



Ministry  
of Justice

The Right Honourable  
**David Gauke MP**  
Lord Chancellor & Secretary of  
State for Justice

The Rt Hon Harriet Harman QC MP  
Chair, Joint Committee on Human Rights  
Committee Office  
House of Commons  
London  
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15 February 2019

Dear Harriet

### ACCESS TO JUSTICE IN DEFAMATION CASES

Thank you for your letter about access to justice in privacy and defamation cases, dated 8 January 2019.

As you recognise, there is a careful balance to be struck between the freedom of the expression of the press, the right to privacy for individuals and access to justice. We also agree that it is important to give effect to our legal obligations under the *MGN v UK* judgment of the European Court of Human Rights in 2011. We have discharged those rights by making the conditional fee agreement (CFA) success fee non-recoverable from 6 April this year.

You raise some concerns about after the event (ATE) insurance for privacy and defamation cases, which covers the costs of having to pay the other party's legal costs if the case is unsuccessful. As you will appreciate, we are not making any changes to ATE insurance recoverability, which means that the arrangements that have been in place since April 2000 will continue for these cases.

As you may know, ATE insurance premiums are priced in a way that reflects the risk (and by extension merits) of a case. This ensures that good cases can be taken forward while weak cases will be naturally filtered out as they are unlikely to be insured. This system allows individuals with good cases to enforce their rights. Potential litigants are advised on the availability of ATE insurance and its costs by their solicitors. We would expect solicitors to make us aware of any concerns about the availability of ATE insurance for these cases: to date they have not done so. In the circumstances, it seems reasonable to conclude that there are no particular concerns about the availability of ATE insurance at the moment, but should your Committee, or solicitors practising in the field, make us aware of any we would be happy to look into them.

The ATE insurance market is independent of Government so the amount of data that we have is limited. For example, ATE insurance may be taken out in cases which settle before any litigation is commenced and we would not have any knowledge of those cases, let alone whether ATE insurance had been taken out.

You are right to emphasise the importance of controlling costs and you may be aware of the significant reforms that have been implemented since the Legal Aid, Sentencing and Punishment of Offenders Act

2012 (LASPO). These include the costs budgeting of claims, including for defamation and privacy, so that the costs are set at the start of the case, preventing the potential abuse that you highlight. More generally, you may be interested in Sir Rupert Jackson's 2017 report on extending fixed recoverable costs in civil cases: we hope to be able to set out the way forward on that report shortly.

As you may know, the Government has now published the Post-Implementation Reviews of Parts 1 (legal aid) and 2 (civil litigation funding and costs) of LASPO, alongside a legal support action plan and a review of legal aid for inquests, and the details are available at (the links to the other reviews are at the bottom): <https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>.

It is helpful to have your Committee's insights, and I note your interest in any future reforms in this area.

Yours ever  


**RT HON DAVID GAUKE MP**