



global witness

**Global Witness' response to the Ministry of Justice's call for consultation on controlling costs in defamation proceedings**

1. Global Witness welcomes the proposal made by the Ministry of Justice to reduce the maximum success fees which lawyers can currently charge in defamation cases from 100% to 10% of the base costs. We believe that restraints to the current law are urgently required and that further reforms are needed in the long term. Furthermore, we believe that greater action is necessary to limit the damaging effect that the threat of excessive cost awards has on reporting public interest information.
2. Global Witness is a non-governmental organisation ("NGO") that exposes the corrupt exploitation of natural resources and international trade systems. We obtain evidence which we use to drive campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was co-nominated for the 2003 Nobel Peace Prize for its work on conflict diamonds.
3. We work predominantly on matters of public interest in developed and developing countries, emerging markets, and in countries with totalitarian regimes and low levels of transparency (according to the Transparency International index).
4. On 14 January 2009, we made a submission and provided oral evidence to the UK Department of Culture, Media & Sport, in which we used five case studies and described our own experience of how UK libel law impedes investigative NGOs in a similar manner as it affects journalists. We would like to reiterate our position as expressed therein for the purposes of the Ministry of Justice's proposal (see enclosed document).
5. We believe that greater attention is required with respect to the negative impacts that current UK libel law has on investigative NGOs like us, which work to expose the truth and publish it in the public interest.

**The obstructive effect of Conditional Fee Arrangements ("CFAs") on NGOs**

6. Global Witness has been increasingly concerned about the highly obstructive effect UK libel law has on investigative work which seeks to expose the truth in the public interest. UK libel law, and the costs connected to it, can and do prevent the publication of NGO reports on governments, corporations and individuals, especially where the information is sensitive and carries a high liability risk. Organisations – in particular non-profits and charities – are often forced to self-censor due to the risk of litigation even when what they were planning on exposing is true. This self-censorship is in part due to the added risk of having to pay double the claimants' costs in the event of losing a defamation case.
7. Global Witness endeavours not to be chilled but to go ahead and publish its detailed and thoroughly researched reports even if it means having to bear the risks as a result of these. It does so because it is in the public interest to uncover matters of corruption, funding of war and human rights abuses.

8. Global Witness often carries out investigations in countries where the local population is not granted the freedom of expression, and cannot freely publish their knowledge on corruption, state looting, and the illicit exploitation of natural resources. In order to serve the public interest Global Witness aims to make such information widely available. Our activities often trigger hostile libel actions from rich business people and politicians, who have the means to start unfounded libel actions which potentially have the power to paralyse us by abusing our financial disadvantage.
9. We welcome the changes that the Government has already introduced in order to control the costs of defamation proceedings. However, we feel strongly that these changes have not gone far enough and for this reason we support the Ministry of Justice in its efforts to reduce the upper limit of the success fee. We are convinced that the current rules shift the focus of defamation actions from the correction of erroneous information to the pursuit of significant financial gain.
10. We support the position of the Ministry of Justice that the claimants' access to justice in defamation cases does not need to be guaranteed in such an excessive way. Even though Global Witness has never been successfully sued, this is definitely not due to the lack of possibility for the claimant under UK libel law. Individuals and companies have repeatedly threatened to file legal actions against us. They have been unsuccessful because we refuse to be cowed and employ a meticulous system of internal procedures that ensures the information we publish is accurate and in the public interest.
11. Global Witness agrees with the reasons given by the Ministry of Justice for the decrease of success fees, specifically in paragraphs 18 and 19 of the proposal. We are concerned about the way in which wealthy clients and their lawyers can afford to be speculative under the current rules. For example, according to Sir Rupert Jackson's report, a claimant's chances of winning a libel case are significantly higher than 50%; this being the case, lawyers face less risk of losing and may pursue cases without sufficient evidence of harm. Organisations such as Global Witness do not have the financial means to be able to defend against such frivolous and vexatious claims. Even if the case never makes it to court, the financial and resources costs involved are daunting and act as a deterrent to publishing information based on the public interest.
12. We believe that the upper limit of the success fees should be set so that lawyers are not encouraged to take up frivolous and vexatious claims. We call for measures to be taken against the use of disproportionate success fees which currently provide lawyers with a 'slush fund' (extra cash) which can be used to pursue non-credible cases in the future.
13. In addition, Global Witness believes that the control of costs in defamation proceedings could be improved further. We therefore propose the following points for the Ministry of Justice to consider:

#### **Justification of lawyers' costs**

14. Global Witness is concerned that the mere limitation of success fee percentages will not reach the aim set out by the Ministry of Justice, which is to achieve proportionate and reasonable costs in defamation proceedings. In our experience there are occasions when the base costs of lawyers are themselves disproportionate and unreasonable. We propose a system of closer scrutiny as to what can be claimed as legal costs (and what can be subsequently multiplied as a success fee).

## **Eligibility for CFAs**

15. We do not agree with granting the possibility of filing claims under CFAs for all claimants in any financial situation. In our understanding CFAs were introduced to protect the rights and access to justice of those who could not afford to file a legal action unless this kind of agreement was available. However, our own experience has revealed that often the claimants using CFAs are not financially constrained, but in fact are very wealthy. Given the initial justification for the introduction of CFAs, Global Witness proposes a system similar to that of legal aid, where the parties are financially assessed before being granted the possibility to file under this type of arrangement. In our opinion this would mean that only those claimants who truly are in need of CFAs can exercise their rights.

## **Obligation of overseas claimants to provide a deposit**

16. Global Witness also believes that overseas claimants should be required – as a matter of course – to deposit a percentage of their potential costs with the court. Global Witness has had direct experience of the time, money and effort it takes to reclaim costs awarded in its favour from a litigant. In 2007, Denis Christel Sassou Nguesso, the son of the President of the Republic of Congo, undertook legal proceedings against Global Witness in an attempt to force us to remove from our website documents that showed how he had been using state oil revenues to fund a lavish (playboy) lifestyle. He was unsuccessful in his challenge and Global Witness was awarded its legal costs – totalling around £50,000. Global Witness has spent the last two years trying to get the cost order enforced and ultimately had to seek enforcement abroad as Mr Sassou-Nguesso does not have any assets in the UK. The extra costs in terms of staff time, legal fees and the effect on our activities as a result of not having this money, have been significant, and only make it harder for organisations such as ours to defend ourselves.

Global Witness appreciates the opportunity to make this submission to the Ministry of Justice and would be willing to discuss any of the above in greater detail. We understand that this document is a proposal for interim measures and that the Ministry of Justice will continue to work on long term solutions as they relate to costs in defamation proceedings. Accordingly, we would like to express our willingness to be involved in and contribute to this work in the future.

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Enclosed: Annex A: Global Witness submission to the Department of Culture, Media & Sport for the inquiry on press standards, privacy and libel, 14 January 2009