in England and Wales. The Department commissioned a **scoping study** into the use of 'no win no fee' arrangements, on 25 June 2008. The study which is being conducted by Professors Richard Moorhead, Paul Fenn and Neil Rickman is looking at whether 'no win no fee', covering both contingency and conditional fees, provide appropriate levels of access to justice and whether they are too expensive.
52. In relation to publication proceedings i.e. defamation and 'privacy' cases being run on CFAs, the scoping study will consider a number of important questions for example whether the success fees of CFA funded cases are so disproportionate as to impact significantly on the administration of justice and freedom of expression; whether uninsured claimants are posing a significant problem to the administration of justice and freedom of expression; and whether CFAs impact disproportionately on local media. The study is expected to be completed in the autumn and its findings will help determine what specific issues require more detailed work.
53. The media were of the view that wealthy claimants should not be allowed to enter into a CFAs in publication proceedings. However, CFAs do not currently have any eligibility criteria or require disclosure of means and claimants have the freedom of choice in funding litigation irrespective of their means. The House of Lords considered in *Campbell* and considered that it would be impractical to require a means test of CFAs. The Law Lords also concluded that relevant legislation and practice directions did not require solicitors to inquire into their clients' means to ensure that their clients could not afford to fund their case prior to entering into a CFA. The findings of the scoping study will help revisit the concerns in this area.
54. A number of respondees highlighted the lack of data/evidence in defamation and 'privacy' cases. The scoping study will help inform the evidence and data requirements in relation to defamation and 'privacy'

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cases and provides a further opportunity for a more evidence-based consideration of various issues around the CFA regime.

55. There is some work under way on **costs capping** orders by the Civil Procedure Rule Committee (CPRC) and a proposed review of costs law by the Master of the Rolls. In light of scoping study and other important strands of work currently underway, the Department will not at this stage be implementing the revised model scheme for fixed success fees and ATE insurance as originally envisaged when the consultation paper was issued.
56. The CPRC is planning to consult on draft rules for **cost capping** orders. In these circumstances we have concluded that any issues relating to costs capping in publication proceedings should be considered in the context of the CPRC consultation. As regards **fixed recoverable hourly rates**, at present there are no plans to fix recoverable hourly rates for publication proceedings.
57. We would however, encourage parties to litigation to consider adopting the revised model on a voluntary basis, which was a suggestion put forward by a number of respondents to the consultation. We recognise that the current system could be improved and the revised model could help reduce unreasonable and disproportionate costs, and provide for a more accurate method of assessing the appropriate level of success fee.
58. We believe that the increased use of staged success fees and ATE insurance premiums could prove to be a key step toward deterring the costs war and would help bring more certainty, simplicity and stability to the costs problems in this area of law. However, it would be unrealistic to move to implement the scheme until the findings of the scoping study are known particularly if the operation of CFAs in defamation and 'privacy' cases is one of the areas that might be recommended for further more detailed research.

## **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 Gabrielle Kann, Ministry of Justice Consultation Co-ordinator, on 020 7210 2622 or email her at [consultation@justice.gsi.gov.uk](mailto:consultation@justice.gsi.gov.uk)

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

**Gabrielle Kann  
Consultation Co-ordinator  
Ministry of Justice  
5th Floor Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.

## **The Consultation Criteria**

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

**These criteria must be reproduced within all consultation documents.**

## **Annex A**

### **List of respondents**

1. Abbey Legal Protection
2. Associated Newspapers Limited
3. Bar Council
4. Beachcroft LLP
5. Charles Russell LLP
6. Clifford Chance LLP
7. Defamation Legal Expenses Insurance Providers Forum representing:  
ARAG, Law Assist and Temple Legal Protection.
8. Farrer & Co LLP
9. Foot Anstey Solicitors
10. Group Litigation Costs Services
11. Institute of Legal Executives
12. Professor Cyril Glasser
13. QBE Insurance Europe Limited
14. Reynolds Porter Chamberlain LLP representing:  
Associated Newspaper Limited, The British Broadcasting Corporation, BBC Worldwide Limited, Channel 5 Broadcasting Limited (Five), Channel Four Television Corporation, Express Newspapers, The Financial Times Limited, Guardian News & Media Limited, Hiscox Insurance Company Limited, Independent News and media Limited, Independent Television News (ITN), Media/Professional Insurance, The National Magazine Company Limited, The Newspaper Society, Newsquest Media Group Limited, The Periodical Publishers Association, The Press Association, Reuters Limited, The Society of Editors, Telegraph Media Group Limited, Trinity Mirror PLC (including MGN Limited) and UKTV Network.

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15. Russell Jones & Walker
16. Schillings Lawyers
17. Supreme Court Costs Office
18. Thompsons Solicitors
19. Times Newspapers Limited
20. Trinity Mirror PLC

## **Annex B**

### **Media groups' proposals**

#### **Success fees**

- A 0% success fee in all defamation cases where an offer of amends is made prior to the issue of substantive proceedings and that offer is accepted.
- A 0% success fee for cases that settle in the period up to the defendant responding substantively to the letter of claim with a denial of liability, or proceedings being issued and served.
- Thereafter, providing there has been compliance by the claimant with the relevant pre-action protocol, a 25% success fee until service of the Defence.
- A 0% success fee for any costs of detailed costs assessment.
- No specific submissions as to paragraphs 3(b), 3(c), 4, 5 and 6 of the model but object to the inclusion of the others.

#### **After the Event Insurance**

- A requirement that ATE insurance is not to be taken out without giving the defendant notice of its terms and a reasonable opportunity to agree or object to such cover being taken out.
- A system of payment stages and rates for ATE insurance premiums and additional liabilities payable to membership organisations.
- Restrictions on the levels of base ATE insurance premiums that can be recovered – suggesting a cap limiting recoverability of any base premium (before discount) to 30% of the level of cover.
- Rules should provide that when assessing whether an ATE insurance premium is proportionate and reasonable, the Court should take into account usual premium rates on the ATE libel 'market'.
- Defendant should also be provided with details of the premium, the extent of the cover to be provided, the terms on which it is to be provided (including any exclusion clauses) and the stage or stages to be covered.
- Defendants need to be provided with proper details of the ATE policies that the claimants intend to enter into.
- The proposals for ATE should also apply to membership organisations.

### **Retrospective CFAs**

- The rules should make it clear that where a party enters into a CFA after a case has started, and it is resolved with the defendant paying costs, the success fee should only be payable in relation to base costs incurred after the CFA had been notified to the defendant.

### **Costs**

- Requirement of prospective, mandatory costs management by cost Masters and Judges with genuine sanctions for breach.
- CPD 11.9 should be deleted/amended to make clear that it does not apply in publication proceedings.
- There should be greater control of hourly rates with proper management of the rates that can be recovered in CFA cases.
- Introduction of automatic and mandatory costs management at an early stage, irrespective of whether the claimant is funded under a CFA, in publication cases without a costs cap.
- Greater control of hourly rates
- CPD 6.5A be revised to include seeking the courts permission in advance of incurring excess costs

### **Other amendments**

- The rule changes need to apply to all publication proceeding cases.
- A definition of publication proceedings as “*defamation, malicious falsehood, breach of confidence or misuse of personal/private information’ application for the disclosure of sources, and claims under the Data Protection Act 1998 in relation to the publication by or to the media of allegedly personal or sensitive personal data*”.
- The rules need to make it clear that they only relates to communications between the parties after publication of the words complained of and that defendants do not have to pay for additional liabilities where they are not already due.
- The rules should be changed to require the Court to consider the overall costs of a case at every stage, including on allocation, at the end of any hearing and when giving directions.

## **Annex C**

### **Stages of fixed success fees and ATE insurance premiums applicable**

#### **1. 0% success fee / 0% ATE insurance premium**

Save as provided in 2-7 below, no success fee and ATE insurance premium will be recoverable in cases where within 14 days from receipt of the letter of claim in which notice is given that a funding arrangement has been entered into or within 14 days of receipt of notice that a funding arrangement has been entered into:-

- (a) the defendant makes an offer of amends pursuant to Section 2 of the Defamation Act 1996 i.e. effectively admits liability, which is accepted and/or leads to the action being settled with damages and costs being agreed without any court proceedings (whether they are proceedings for remedies or costs only proceedings).
- (b) the defendant's response to the letter of claim pursuant to either the Pre-Action Protocol for Defamation or the Practice Direction on Protocols (for non-libel claims) admits liability and leads to the action being settled with damages and costs being agreed without any court proceedings (whether they are proceedings for remedies or costs only proceedings).
- (c) proceedings are issued solely for the purpose of a statement in open court.

#### **2. 25% success fee / 25 % ATE insurance premium**

A 25% success fee and ATE insurance premium will be recoverable where:-

- (a) liability is admitted but agreement is not reached on damages and proceedings are issued and served;
- (b) the parties agree to a binding arbitration on any issue AND the defendant offers to pay for the arbitration, if the action settles under 1 (a) or (b) above as a result of the binding arbitration.
- (c) a case settles after the trial of a preliminary issue (except in circumstances where the timescales envisaged in 4 and 5 below has been reached regarding the hearing of a preliminary issue, in which case the respective percentage fee shall be applicable).

**3. 50% success fee / 50% ATE premium**

A 50% success fee and ATE premium will be recoverable where:-

- (a) a case settles after the defendant states or otherwise indicates in a response to the letter of claim that the defendant will be raising a substantive defence to the letter of claim or there is a denial that the publication is actionable. This includes cases in which the defendant disputes that the publication is (a) defamatory and/or (b) identifies the claimant.
- (b) a case settles after service of the Defence but on or before the 14<sup>th</sup> day following first service of witness statements. This period shall be extended, if within the 14 day period following service of witness statements the defendant makes a Part 36 offer, which is accepted.
- (c) a case settles after the trial of a preliminary issue (save where the time scale envisaged in stage 4 or 5 below has already been reached with regard to the hearing of the preliminary issue, in which case that percentage success fee shall apply).

**4. 75% success fee / 75 % ATE premium**

A 75% success fee and ATE premium will be recoverable where:-

a case settles after the 14<sup>th</sup> day following first service of witness statements (or any extension thereto as set out above) but earlier than the 45<sup>th</sup> day before the date listed for the start of trial (or in the case of postponement of the trial date, 45 days from the most recent listed date if both parties consent to the listing).

**5. 100% success fee / 100% ATE premium**

A 100% success fee and ATE premium will be recoverable where: -

A case reaches trial or settles within 45 days before the date listed for the start of the trial (or in the case of postponement of the trial date, 45 days from the most recent listed date if both parties consent to the listing).

**6. Extension of time**

Any period provided for in this Protocol may be extended by agreement between the parties or if the court orders so.

**7. Part 36 offers**

If a Part 36 offer is made and subsequently accepted the relevant success fee and ATE premium will be the success fee and ATE premium at the time the offer was made.

**8. Costs of Detailed Assessment**

A success fee of 25% will be recoverable on the costs incurred in preparation for and of any detailed assessment hearing.

## Annex D

### Summary of changes made to the model scheme set out in the consultation paper (Annex C)

Paragraph	Issue	Changes made
Heading	Modified heading to include the word ' <i>fixed</i> ' before success fees.	'Stages of <b>fixed</b> success fees and ATE insurance premiums applicable'
1.	Added words in bold to heading  Modified paragraph to include the words ' <i>and ATE insurance premium</i> '	'0% success fee / <b>0% ATE insurance premium</b>  'Save as provided in 2-7 below, no success fee <b>and ATE insurance premium</b> will be recoverable in cases where within 14 days...'
1a.	Modified paragraph by adding the word ' <i>any</i> ' before court and replacing the words ' <i>Request for Detailed Assessment being taken out</i> ' with the words in bold.	'the defendant makes an offer of amend pursuant to Section 2 of the Defamation act 1996 i.e. effectively admits liability, which is accepted and/or leads to the action being settled with damages and costs being agreed without <b>any</b> court proceedings ( <b>whether they are proceedings for remedies or costs only proceedings</b> )'.
1b.	Delete the third word ' <i>detailed</i> ' in the first line and add the word ' <i>any</i> ' in the fourth line and the words in bold.  Delete the words in the last line	'the defendant's response to the letter of claim pursuant to either the Pre-action Protocol for Defamation or the Practice Directions on Protocols (for non-libel claims) admits liability and leads to the

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	<i>'or a request for Detailed Assessment being taken out'.</i>	action being settled with damages and costs being agreed without <b>any</b> court proceedings ( <b>whether they are proceedings for remedies or costs only proceedings</b> )'.
2.	Added words in bold to heading and the first paragraph.	'25% success fee / <b>25% ATE insurance premium</b> '  'A 25% success fee <b>and ATE insurance premium</b> will be recoverable where:-'
2a.	Deleted original paragraphs 2(a), 2(b) and 2(d).  Added words in bold to new paragraph 2a (old paragraph 2(c). Old paragraph 2e becomes new paragraph 2b).	<b>'Liability is admitted but</b> agreement is not reached on damages and proceedings are issued and served'.
2c.	Create a new paragraph 2c which incorporates Senior Cost Judge's suggestion for a limitation similar to that which appears in para 3(c) being added to para 2, along the lines found in paragraph 3.	<b>'A case settles after the trial of a preliminary issue (except in circumstances where the timescales envisaged in 4 and 5 below has been reached regarding the hearing of a preliminary issue, in which case the respective percentage fee shall be applicable'</b> .
3.	Add new words in bold to heading and in first paragraph	'50% success fee / <b>50% ATE premium</b> '  'A 50% success fee <b>and 50% ATE premium</b> will be recoverable where:-'
4.	Add new words in bold to heading and first paragraph	'75% success fee / <b>75% ATE premium</b> '  'A 75% success fee will <b>and ATE premium</b> will be recoverable where:-'  'A case settles after the 14 <sup>th</sup> day following the first services of witness statements (or any extension thereto as set out above) but earlier than the 45 <sup>th</sup> day before the date listed for the start of trial



Summary: Intervention & Options		
<b>Department /Agency:</b>	<b>Title:</b> Final Impact Assessment of	
<b>Stage:</b> Response	<b>Version:</b>	<b>Date:</b> July 2008
<b>Related Publications:</b>		

Available to view or download at:

<http://www.>

Contact for enquiries: Aleks Leonard

Telephone: 052

What is the problem under consideration? Why is government intervention necessary?  
and the proposal would be a significant step forward.

What are the policy objectives and the intended effects?

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

Although the responses supported the second option in principle, the Department considers that it would be unrealistic to move to implement the proposals without further consideration in light of developments in other related including the scoping study into the use of 'no win no fee' arrangements and the proposed work on civil costs systems.

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

N/A

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**Ministerial Sign-off** For Impact Assessment.

*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:

N/A

.....Date:

Summary: Analysis & Evidence					
Policy Option:		Description:			
<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups'		
	<b>One-off</b> (Transition)	<b>Yrs</b>			
	£				
	<b>Average Annual Cost</b> (excluding one-off)				
	£		<b>Total Cost (PV)</b>	£	
Other <b>key non-monetised costs</b> by 'main affected groups'					
<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups'		
	<b>One-off</b>	<b>Yrs</b>			
	£				
	<b>Average Annual Benefit</b> (excluding one-off)				
	£ 633 k		<b>Total Benefit (PV)</b>	£ 5.45 m	
Other <b>key non-monetised benefits</b> by 'main affected groups'					
Key Assumptions/Sensitivities/Risks					
Price Base Year	Time Period Years	<b>Net Benefit Range (NPV)</b> £ 2.59 – 2.66 m		<b>NET BENEFIT (NPV Best estimate)</b> £ 2.63 m	
What is the geographic coverage of the policy/option?					
On what date will the policy be implemented?			To be determined		
Which organisation(s) will enforce the policy?					
What is the total annual cost of enforcement for these organisations?			£		
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?			£		
What is the value of changes in greenhouse gas emissions?			£		
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?		Yes/No	Yes/No	N/A	N/A
<b>Impact on Admin Burdens Baseline</b> (2005 Prices)				(Increase - Decrease)	
Increase	£	Decrease	£	<b>Net</b>	£
Key:				Annual costs and benefits: Constant Prices	(Net) Present Value

## Evidence Base (for summary sheets)

### Publication Proceedings – final impact assessment

#### Title and proposal

1. The Government 's conclusions following a formal public consultation by the Ministry of Justice on *Conditional Fee Agreements in Publication Proceedings – Success fees and after the event insurance*.

#### Purpose and intended measure

##### Objective

2. The proposals contained in the consultation paper intended to bring more effective costs control in publication proceedings funded under conditional fee agreements (CFAs). The intention was to help reduce unreasonable and disproportionate costs, improve the current charging mechanism and ensure that costs are more appropriate.

#### Devolution

3. The proposals apply to England and Wales only.

#### Background

4. The use of CFAs in publication proceedings emerged as a controversial issue during the 2003 CFA review '*Simplifying CFAs*'. The media organisation then raised concerns about the impact of CFAs in publication proceedings and claimed that CFAs inhibited the right to freedom of expression and encouraged unmeritorious claims. Following the 2004 consultation '*Making Simple CFAs a reality*' the media organisations reiterated their concerns and views that CFAs needed to be controlled in publication proceedings.
5. The perceived problems were as follows:
  - Funding publication proceedings cases under CFAs impinged on the media's right to freedom of expression and the success fee could effectively double a claimant's lawyer's costs resulting in the 'chilling' factor.
  - The media was forced to settle claims, which they might otherwise have fought due to excessive costs – the 'ransom' factor.
  - There was no real After the Event (ATE) market.
  - The failure of costs judges to effectively control costs in publication proceedings.

#### Rationale for Government Intervention

6. Following the Constitutional Affairs Select Committee report on 2005 and the House of Lords judgment in the *Campbell* ' case it was accepted that effective procedures were necessary to bring about costs control in this particular area of law.
7. The Civil Justice Council's (CJC) mediation process between representatives from the media, legal profession and insurance providers achieved substantial progress resulting in the proposed model.

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The CJC recommended to the Department that the model developed should be consulted on for possible implementation through the Civil procedure Rules.

### Consultation

8. The consultation paper, Conditional Fee Agreement in Publication Proceedings - Success Fee and After the Event Insurance, was published in August 2007. It sought out views on proposals to implement the Civil Justice Council's (CJC) recommendations on fixed recoverable staged success fee and after the event insurance in publication proceedings funded under CFAs. Respondents were also invited to comment on the partial impact assessment.
9. The proposals were supported in principle, and respondents included the legal professional bodies, trade unions, media groups, the judiciary and insurers. The issues were also discussed at meetings with key representatives of the media groups and legal expense insurers and the Senior Cost Judge. We also consulted with the Enterprise Directorate at the Department for Business Enterprise and Regulatory Reforms (BERR). The consultation closed on 31 October 2007 but was extended to 8 November.
10. We received twenty responses to the consultation. The media group put forward a joint submission on behalf of twenty-two media organisations. Most respondents expressed support in principle for the proposed model in respect of fixed success fees, although some objected to the proposed 14-day nil recovery of ATE premiums. The majority however, accepted the need for reform and welcomed the Department's commitment to achieving reasonable and proportionate cost controls to defamation proceedings.

### Options

11. The options considered are:
12. **Option 1** – do nothing
13. **Option 2** – Introduce fixed recoverable staged success fees and after the event insurance premiums in publication proceedings.
14. **Do nothing** – This option would retain the existing charging mechanism and its complexities in CFA funded publication proceedings. Legal challenges on costs would continue resulting in inefficient use of court time dealing with costs hearings cases. Uncertainty and instability to the costs problems would continue with defendants and liability insurers having to pay success fees and ATE insurance from the outset.
15. **Option 2** – The consultation process has helped make it clear that the current system was in need of reform. The proposed changes would reduce unreasonable and disproportionate costs to some extent, improve the current charging mechanism and ensure that costs were more appropriate and reasonable. The majority agreed that the proposed model was a positive development and would be a major step toward deterring the costs war and bring more certainty, simplicity and stability to the costs problems in publication proceedings. However, in light of the range of other issues raised in the responses and other factors including work which is currently under way in areas relevant to the proposals, the **Department will not be implementing the revised scheme for fixed success fees and ATE insurance at this stage.**
16. Some respondents have commented that they would benefit from the ability to advise clients with more certainty about the likely outcome of a case in which the opposing party had a CFA and ATE insurance. The changes in the proposed model could benefit consumers, solicitors and defendants as agreements would need to be more transparent and the length of time claimants' lawyers and defendants need to spend on agreeing success fees and ATE insurance premiums would be reduced. The Department would therefore encourage parties to adopt the model on a voluntary basis.

### **Key groups affected by the proposals**

17. The legal representatives have commented that the proposed changes would be a significant step forward and should be incorporated into rules of court. They commented the proposed changes would ensure that costs were more proportionate. Although they were not in a position to quantify any savings some respondents commented that they would be in a better position to advise their clients with certainty and clarity.
18. The media would benefit from not having to pay for a set success fee and ATE Insurance for the initial 14 day of a letter of notice of a claim being issued.
19. Liability insurers expressed concerns about the proposed changes. They commented that limiting the recoverability of ATE premiums would undermine access to justice and there would be no equality of arms. They believed that there would be a reduction in business and no incentive for other insurers to join the market. However, there was overall acceptance from respondents that limiting the recoverability of ATE insurance was a positive initial development. During the initial stage there was no risk to insure and it might not be appropriate to take out an ATE insurance form outset and incurring unnecessary costs. Although it was felt that ATE premiums might increase initially, it should become cheaper as costs become more proportionate.

### **Costs and benefits for businesses**

20. The bodies we consulted did not provide any quantification of the possible benefits the proposals would achieve. However, the majority welcomed the proposals to introduce fixed recoverable staged success fees and agreed it would be a positive initial step.
21. The legal representatives confirmed that the proposals would be more transparent and would enable them to advise their clients with certainty and clarity. Defendants would not have to pay for success fee and ATE insurance premiums for the initial 14-day of a claim and would behave aggressively or challenge costs.
22. We received no data on the number of publication proceedings cases funded by a CFA with success fee and ATE insurance. We therefore assume that the estimate we used in the partial impact assessment (about 300 claims per year) was acceptable and that for the purpose of this final impact assessment that half would be subject to the new proposals.
23. We also received no data on any start up costs involved for businesses (small and large) on the proposed changes although some respondents commented that they envisaged no costs.
24. We consulted with Enterprise Directorate at BERR who contributed to the development of the Small Firms Impact Test (as part of the Impact Assessment process) regarding the potential impact the proposed changes would have on small businesses and the potential consequences to their business. BERR also suggested changes to the Consultation document and brought the consultation to the attention of small businesses on their Small Firms Consultation Database and the cross Government website for business [www.businesslink.gov.uk](http://www.businesslink.gov.uk). Those small businesses that responded commented there would be no potential costs.

### **Savings for businesses**

25. Some respondents provided figures on the hourly rates currently being charged by solicitors but there was no indication as to how many hours were claimed. We concluded for the purpose of this final impact assessment that the average hourly rates based on the figures provided by some respondents and charged were as follows:

- Grade A solicitors £394
- Grade B solicitors £266
- Grade D solicitors £148
- Costs draftsman £150
- Total hourly costs £958

Number of hours allowed:

- Partners work – 20 hours
- Assistant solicitor – 30 hours
- Counsel's work – 30 hours

26. From the information provided by some respondents we concluded that the current total hourly costs would be about £958. Although respondents were not in able to quantify any such savings, some legal representatives commented that implementing the proposed changes would mean advising their clients with more certainty and clarity. This would probably save solicitors about 2 hours on each CFA funded case with a total saving of £287k per year (958 x2 x150 cases).

### **Costs and benefits to the courts**

27. The costs judges of the Supreme Court Costs Office commented in their response that the proposed changes was an initial step to achieving a just costs regime where CFAs and ATE insurance were used in publication proceedings. However, respondents did not provide information on the number of CFA funded cases or any new costs they thought might arise from the changes.

28. The Department's report, Judicial and Court statistics 2006, indicated that proceedings were started in the Queens Bench Division of the High court in about 220 defamation cases between 1999 and 2006. (Data is not available for 2007). It is estimated that about half of this proportion would be funded by a CFA and that the new proposal would bring about 50% reduction in the number of cases taken to court on costs issues.

### **Savings for the courts**

29. The proposed changes would bring about a reduction of one day's judiciary work on detailed assessment hearing at Supreme Court Costs office with savings of about £18k per year (£322 x 55 cases). This is based on the costs of detailed assessment on costs issues per day at £322 - based on a salary of £98,900 for a cost judge and £18,500 per year for a court staff (admin).

### **Costs and benefits for media defendants**

30. Some media respondents commented that the current insurance premiums for a publication proceedings dispute is about £68,250.00 with a liability of £100,000. We estimate out of 150 cases funded under a CFA that one third would benefit from the changes, making savings of around £328k.

### **Costs and benefits for the Insurers**

31. The changes would have an adverse impact on ATE insurance providers costing about £328k. However, respondents commented that the proposed changes were a positive initial development. Many respondents indicated that during the initial stage there was no risk to insure and it might not be appropriate to take out an ATE insurance from outset and incurring unnecessary liabilities. Although ATE insurance might increase initially, it should become cheaper as costs become more proportionate.

### **Legal aid impact**

32. The proposed changes will have no impact on legal aid fund. This area of law is excluded from legal aid.

### **Equality Impact**

33. We have undertaken an Equality Impact Assessment initial screening and have not identified any equality impacts. Respondents did not provide any information that would indicate any equality impact.

### **Small Firm Impact Test**

34. We have not identified any obvious disadvantages. We consulted with Enterprise Directorate at BERR regarding the potential impact the proposed changes would have on small business and the consequences to their business. We received no concerns from the Enterprise Directorate and those businesses that responded confirmed there would be no potential costs.

### **Competition Assessment**

35. The competition filter was completed and indicated no areas of concern. The ATE insurance markets would be most affected by the changes. Some respondents commented that premiums might increase initially. However, we believe that as costs become more proportionate ATE premiums should become cheaper and would see claims settling at reasonable costs.

### **Enforcement, sanctions and monitoring**

36. The professional bodies will monitor the conduct of practitioners and the courts will consider the cases that come before them. The courts may sanction solicitors costs if found to be non-compliant with the proposed changes.

### Specific Impact Tests: Checklist

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

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

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

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