global witness

Global Witness's response to the Ministry of Justice's consultation on costs protection in defamation and privacy claims

About Global Witness

Founded in 1993 Global Witness (GW) runs pioneering campaigns against natural resource related conflict and corruption and associated environmental and human rights abuses. Through our investigations, reporting and campaigning we seek and create solutions to the 'resource curse', so that citizens of resource-rich countries can get a fair share of their country's wealth. We work on matters of high public interest in developed and developing countries, often exposing corruption and conflict. Our investigative reports have revealed how abundant timber, diamonds, minerals, oil and other natural resources can incentivise corruption, destabilise governments and lead to war. We were nominated for the Nobel Peace Prize in 2003 for our work exposing blood diamonds in Africa.

Relevance to HMG's consultation on costs protection in defamation proceedings

Global Witness (GW) welcomes the consultation. We are careful and responsible publishers; we make sure that our investigations are painstakingly researched and supported by evidence, and we believe they are of significant public interest. We also always seek to give a right of reply to the relevant parties if possible. Despite this, we regularly face threats of libel claims, which we are forced to take seriously under the current law. These threats usually come from wealthy and powerful companies, individuals and high-ranking officials, who can easily afford to make claims which force us to dedicate a significant amount of resources to refute them even though they may be baseless. The threat of having to pay the other side's costs, which may be more than doubled by the use of conditional fee agreements, the accompanying success fee and 'after the event' insurance premium, besides our own costs is a real risk to GW's ability to carry on its work.

To be effective, our work involves confronting extremely wealthy and powerful vested interests.

A report we published in June 2012 revealed evidence that numerous UK companies appeared to have been involved in a major money laundering scandal involving a Kyrgyzstan bank and showed that urgent action is needed to address the ease with which the UK and other major economies are used to launder the proceeds of corruption, tax evasion and other crimes.

Since 2012 we have been exposing the 'secret sales' of five major state mining assets in the Democratic Republic of Congo (DRC). These were facilitated through opaque offshore company structures that then sold the assets to major international mining

companies at a significant profit.[1] We estimate the losses to the country are at least $1.3 billion, which is double the annual spending on health and education in the DRC combined. This supported a campaign for greater transparency in the oil and mining industry, is currently the subject of a submission to a UK select committee inquiry as well as international attention from prestigious bodies like the Africa Progress Panel. One of the mining companies concerned is also the subject of an investigation by the Serious Fraud Office, partly in relation to these deals.

Another example from this year is our investigation into corruption among the ruling elite in Sarawak, Malaysia through land grabbing and secret deals.[2] The campaign had a significant impact creating a political and media storm and leading to an investigation of Chief Minister Taib by the Malaysian Anti-Corruption Commission.

In these cases we and others working to promote transparency have had highly aggressive legal threats from London lawyers representing the vested interests who have most profited from these deals.

The difficulties caused by our frequent exposure to threat of libel and privacy actions are compounded because the costs of cases in England and Wales are so extraordinarily high. A 2008 Oxford study showed that the costs of libel actions in England and Wales are 140 times the European average[3]. Such high costs can make choosing to defend material difficult to justify for Global Witness, which has other pressing issues making claims to its limited budget. This issue has been recognised as highly important and Simon Hughes (MP for Bermondsey and Old Southwark) expressed the need to "encourage good investigative journalism and in the process journalists should not be afraid of exposing what they need to expose in the public interest." (Col 378 Hansard)

Costs need to be reduced generally, and investigative NGOs like GW should not be afraid to expose wrongdoing in the public interest provided that they do so responsibly and give fair right of reply (which we always seek to do). They should be able to publish and to defend their publications without risking financial ruin. The Government's proposal that parties will no longer be able to recover success fees or 'after the event' insurance premiums from losing opponents, and that defendants should be able to benefit from costs protection, is therefore very welcome.

If Global Witness were able to benefit from costs protection it would make a positive difference to its work and its ability to publish reports in the public interest. We would be free to make decisions on whether to take down material, or defend it in court if necessary, based more on the rights and wrongs of the issue rather than on financial considerations. Costs protection for defendants would prevent undue intimidation and allow cases to be decided on merit rather than inequality of arms. Our right to freedom

[1] http://www.globalwitness.org/library/global-witness-calls-uk-select-committee-lift-lid-corruption-scandals

[2] http://www.globalwitness.org/insideshadowstate/

[3] http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf

of expression would be considerably strengthened.

Global Witness believes that we should be able to benefit from the current costs protection proposals. We think there should be greater clarity on the financial thresholds and how these may be applied in relation to an organisation such as ours.

We are concerned that section 40 of the Crime and Courts Act 2013 seeks to deprive costs protection from relevant publishers who are not members of the new press regulator.

We are also concerned that costs protection has the potential to offer claimants the opportunity to pursue trivial and unmeritorious claims, and believe the process of considering applications for costs protection ought to be able to prevent such claims from proceeding.

We have responded to the specific questions that we believe are relevant to us below:

Question 1: Do you agree with the scope of the protection? If not, what should it cover?

Yes we agree that (a) the proposals should cover publication and privacy proceedings, (b) protection should be available to both claimants and defendants and (c) protection should be subject to consideration of means.

But, in relation to the provision that section 40 of the Crime and Courts Act 2013 should take precedence over the costs protection rules, we do not agree that publishers should be penalised in costs for not joining an approved regulator.

In particular removal of costs protection for publishing NGOs like GW would run contrary to the government's own rationale for introducing the costs protection rules: 'to ensure meritorious cases are able to be brought or defended by the less wealthy, who should not be deterred from bringing or defending an appropriate claim through the fear of having to pay unaffordable legal costs to the other side if they lose.'[4]

Question 2: Do you agree with this process? If not, how should it be improved?

We agree that defendants as well as claimants should be able to benefit from costs protection. But we are concerned about both the availability of full costs protection (nil net liability) for claimants and the apparent presumption of full costs protection for claimants who are individuals.

It is right that the government recognises that defamation proceedings have different characteristics to personal injury cases where an individual personal injury claimant is invariably suing a well-resourced defendant.

[4] p.4 Consultation paper

However, the procedure currently proposed in relation to defamation claims seems to provide that claimants who are individuals should get full costs protection if they apply unless the court is satisfied that they would not suffer severe financial hardship without such costs protection. We do not think that there is a justification for claimants to be treated more favourably than defendants. There is a further concern that nil net liability for claimants will encourage unmeritorious or vexatious claims.

In relation to the process of applying for costs protection, we believe that there should be at least some consideration of the merits of the claim as well as consideration of the applicant's finances without frontloading costs inappropriately. We have experience of an early application to the court to resist an unmeritorious claim costing £50,000 in our own costs. We successfully resisted an application by the son of the President of the Republic of Congo who attempted to force us to remove from our website documents that showed how he had used state oil revenues to fund a lavish playboy lifestyle.

Costs protection should provide access to justice in cases that have a foundation, not open the door to claims that are without merit and that ensure that another party runs up legal costs, which it has no chance of recovering. There must therefore be some mechanism built in to the process of the application for costs protection which does not allow trivial or unmeritorious claims to proceed.

Question 3: Do you agree with the approach of allowing full costs protection for those of modest means, partial (capped) protection for those in the 'mid' group, and no costs protection for those with substantial means?

This approach appears to try to level the playing field in terms of resources available to parties, and this is welcome as it will increase access to justice, particularly for individuals. However, we repeat our concern that full costs protection for claimants may encourage claims that are without merit because the claimants know they won't have to pay the publisher's costs if they lose. This could discourage investigative reporting and have serious consequences for freedom of expression. Claimants have a choice whether to litigate and should only do so if they face some risk if the claim does not succeed. Defamation claims are different to personal injury claims, not least because of the burden of proof on the defendant to justify or otherwise defend.

Established not-for-profit organisations in particular may have money in the bank, but this is not 'spare'. The court should be able to take into account the fact that both using this money to defend unmeritorious libel actions brought by nil net liability claimants and risking an order for costs of claimants generally could threaten such an organisation's viability.

Question 4: Should there be any further clarification of the level of means for each group? If so, what levels of means would be appropriate?

Clarification of the level of means which will enable parties to qualify for full, partial, or no costs protection is important. If a publishing NGO of mid means is defending a case in the

public interest account should be taken of this to reduce the costs cap which might otherwise apply.

Question 5: Do you agree that the test of 'severe financial hardship' is the right test to exclude the very wealthy – whether individuals or bodies (including, for example, national newspapers that report a loss)? If not, what is the appropriate test?

Global Witness believes that the test of 'severe financial hardship' is appropriate to exclude the very wealthy; there is a risk, however, that unless properly applied it will be manipulated, especially by those with significant overseas assets.

We note that draft rule 44.26(2) suggests the issue of insurance may be relevant for the purpose of assessing severe financial hardship. This risks major unintended consequences such as increasing the costs of insurance and, if being insured adversely affects an insured party's position, it may discourage them from taking out insurance in the first place or push premiums further up.

Question 6: Do you agree that a party in the 'mid' group should pay a 'reasonable amount'? If not, what is the appropriate test?

This sounds sensible and could level the playing field, but as with question four above, the detail of what constitutes a 'reasonable amount' is important. The 'reasonable amount' must not be so high that parties are too afraid for their financial security to defend their material.

Question 7: What factors should be taken into account in determining what is a 'reasonable amount' for a party in the 'mid' group to be liable for?

A party's uncommitted financial resources, its necessary expenditure to continue functioning, and its ability to fulfil its future commitments are all factors that the court ought to take into account.

Question 8: What evidence do you have on the legal costs for claimants and defendants in defamation cases? We would be particularly interested in information on the average level of costs for each party and how this varies across cases.

We have experience of a successful early application to the court to resist an unmeritorious privacy claim in the High Court but it still cost us over £50,000 in costs that we did not fully recover.

Question 9: What evidence do you have on the financial means of claimants and defendants in defamation cases?

The reports we publish often challenge powerful and well-resourced individuals and multinational companies. In the cases cited earlier in DRC and Malaysia, the lawyers were acting on behalf of clients worth hundreds of millions or several billion pounds. In contrast, Global Witness is a small not for profit organisation whose continuing operations would be

jeopardised by having to pay tens of thousands of pounds in other parties' legal costs, besides its own.

Question 11: Do you agree with the proposed additional provisions? If not, how should they be improved?

The proposed additional provisions appear sensible.

Question 12: Should there be any specific provision in the rules concerning which party should pay the costs of an application for costs protection? If so, what should the provision be?

No, we do not think any specific rules should be made in relation to this.

Question 13: Should the Pre-Action Protocol for Defamation be amended to take account of these new provisions? If so how?

The Pre-Action Protocol for Defamation should be amended to encourage parties to consider whether an agreement can be reached in relation to the issue of costs protection early in a dispute.

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