



# Joint Committee on Human Rights

Committee Office · House of Commons · London · SW1A 0AA

Tel 020 7219 2797 Email [JCHR@parliament.uk](mailto:JCHR@parliament.uk) Website [www.parliament.uk](http://www.parliament.uk)



From Rt Hon Harriet Harman MP, Chair

Rt Hon David Gauke MP  
Lord Chancellor and Secretary of State for Justice  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ

8 January 2019

Dear David,

## **Access to justice in defamation cases**

Thank you very much for the helpful report “Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government’s response to Human Rights judgments 2017-2018”. We also note the recent positive progress made in efforts to address outstanding ECHR judgments against the UK as well as in addressing declarations of incompatibility made by the UK Courts.

I note the recent statutory instruments laid and written ministerial statement in relation to defamation, privacy and access to justice and the efforts to address the ECHR judgment in *MGN v UK*. It is of course right that steps are taken to give effect to outstanding ECHR cases, including the measures taken here to address the *MGN* case.

However I note that this issue involves a careful balancing between the freedom of expression of the press (under Article 10 ECHR), the right to privacy of individuals (under Article 8 ECHR) and access to justice (which needs to be effective and affordable). For that reason I am writing to note some caution about the overall balance being struck here.

In particular, under these arrangements, some individuals whose right to a private life has been violated may not be able to obtain or afford After-The-Event (ATE) insurance. As noted in the Government Consultation Response “Costs protection in defamation and privacy claims: the Government’s proposals”<sup>1</sup>, “the ATE regime enables parties with a good case to litigate and discharge their Article 10 (freedom of expression) without the fear of having to pay potentially ruinous legal costs if their case falls”. What is not clear is how those, of modest means, whose right to a private life has been breached, can be able to access justice if they might be unable to secure private ATE insurance.

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<sup>1</sup> <https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims/results/costs-protection-defamation-privacy-claims-government-response.pdf>

This could effectively prevent access to justice in such cases and therefore prevent access to an effective remedy for a breach of an individual's convention rights.

I understand that for the most frivolous cases this does not entail a significant concern around access to justice. However, I would be gravely concerned were those with reasonable or good cases unable to secure affordable ATE insurance and therefore unable to enforce their right to a private life.

We believe this careful balance should be kept under review, to ensure adequate protection for individuals to enforce their human right to respect for their private life. We would be grateful to be kept informed and updated as to the adequacy of these arrangements in enabling individuals to enforce their rights. For this review to be effective, the Government will need robust information. I would be grateful if you could provide information about:

- The number of providers currently in the After the Event Insurance Market and the level of premiums;
- The Government's plans to monitor the market for After the Event Insurance;
- How many cases involving Article 8 rights are funded by ATE insurance;
- How, if at all, the Government intends to monitor the extent to which those with moderately strong cases are able to access the courts;
- What incentives, if any, there will be to ensure that defendants do not use their costs as a weapon in litigation.
- What measures are in place to protect an individual's right to private life before that right is breached by a publication.

We also note that, in your letter and your written ministerial statement, you state that the availability of recoverable ATE insurance will be maintained for these cases "at least for the time being". We consider - as reflected in the Leveson Report recommendations - that costs protections must be maintained to ensure adequate access to justice for individuals whose right to a private life has been violated, so that they are able to enforce their rights. Therefore, were there to be any changes to this system, alternative adequate measures to enable access to justice must be put in place. We would be grateful to be kept informed and updated if the Government has any plans to vary this cost protection system.

Finally, as this subject touches on the topic of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), I note that the Committee looks forward to considering the forthcoming results of the Government's review of LASPO – not least as the access to justice issues arising as a result of the LASPO reforms feature in nearly every thematic inquiry undertaken by the Committee this session, raising concerns as to the ability of individuals to enforce their human rights through access to the Courts.

Yours sincerely



**Rt Hon Harriet Harman MP**  
**Chair, Joint Committee on Human Rights**