



DEFAMATION COSTS WORKING GROUP 2013

FINAL REPORT

Chairman's Foreword

The Civil Justice Council's Working Group on Defamation Costs was established in December 2012 in order to consider the potential reform of costs protection in defamation and privacy claims. Its membership was drawn from a representative range of interested parties, in order to gain as wide a perspective as possible. It was established by the Council at the request of the Government and was required to submit its Report by the end of March 2013.

Given the short time frame, the Working Group has been unable to consider the issues involved in this very difficult (and fast developing) policy area in as much detail as they merit. It has also been unable to conduct a consultation in the time available or take account of the potential consequences that might flow from the adoption of recommendations made in the Leveson Report e.g., the establishment of an arbitration system. The impact of these will need to be considered further.

With these caveats, the Report sets out a series of recommendations. They are intended to form the basis for further detailed discussion and should be read in conjunction with the CJC's earlier work in this area¹. They are not intended to be regarded as definitive answers. The Working Group's terms of reference specifically required it to consider options for reform and to set out the advantages and disadvantages of those options. The recommendations reflect conclusions of the Working Group, and in some cases those of a majority of its members.

It will now be for Government and Parliament to consider further the various options for reform detailed in the Working Party's recommendations.

John Pickering,
Chairman of the Working Group

¹ A CJC Working Group produced a report on the Defamation Bill in June 2011 - <http://www.judiciary.gov.uk/JCO%2fDocuments%2fCJC%2fPublications%2fconsultation+responses%2fCivil+Justice+Council+Working+Party+-+Defamation+Bill+-+10+6+11.docx>.

Part I: Introduction to the Working Group’s role and the backdrop against which this report has been produced

1 INTRODUCTORY NARRATIVE- SETTING THE SCENE

- 1.1 The Government implements Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“**LASPO**”) on 1 April 2013. The Act will bring into effect a package of reforms following Jackson LJ’s recommendations in his Review of Civil Litigation Costs², published in December 2009, including changes to the way in which ‘no win, no fee’ conditional fee arrangements (“**CFAs**”) work.
- 1.2 Jackson LJ’s conclusion, specifically in relation to the operation of CFAs within the context of defamation and related claims³, was that the recoverability of success fees of lawyers instructed on a CFA basis and premiums for After the Event insurance (“**ATE**”) should be abolished, and that *“the claimant’s position should be protected by (a) raising the general level of damages in defamation and breach of privacy proceedings by 10% and (b) introducing a regime of qualified one way costs shifting”* (“**QOCS**”).
- 1.3 The purpose of the suggested 10% increase in damages awards was to enable any success fee that was to be paid to the claimant’s lawyers to be paid out of the damages award (rather than being recovered from the losing party as is currently the case)⁴.
- 1.4 The Court of Appeal handed down a recent decision in ***Simmons v Castle [2012] EWCA Civ 1039*** applying the 10% increase in general damages to all cases decided after 1st April 2013. The ruling was intended to coincide with the implementation of the reforms contained within LASPO, due to come into effect on the same date.
- 1.5 In the meantime, a fundamental concern underlying the Defamation Bill currently progressing through Parliament has been to simplify and clarify the law and procedure relating to defamation actions, to help reduce the length of proceedings and the substantial costs that can arise. These include, for example, the reversal of the presumption that there be trial by jury in defamation actions. These proposals are complementary to the more general costs reforms prompted by Jackson LJ’s report across the board.
- 1.6 The Defamation Bill as currently drafted deals in part with costs issues related to the use (or non-use) of a specialist arbitration system set to be established to deal with defamation claims (as a result of a recent amendment proposed by Lord Puttnam discussed further at paragraph 4.3 below). It does not, however, currently address costs in defamation proceedings in any wider sense.

² <http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/reports>

³ *ibid*, Part 5, Chapter 32, para 3.13

⁴ Part 2, Chapter 10, Section 4

- 1.7 Similar to Parliament's desire to reduce the costs and complexities of defamation actions, the LASPO reforms to the current CFA regime are also intended to reduce the costs of civil litigation, albeit ensuring that meritorious cases can still be pursued⁵. Damage-based agreements (DBAs) offer another funding option for litigation via the new legislation, although they are predicated on lawyers taking a share of the damages awarded for clients who win their case and thus (with the often low damages awarded in defamation cases) may be an unattractive mechanism in this context.
- 1.8 However, the LASPO reforms, as set to be implemented, are not without their potential negative consequences. Whilst not all of Jackson LJ's recommendations have been incorporated into the provisions of LASPO, of those that have been in relation to defamation and related claims, there has been serious concern about the likely impact of sections 44 and 46 LASPO, in particular on the access to justice of parties with limited means. Those sections have the effect of removing the recoverability from the losing party of: (1) success fees that have previously been claimed by lawyers acting on a CFA basis; and (2) ATE insurance premiums.
- 1.9 The concern about these changes, which have been voiced by many practitioners and commentators, is that they will have a seriously detrimental impact on access to justice for both claimants and defendants in areas of law in which a substantial number of litigants have traditionally relied on CFAs, and the recoverability of ATE insurance premiums, to fund their claims.
- 1.10 In the absence of those mechanisms, critics believe that such parties will now be unable to bring or defend meritorious claims because all but the super-rich will be incapable of shouldering the burden of the potential costs consequences that may follow in the event they are unsuccessful.
- 1.11 The issues were comprehensively summarised in the 7th *Report of the Joint Committee scrutinising the Defamation Bill*⁶, published on 4 December 2012, which explained as follows:

"Costs, funding and access to justice

60. The availability of conditional fee agreements ("CFAs") for actions in defamation has long been the subject of debate. Under a traditional CFA the lawyer does not generally receive a fee from the client if the case is lost. However, if the case is won, the lawyer's costs (the 'base costs') are generally recoverable from the losing party. In these cases, the lawyer could charge an uplift on these base costs, which (until very recently) was recoverable from the losing party. This uplift is known as the 'success fee'. In addition, After the Event (ATE) insurance can be taken out by parties in a CFA-funded case to insure against the risk of having to pay their opponent's costs and their own disbursements if they lose. As with success fees, until very recently, ATE insurance premiums were recoverable from the losing party.

⁵ <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/working-parties/costs-in-defamation-proceedings>

⁶ Taken from Section 3 of the Report 'Wider issues raised by defamation reform' available online at: <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/84/8406.htm>

61. It has therefore been argued that defendants in actions for defamation could be perceived to be under a coercive financial risk, as they could be liable for success fees on top of base costs. Critics argue that this inhibits the freedom of expression of defendants in a real and material way. Irresponsible parties have no incentive to maintain sensible costs, as they are afforded protection by the structure and operation of the CFA model. In addition, ATE insurance raised similar concerns, as it was recoverable from the losing defendant.

62. The European Court of Human Rights recently gave judgment in *MGN v the UK* (2011) ECHR 66 in which the Court agreed with such a view, finding that the existing CFA arrangements on recoverability contravened Article 10: the risk to the defendant of being liable for the high and disproportionate costs in a defamation action produced a chilling effect on free speech. CFAs that enabled recovery of success fees from the losing side were deemed disproportionate.

63. The subsequent Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 has altered the way in which CFAs operate. Sections 44-46 of the LASPO Act 2012 govern the recoverability of success fees and ATE insurance. The net effect of these provisions is to limit the recoverability of success fees and ATE in a CFA-funded case from a losing defendant. Members will recall that a major criticism of these reforms is that they render the CFA-model almost obsolete, as lawyers will be reluctant to take on defamation cases on a CFA-basis if they are no longer commercially viable.

64. We wrote to the Government expressing our concerns that this change to CFAs and ATE may inhibit access to justice for those claimants and defendants, who are middle-income, but not eligible for legal aid. The Government has responded to our concerns by reaffirming their commitment to the LASPO reforms, and the belief that these rules will restore balance to the system and result in a reduction in legal costs. The Government also relied on the decision of the European Court of Human Rights in *MGN Ltd. v the UK*, to justify the changes to costs in defamation proceedings: the new rules on non-recoverability of success fees and ATE from the losing party will address the European Court's criticism in that case.

65. The Government also outlined what the LASPO reforms would achieve:

"We are not removing the access to CFAs of either claimants or defendants; rather we aim to create a stronger balance between the interests of claimants and defendants. The reforms will still provide the claimants with a means to bring meritorious cases but will also ensure that the costs faced by defendants are proportionate, thereby correcting the present anomaly where claimants have little incentive to keep an eye on the costs they incur. Moreover, it is unfair on defendants that they may feel unable to fight cases, even when they know they are in the right, for fear of excessive costs if they lose."

66. However, the Government has acknowledged the dilemma facing less wealthy claimants and defendants, as they may be put off from pursuing or defending reasonable actions because of the risk of having to pay the other side's legal costs if their case fails. The Government has therefore said that it will therefore consider the issue of costs protection.

67. Lord McNally made a commitment at Second Reading to ask the Civil Justice Council to consider the case for, and possible options for reform of, costs protection in defamation and privacy related claims. The Civil Justice Council is an advisory body, chaired by the Master of the Rolls, and has previously assisted the Ministry of Justice in developing a regime of costs protection in personal injury cases. The Government has indicated in its response to us that the Civil Justice Council will set up a working group to consider the issue of costs protection in defamation/privacy cases, and report with its recommendations by the end of March 2013. This timetable will allow the Government to consider what, if any changes, should be made to the Civil Procedure Rules when the Defamation Bill comes into effect."

1.12 The Working Group believes that it is crucial for those responsible for drafting

any new rules concerning the possible introduction of a costs protection mechanism to fully appreciate the operation, and impact, of ATE insurance in the current market. Its availability has had a significant impact on the willingness of claimants to pursue claims and in some cases, defendants to defend them. With the aid of ATE insurance in place, parties are able to litigate, without any (or a substantially reduced) risk, on their part, of having to pay the other side's costs in the event that they are unsuccessful.

1.13 Leveson LJ set this out succinctly at Part J, Chapter 3 of the report from his *"Inquiry into the culture, practices and ethics of the press"*, Part 1 of which was published on 29 November 2012⁷:

"2.6 Everybody understands the protection that insurance provides. In the usual case, a premium is paid on the basis that if the insured event arises during the period of the insurance, a specified sum will be paid. Life insurance operates on the basis that an identified lump sum will be paid during the currency of the contract if the person who is the subject of the insurance dies. Travel insurance can insure against the risk of cancellation, baggage being lost in transit, medical expenses being incurred or a host of other risks. ATE is different. The event has occurred before the insurance is taken out. This insurance, however, is to cover the risk of failure of the litigation that arises out of the event. The premium is calculated by the underwriters, based on the risk that the litigation will fail and the amount at risk (the costs that would be ordered to be paid to the winning side) for which insurance is sought.

2.7 ATE insurance has another benefit. As the law presently stands (although this is about to change), the premium itself is fully recoverable as part of the costs of the action so that if the beneficiary of the policy succeeds, not only are the solicitors' costs (including the uplift of up to 100%) recovered but the premium for the ATE insurance is also recoverable. Furthermore, the premium can itself be conditional, in which circumstance it will only be payable if the action itself succeeds. On that basis, if the action fails so that the providers of the ATE insurance have to meet costs up to the insured limit, the solicitors will not recover their costs and the ATE insurers will not recover the premium (notwithstanding that they have had to pay out on the insurance). All this comes at a cost. Insurers will calculate the premium at an appropriate level so that recoveries in the successful cases compensate the loss of premium (and the costs paid) in the unsuccessful proceedings. It will be no surprise, therefore, that premiums have been high.

2.8 The consequence has been a massive increase in the costs of litigation for defendants who lose and, thus, the cost of premiums for employers insuring against employees and public liability claims for those requiring road traffic insurance and many others. It has also increased the cost for those who self-insure, in which group newspaper titles are likely to be included. It resulted in lobbying the Government to change the rules, not only generally but specifically in relation to defamation. As a result, the Ministry of Justice issued a consultation paper on "Controlling costs in defamation proceedings"⁴; having reviewed the responses it decided to invite the Civil Procedure Rule Committee (CPRC) to consider draft rules to implement a number of measures to control costs in publication proceedings."

⁴ <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/consultations/controlling-costs-in-defamation-proceedings.htm>

1.14 In light of those concerns Leveson LJ went on to make the following recommendation in his report:

"3.13 In the absence of some mechanism for cost free, expeditious access to justice, in my

⁷<http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp>

view, the failure to adopt the proposals suggested by Jackson LJ in relation to costs shifting will put access to justice in this type of case in real jeopardy, turning the clock back to the time when, in reality, only the very wealthy could pursue claims such as these. I recognise (as did Jackson LJ) that most personal injury litigation succeeds with the result that qualified one way costs shifting in place of recoverable but expensive ATE insurance is just as likely to cost insurers less and, furthermore, that the same cannot necessarily be said for defamation and privacy cases. An arbitral arm of a new regulator could provide such a mechanism which would benefit the public and equally be cost effective for the press;²² if such a scheme is not adopted, however, I have no doubt that the requirements of access to justice for all should prevail and that the proposals of Jackson LJ should be accepted....”

22 Part K, Chapter 7. As part of the response to encouragement by the Joint Committee to promote a voluntary, media-orientated forum for dispute resolution, the Government recognised that there could well be value in there being a range of arbitration options available, noting that methods of redress and the type of body required to secure effective regulation were issues which are central to this Inquiry: see para 68

1.15 The concerns with respect to impeding access to justice as a result of changes to the CFA system do not merely affect claimants: deserving defendants have also been able to take advantage of such arrangements in a significant minority of cases to date. The much-publicised litigation between the British Chiropractic Association and Simon Singh in 2011⁸ was one such case, and the action against Dr Peter Wilmschurst by an American manufacturer of medical devices, was another important case defended with the benefit of a CFA, also in 2011.

1.16 The Working Group identifies other examples in the conclusions to this report at section 8 of meritorious cases which, in the absence of the current CFA regime (or at the very least, *some* kind of CFA regime), would not have been able to have been brought or defended by the party who relied on such funding.

1.17 The effect of these concerns about the changes contained in ss 44 and 46 LASPO resulted in the Ministry of Justice producing a Statutory Instrument on 18 January 2013⁹, delaying the application of those provisions to certain types of actions including “*publication and privacy proceedings*”, defined in article 1(2) of that commencement order as proceedings concerning:

- “(a) defamation;
- (b) malicious falsehood;
- (c) breach of confidence involving publication to the general public; or
- (d) misuse of private information; or
- (e) harassment, where the defendant is a news publisher.”

For the time being therefore, publication and privacy proceedings (which shall bear the meaning set out above when the term is adopted in this report), will continue to benefit from the recoverability of success fees and ATE insurance premiums from 1st April 2013 until further notice. It is anticipated that the changes will come into effect later in 2013, to coincide with commencement of complementary measures in the Defamation Act.

⁸ (2011) 1 WLR 133

⁹ 2013 No. 77 (C.4), section 4

2 CREATION, MEMBERSHIP AND REMIT OF THIS WORKING GROUP

2.1 Pursuant to Lord McNally's commitment to the House at the Second Reading of the Defamation Bill, the Civil Justice Council has commissioned this Working Group to produce a report to:

“(1) Identify whether there are meritorious actions for [publication and privacy proceedings] which could not properly be brought or defended without some form of costs protection; and

(2) If so identified, to advise:

(i) in which types of cases (or stages of cases) some form of costs protection should apply; and

(ii) what options for costs protection might be considered, with their advantages and disadvantages.

(3) To provide written advice to the Ministry of Justice by the end of March 2013.”

2.2 The membership of this Working Group is drawn from practitioners and experts in this field, and represent different interests in the area. They are:

John Pickering (Chair) – Partner, Irwin Mitchell
Nicholas Bacon QC – Barrister, 4 New Square
Desmond Browne QC - Barrister, 5 Raymond Buildings
Keith Mathieson – Partner, RPC
Professor Rachael Mulheron – Queen Mary University of London
Lucy Moorman – Partner, Simons Muirhead and Burton
Zoe Norden – In-House Lawyer, The Guardian
Jack Norris – Ministry of Justice
Marcus Partington, Group Legal Director, Trinity Mirror plc
Alasdair Pepper – Partner, Carter-Ruck Solicitors
Costs Judge Gordon-Saker
Chloe Strong – Barrister, 5 Raymond Buildings
Robert Wright – Ministry of Justice
Peter Farr – CJC Secretary
Andrea Dowsett – CJC Assistant Secretary

2.3 The approach taken in this report has been to include all views, including those which dissented from the majority view of the Working Group. The Chatham House Rule has been applied throughout.

2.4 This Working Group's remit has been to identify a costs protection mechanism which may be suitable for application in the publication and privacy proceedings context, in order to enable claimants and/or defendants to bring or defend claims where it is in the interests of justice for them to do so, and where that might otherwise be compromised as a result of the changes being introduced by LASPO.

2.5 Whilst the Working Group has proceeded on the basis that the LASPO changes (with respect to irrecoverability of success fees and ATE premiums) will *definitely* come into effect at some point in the future in their current form (with the only question being when they do), some members of the Group would urge the MoJ to rethink the removal of the recovery of ATE premiums

and success fees from the losing party in publication and privacy proceedings altogether. Those members suggested that the solution to the funding issues lies instead in maintaining the potential for one party to be liable to pay the other side's costs, limited CFA success fees, and discussions about alternatives to ATE insurance which could offer a similar solution.

- 2.6 A number of those members indicated to the Working Group that they had been in contact with providers of ATE insurance in the market, who had explained that they were in the process of trying to determine if there were alternate products which could be offered to fill the gap due to be left by the irrecoverability of ATE premiums.
- 2.7 However, despite this, other members of the Working Group were unconvinced of the possibility of underwriters being able to devise an ATE policy on terms that would be acceptable to litigants. They noted that premiums in the past have been extraordinarily high (up to 70% of the insured amount in some cases), and the products have only flourished in an artificial world where the payment of premiums has been deferred, and has never had to be borne by the unsuccessful claimant at any rate (where it is the claimant that has benefitted from such funding).

3 THE NATURE OF PUBLICATION AND PRIVACY PROCEEDINGS

Unique nature of this type of litigation

- 3.1 Litigation within the areas of law covered by publication and privacy proceedings (primarily defamation, privacy and harassment) differs in various respects vis a vis other types of proceedings, because:

(i) Such cases are relatively few in number (compared for example with personal injury claims)¹⁰;

(ii) There is typically an asymmetric relationship between the parties, although it is not the case that this balance is typically in favour of either claimants or defendants, one way or the other. Occasionally there are cases where both the claimant and the defendant are of equal means, although these are not the norm¹¹;

(iii) A financial remedy is not the only type of remedy sought in these cases and, crucially, is often not the most important aspect for the claimant to achieve. Instead the following frequently assume a greater importance:

- Apologies that are often sought by claimants as part of a settlement in defamation claims

¹⁰ In 2011, the judiciary and courts statistics showed that there were 165 defamation cases heard by the High Court QBD and 805 PI claims (see www.justice.gov.uk/statistics/courts-and-sentencing). The statistics do not include a breakdown for hearings in the county court for PI cases.

¹¹ cf the view of Jackson LJ, repeated by Leveson LJ in his report at Chap 3, para 2.14 which spoke about the "paradigm libel case" concerning an individual of moderate means and a well resourced media defendant.

- In defamation and privacy claims interim and/or final injunctions are often applied for

(iv) There are even differences between the role that financial damages play in defamation as compared to privacy proceedings. As Leveson LJ said in his report (endorsing the view adopted by Jackson LJ):

“....a claimant would attach great value to winning his [defamation] claim because the judgment would be vindication. In the case of defamation, that vindication is the public demonstration of success in the action, thereby neutralising the slander or libel. In the case of privacy, however, that which was private is no longer so and, irrespective of the condemnation that might flow from a judgment, what was placed in the public domain cannot be erased (even if some references can be removed from the internet). A modest increase in damages (themselves usually modest) will provide little encouragement to a claimant otherwise anxious to seek what might be entirely justifiable redress.”¹²

(iv) Costs

- They are often high in publication and privacy proceedings, and damages awards low in comparison. Awards in defamation claims have been said to average no more than £40,000 in recent years¹³, and the award given to Max Mosley in his privacy claim against the News of the World¹⁴ of £60,000 has been, by far, the largest to date.
- There does appear, however, to be an increasing willingness on the part of the courts in recent years to make more-than-minimal awards in privacy cases. For example, £15,000 was awarded to the child claimant for a breach of her privacy in **AAA v Associated Newspapers [2012] EWHC 2103 (QB)** (in the absence of any evidence of *actual* distress being suffered on the claimant’s part) and £30,000 for misuse of the claimant’s private medical information in **Cooper v Turrell [2011] EWHC 3269 (QB)**. The court in *Mosley*, however, made clear that it was not prepared to award exemplary damages in a claim for misuse of private information, stating that there was no authority or other justification for extending the application of this type of award into this new area of law. The court also specifically refused to add a sum to the damages award to act as a deterrent.
- Even where substantial awards are made, recoverability is still a very real issue: whilst £175,000 was awarded in damages for

¹² Leveson Inquiry report, Chapter 3, para 3.13

¹³ The Joint Committee on the Draft Defamation Bill observed at para 89 of their First Report produced in 2011 that the average level of damages in defamation cases was no more than £40,000, and “costs tend to be measured in hundreds of thousands when a case goes to court”

(<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm>)

¹⁴ *Mosley v. News Group Newspapers* [2008] EMLR 20, [2008] EWHC 1777 (QB)

serious libels in *Al-Amoudi v Kifle [2011] EWHC 2037 (QB)*, no monies were ultimately ever recovered from the defendant, who was based outside of the jurisdiction.

4 CURRENT STATE OF THE LAW

- 4.1 The Working Group wanted to stress the difficulty of producing this report in the current uncertain legislative climate, especially concerning the proposed amendments to the draft Defamation Bill, and continuing discussion relating to the establishment and form of a new press regulator.
- 4.2 The Defamation Bill, which received its Third Reading in the House of Lords on 25th February 2013, is scheduled to be addressed next at the 'ping pong' stage on 16th April 2013.
- 4.3 As of 24th March 2013 the Bill, as a result of an amendment proposed by Lord Puttnam, contained provision for the creation of a specialist arbitration service pursuant to the recommendations by Leveson LJ (despite the fact that the Bill was never intended to have any interaction with the Leveson proposals at all).
- 4.4 Under Lord Puttnam's amendment an independent body (the 'Defamation Recognition Commission') would have to certify other bodies as 'Independent Regulatory Boards', which would themselves be responsible for providing an arbitration system. Whilst that arbitration system (or systems) would be voluntary, newspapers which did not join up could be punished by courts in the form of awards of greater damages and costs in defamation cases. In addition, a claimant could similarly be ordered to pay all the costs of an action and risk an award of exemplary damages if it unreasonably chose not to utilise the arbitration system.
- 4.5 Although the Defamation Bill therefore currently addresses costs in respect of the use (or non-use) of the specialist arbitration system, it does not deal with costs issues in any wider sense.
- 4.6 At any rate, it is still unclear to what extent the Leveson LJ proposals will be carried through on the back of this legislation. Indeed, from the press reports at the time of writing, it is not clear whether even the non-Leveson sections of the Defamation Bill will definitely reach the statute book at all.
- 4.7 The amendments to the Defamation Bill, as currently drafted, appear to go hand-in-hand with the creation of the new press regulator, due to take the place of the soon-to-be defunct Press Complaints Commission. Whilst the specifics of the new regulator's exact powers are not entirely clear what is, following a cross-party deal struck in the House of Commons on 17th March 2013 (apparently propelled by Lord Puttnam's amendments to the Bill), is that the new regulator will be indirectly backed by law. This will be in the form of the creation of a 'recognition panel', which will be set up to oversee the new regulator, and enshrined by way of a Royal Charter.
- 4.8 The terms of the deal struck between the parties also provides for the new

regulator to have the power to impose fines of up to £1m against newspapers which sign up to the body, and to demand that they print prominent corrections where it deems that is appropriate.

- 4.9 If newspapers refuse to sign up to the regulator, at present, it appears that they would risk having to pay more in costs and/or damages if a claim went to court, with the possibility of having to pay a claimant's costs, *even* if they are unsuccessful, in certain circumstances (seemingly therefore in line with Lord Puttnam's amendment to the Bill).
- 4.10 It is also difficult at this juncture to know how the Jackson LJ reforms will bed down, and how they will affect the culture and practice of civil litigation generally – e.g. whether they will result in a stronger approach being taken to case management and costs budgeting. This is therefore a very difficult moment in time to be attempting to assess what is needed to provide access to justice for parties in publication and privacy litigation, which (it must be remembered) does not always involve the media. To emphasise an obvious point, the landscape would look very different were there to be a new-style press regulator providing a specialist arbitration service as referred to above, which (in the words of para.2, Sch.2 of the Defamation Bill as amended on Report¹⁵) was "*a fair, quick and inexpensive process, which is inquisitorial and free for complainants to use*".
- 4.11 In addition to the great deal of uncertainty surrounding potential legislative changes, privacy law generally is a relatively recent jurisprudential development, meaning that it is a fast evolving area of law.
- 4.12 The origins of privacy law trace back only as far as the Human Rights Act 1998 (excluding for these purposes the law relating to breach of confidence). As a result, the courts are still consistently seeing test cases brought before them which seek to challenge the boundaries of the area. In part because of this uncertainty, and also because the claimants to such actions are often individuals of relatively little means, CFAs have been relied on to fund the actions. Two of the most recent high profile privacy law cases, *Trimingham v Associated Newspapers Ltd*¹⁶ and *AAA v Associated Newspapers Ltd*¹⁷ for example, were both funded by CFAs.
- 4.13 It follows from the present state of uncertainty that any recommendations made by the Working Group will need to be kept under continuous review as the situation develops. They should not be set in stone.

¹⁵ See www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130205-0001.htm#13020546001351

¹⁶ *Trimingham v. Associated Newspapers Ltd* [2012] EWHC 1296 (QB)

¹⁷ *AAA v Associated Newspapers Ltd* [2012] EWHC 2224 (QB)

PART II: DISCUSSION AND RECOMMENDATIONS BY THE WORKING GROUP

5 JUDICIAL CASE MANAGEMENT

5.1 The Working Group felt that early and effective judicial case management was absolutely fundamental to any attempt to try and control costs within publication and privacy proceedings. It believed that any costs protection mechanism that was introduced would only be effective to the extent that it went hand in hand with an enhanced judicial intervention regime.

5.2 Should specialist judges be used to hear publication and privacy proceedings?

5.2.1 There was a strong consensus amongst the Working Group for specialist judges to be used at all levels, including Masters, High Court and appellate judges. The Working Group felt that specialists were required in particular because of the many complexities and nuances in these areas of law, which the judges would ideally need to have experience of, in order that they could have the confidence to decide what issues needed to be tried, at what time, and by means of what evidence.

5.2.2 The Working Group noted that the use of specialist judges to hear specific types of claim would not represent a foray into the unknown. Specialists are already used to hear clinical negligence and mesothelioma claims, for example.

5.2.3 The Working Group agreed that it would be a good idea for there to be judges who were assigned to individual cases, and had the responsibility of managing and overseeing that case through each particular stage of the judicial process (and, if relevant and possible, through the next stage as well should the case progress that far). In particular, the assigned judge should be in charge of setting out a time-table for the progression of the action, and ensuring thereafter that it is adhered to. It was felt that implementation of some form of a ticketing and docketing system would be the best way to achieve this.

Wide range of powers to be given to judges to intervene in cases

5.3 It was felt that judges should be given wide powers in this regard, so as to be able to deal with the pressing issues, early on in a case, hopefully encouraging early resolution, either through agreement or adjudication.

5.4 In relation to costs issues in particular, the Working Group mooted the idea of there being a costs judge who could be assigned to publication and privacy proceedings at the High Court which involved particularly complex costs issues. That judge would, the Working Group contemplated, be able to deal with questions of costs from the outset, and would have a particular emphasis on managing the application of the costs budgeting regime within those

proceedings. In those cases the costs judge could assist the assigned judge who had been charged with control of the proceedings.

- 5.5 The Working Group noted that that, with respect to costs issues generally, judges should begin to have more control with the introduction of Costs Management Orders under the new CPR 3.12 to 3.18. If a court grants such an order under the new regime, it will mean that it thereafter controls the parties' budgets in respect of recoverable costs.

Use of early judicial determination on key issues aside from costs

- 5.6 In addition to dealing with costs, the Working Group also felt that early judicial intervention should extend to other key areas, including the determination of:
- The meaning of the 'words complained of' in defamation cases.
 - Whether an action has fundamental merit.
 - How the parties have conducted themselves from the start of the proceedings, which includes how long the claimant has taken to bring the complaint.

General case management and directions

- 5.7 Members of the Working Group were in complete agreement that the judges' role should extend to enhanced case management generally: they should provide good, clear and cogent case management directions as early as possible. In order to do so, the assigned judge should set the date for the first CMC in a case to be as soon as possible after proceedings have been issued. If necessary members of the Working Group noted that this could take place over the telephone, rather than requiring attendance by the parties in person (again to keep costs down).
- 5.8 One claimant representative member of the Working Group believed that, currently, the stage at which the first CMC takes place is often far too late in the day. By the time that it does significant costs have often been incurred, some of which ultimately transpire to be completely unnecessary, given the directions later made in a case.
- 5.9 The directions provided at that first CMC should include, as a matter of course, dictating the maximum length of statements of case, witness statements and skeleton arguments, so that the courts are not overburdened with "extensive discursive" written arguments where unnecessary. This issue is not only a concern within the privacy and publication proceedings context: Arden LJ issued a plea during a recent Court of Appeal hearing concerning a contractual claim by the Irish property developer Patrick McKillen against the Barclay brothers for parties not to overburden the courts by producing copious amounts of unnecessary paperwork.

- 5.10 Whilst judges *do* currently have the power to direct limits on the length of documentation submitted to the court under the general case management powers in CPR Part 3, the Working Group did not feel these powers were exercised regularly enough at the moment.
- 5.11 Similarly one member suggested also that judges should give directions limiting the time that speeches should run to in the event the matter did have to go to a hearing.
- 5.12 Certain members of the Working Group, both from the claimant and defendant camps, were also keen to encourage the increased use of paper determinations in publication and privacy proceedings where possible, as they felt this would reduce both the amount of time and expense spent on such issues. This is something that members felt could be directed by judges early on in a case and again, whilst it is already possible for judges to do so, the Working Group noted that there appeared to be a reluctance for this approach to be taken in relation to most issues, even where they were relatively ‘simple’ ones to deal with, such as meaning.
- 5.13 For example, the Working Group noted the concern expressed by Tugendhat J about dealing with a meaning application on paper in ***Church v MGN Ltd [2012] EMLR 28***, who felt that such a course of action might compromise the principles of open justice (because the written submissions might not be available to the public under the provisions for obtaining court documents in CPR Part 5.4C). The Working Group felt, however, that such concerns could easily be overcome by putting in place a rule that all written submissions were provided at the same time as the decision is delivered (especially given that, in *Church* for example, the defendant’s submissions, at least, were relatively short).
- 5.14 Some members of the Working Group also felt that the claimant should be encouraged to make clear, through judicial intervention if necessary, at a very early stage, exactly what remedies they were seeking, i.e. the level of any damages award and, in relation to a defamation case, the wording of an apology and the removal of the article online if applicable. Others pointed out that this would be nothing new; it would simply be the enforcement of the existing requirements as contained within the Pre-Action Protocol on Defamation.

6 EXISTING TYPES OF COSTS PROTECTION MECHANISMS ON WHICH A SYSTEM FOR USE IN PUBLICATION AND PRIVACY PROCEEDINGS COULD BE MODELLED

6.1 QOCS

- 6.1.1 QOCS was described by Jackson LJ in his report as *“a system of one way costs shifting which may become a two-way costs shifting system in certain circumstances, e.g. if it is just that there be two way costs shifting given the*

*resources available to the parties.*¹⁸ It was recommended in the Jackson LJ report for use in personal injury cases, and is currently being implemented¹⁹ for claimants in proceedings which include a claim for damages for personal injuries, under the Fatal Accidents Act 1976 or which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, and was implemented by way of ss 44.13 to 44.17 of the Civil Procedure (Amendment) Rules 2013 - SI 2013 No.262 (L.1) . The effect of QOCS, as it applies to these kinds of personal injury cases is that, generally speaking, those claimants who behave reasonably will not be liable to pay the other side's costs in cases which they lose.

- 6.1.2 A QOCS type system was also the option recommended by Jackson LJ for publication and privacy cases, and was endorsed by Leveson LJ at paragraph 3.13. Those reports both concluded that the new provision of the Civil Procedure Rules should provide:

“Costs ordered against the claimant in any claim for defamation or breach of privacy shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including: the financial resources of all parties to the proceedings; and their conduct in connection with the dispute to which the proceedings relate.”²⁰

- 6.1.3 However, in spite of that, QOCS (or indeed any other type of costs protection) is yet to be implemented in publication and privacy proceedings.

Applying QOCS to publication and privacy proceedings

- 6.1.4 The Working Group was keen to recognise that QOCS as a mechanism, as it is currently applied in personal injury cases, is only applicable to claimants by its very nature (i.e. it is *one way* costs shifting). It also works in such cases by way of set-off against damages awarded, i.e. claimants are only liable to pay costs up to a maximum amount of the damages that may be awarded in their case, but no more.
- 6.1.5 The majority of the Working Group believed that a variation of the QOCS concept, as is currently applicable to personal injury claims, could be implemented for claimants in publication and privacy proceedings. However, there would need to be serious consideration before the same kind of damage set-off provision was implemented in relation to these types of proceedings as well, simply because of the relatively low awards made in these areas (as detailed at paragraph 3.1 above).
- 6.1.6 Despite the inapplicability of QOCS (as currently formulated in personal injury claims) to anything other than claimants, several members of the Working Group believed that there would be no difficulty in drafting rules, based on a variation of QOCS, which had the potential to be applied to defendants as

¹⁸ *Review of Civil Litigation Costs: Final Report*, Glossary, p. xiv

¹⁹ See amendments to Rules 44.13-44.17 contained in the Schedule to SI 2013, No 263, www.legislation.gov.uk/ukxi/2013/262/contents/made

²⁰ See Access to Justice Act 1999, s11(1), as referred to in *Review of Civil Litigation Costs: Final Report*, para 5.3, fn 39

well as claimants in publication and privacy proceedings.

- 6.1.7 Those members did however agree that, in the event this was done, the nomenclature of 'QOCS' would be an inapt name for the new mechanism, as it would not be an accurate description of the operation of that type of costs protection system. It might also lead to unnecessary confusion with the system currently in place in personal injury claims.
- 6.1.8 For that reason, the Working Group suggested alternative tags such as Adaptable Costs Protection (ACP) or Variable Costs Protection (VCP), which would better encapsulate the operation of the new variation of the mechanism.

6.2 Costs capping

- 6.2.1 Costs capping is presently available to the courts under the general case management powers contained within CPR Part 3 (see in particular 3.1.8) and under CPR 44.18 (as supplemented by Section 23A of the Costs Practice Direction, Part 44), and will remain available after 1st April 2013.
- 6.2.2 A party may only apply for a costs capping order in respect of their opposite number where there is a substantial risk that disproportionate costs will be incurred, and where there are "*exceptional circumstances*" that justify the grant of such an order (as stipulated at CPR 44PD.18, para 23A.1). The application can be made at any stage of the proceedings, and either in respect of the litigation as a whole, or any issues which are to be tried discretely.
- 6.2.3 If granted, the effect of a costs capping order is that a party in respect of whom it is made has their future costs 'fixed' at a certain level, such that from the date of the order their ability to recover any costs (pursuant to an order for costs which may subsequently be made) is limited to a fixed amount.
- 6.2.4 Although a party can apply to vary a costs capping order, this will only be allowed where there has been a material change in circumstances since the order was granted, or where there is some other compelling reason²¹.
- 6.2.5 Whilst a costs capping order can protect a party in terms of limiting the amount of costs which may ultimately be enforced against it, it does not *prevent* the enforcement of **any** costs order against them at all. This is one important respect in which this type of mechanism would differ from a QOCS-type system.
- 6.2.6 The majority of the Working Group felt that whilst costs capping could be used alongside other costs protection mechanisms in the context of publication and privacy proceedings (requiring no change in the current rules) it would not, on its own, be sufficient to solve the concerns which this

²¹ See CPR 44.18(7)

Working Group set out to address in these fields.

- 6.2.7 A minority of the Working Group suggested that, in line with the recommendation made by the Joint Committee on Privacy and Injunctions which reported on 12 March 2012²², the exceptionality requirement in the Costs Practice Direction, should be removed, so that costs capping can be applied with increased frequency in these types of cases.
- 6.2.8 That minority which supported the proposal pointed to the case of ***Peacock v MGN Ltd [2009] 4 Costs L.R. 584***. *Peacock* was the first reported case on costs capping since the introduction of the costs capping rules earlier that same year. It was a libel claim in which the claimant's representation was funded by way of a CFA. The judge in the case, Eady J, was somewhat critical of the conservative wording adopted by the Civil Procedure Rules Committee (CPRC) in the new rules, explaining at [22] that he would have been "*strongly inclined*" to make a costs capping order, but he felt inhibited from doing so, in part, because of the "*exceptionality*" principle required to be satisfied before a costs capping order can be made.
- 6.2.9 Other members of the Working Group also mooted the possibility of a variation on the costs-capping theme which could be introduced in publication and privacy proceedings, as opposed to a QOCS-type system. That system could come in the form of a variable-capping system, based on the level of legal costs a claimant or defendant faces. Applying this to a claimant's position for example, this could limit their costs to no more than the damages recovered (by way of set off).

6.3 Protective Costs Orders ("PCOs")

- 6.3.1 PCOs were created as a means of providing costs protection for claimants in judicial review actions, designed to ***limit*** their exposure to a defendant's costs (albeit that that limit could be reduced right down to zero). If successfully applied for, normally at the time the application for permission for judicial review is granted, a PCO provides that the applicant shall, regardless of the outcome of the proceedings, either not be liable at all for the other party's costs (having a similar effect in those circumstances therefore to a QOCS system) or be liable only for a fixed portion of them (in which case more akin to costs capping).
- 6.3.2 With PCOs however, if the party is successful, they may be entitled to recover all or part of their costs from the losing party (although a court may also make a costs capping order in connection with a PCO so as to limit such costs).
- 6.3.3 Whilst they may have a similar effect to costs capping orders in certain circumstances, PCOs are to be distinguished from such orders as they are a

²² Para 141, p36 of the Report which can be found at <http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf>

separate, very specific, type of costs protection mechanism which has been developed in the context of judicial review litigation involving issues of public importance. The availability of PCOs is outlined at CPR 48.15.7.

6.3.4 PCOs can be made at any stage of the proceedings on conditions the court thinks fit, and can take a number of different forms. PCOs will only be ordered, however, where the court is satisfied of a number of stringent pre-requisites, as laid down by the Court of Appeal in ***R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 1 WLR 2600***, namely that:

- (i) the issues raised are of general public importance;
- (ii) the public interest requires that those issues should be resolved;
- (iii) the applicant has no private interest in the outcome of the case;
- (iv) having regard to the financial resources of the applicant and the respondents and to the amount of costs that are likely to be involved it is fair and just to make the order;
- (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

6.3.5 Whilst, to date, such orders have only been made in favour of claimants in judicial review cases, the Notes to the 2012 White Book at p1618 explain that *“there is no reason in principle why they should not, in an appropriate case, extend to protect the position of a defendant.”* They explain that such an order, whilst it would be unusual, might be made where an individual had a public law role and there was, for whatever reason, no protection given to them in relation to costs by any other body or person.

6.3.6 Given the very specific nature of PCOs (notably their applicability solely to cases concerning issues of public importance) the Working Group does not believe that it would be useful, nor appropriate, to consider the extension of the current PCO regime to cover publication and privacy proceedings as a solution to the access to justice issues which exist there.

6.4 Aarhus ‘fixed costs’ regime

6.4.1 The Aarhus Convention, a multi-lateral environmental agreement, on ‘Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters’ (the “**Convention**”), entered into force on 30 October 2001, and was signed by over 40 parties including the UK and the European Union. The Convention dealt with, amongst other things, access to justice issues in connection with the public’s right to challenge decisions made about environmental law issues.

6.4.2 Pursuant to that aim, both the Convention and the Public Participation Directive (PPD) (the mechanism through which the Convention is

implemented in the EU) stated that each party should, within the framework of its national legislation, ensure that the public has access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of law relating to the environment. The Convention also specified that these procedures should not be “*prohibitively expensive*” so as to prevent the public from pursuing environmental challenges.

- 6.4.3 As a result the CPRC approved, alongside the exercise it undertook on the codification of the rules on PCOs on 7 December 2012, a regime for use in respect of claims falling within the Convention. This regime set out the circumstances in which a fixed costs order would be granted (essentially where the claim was one made pursuant to the Convention), and at what level those costs would be fixed²³. The regime, which comes into force on 1st April 2013²⁴, limits a claimant’s liability to pay a defendant’s costs in such claims to £5,000 if they are an individual, and £10,000 where the claimant is an organisation. In contrast, it limits a defendant’s liability to pay a claimant’s costs to £35,000²⁵.
- 6.4.4 The regime will apply to a claim provided that it is within the scope of the Convention; it is not dependent upon permission having been granted for such a claim to be brought.
- 6.4.5 The Working Group felt that the costs fixing regime adopted in respect of Aarhus Convention claims was a sensible solution to the particular problem that resulted from the obligations imposed on the UK by the Convention. However they felt that this costs protection system only affected a very small number of similar cases, and it was not felt that it would be appropriate to transfer this model directly across to publication and privacy proceedings, given the great variety of the types of cases that can fall within that bracket, and the range of potential costs that can be involved.
- 6.4.6 It was also pointed out by one member of the Working Group that such low financial limits, whilst appropriate in the context of the inquisitorial litigation system that is in place on the Continent, were not suitable for direct application in this jurisdiction, because of the contrasting adversarial basis of our system (and therefore the inevitably higher costs that ensue).

6.5 Costs budgeting

- 6.5.1 Much like costs capping, costs budgeting does not remove all liability for costs, it simply reduces it, by dictating a maximum level of costs that will be recoverable from the other side in the event that a costs order is made.
- 6.5.2 The system works by requiring each party to draw up ‘costs budgets’ in

²³ Convention on Access to Information, Public Participation In Decision-Making and Access to Justice in Environmental Matters, see <http://live.unec.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

²⁴ via Statutory Instrument 2013 No. 262 (L1)- The Civil Procedure (Amendment) Rules 2013, as laid before Parliament on 12th February 2013.

²⁵ Part 45.41 of SI 1998, No 3132, as amended by SI 2013, No 262,

advance, at an early stage in proceedings, setting out the costs they are to incur in respect of the different stages of litigation. Once each party's budget is approved, it is required to adhere to the limits laid out in it. To the extent they do not, they are penalised in the event that a costs order is made in their favour, by not being able to recover any more than the amounts that were approved.

- 6.5.3 The concept of costs budgeting is not a new one. It was introduced on a pilot scheme basis in defamation actions in 2009, where it was intended to control the costs of defamation proceedings. Costs budgeting been addressed in depth very recently by the Court of Appeal in **Henry v News Group Newspapers [2013] EWCA Civ 19**. Moore-Bick LJ at [3] onwards set out the system as follows:

“Costs Management – Practice Direction 51D

3 The concept of costs budgeting as a form of case management is not new, but it obtained prominence as a potentially valuable means of controlling the costs of litigation following the publication in May 2009 of the Preliminary Report of Sir Rupert Jackson at the end of the first stage in his review of civil litigation costs. In paragraph 3.5 of chapter 48 of the report he described the essence of costs budgeting as being

“that the costs of litigation are planned in advance; the litigation is then managed and conducted in such a way as to keep the costs within the budget.”

It is clear from the discussion in section 3 of chapter 48 that at that stage Sir Rupert regarded costs budgeting as closely related to costs capping, an approach which was beginning to find favour in some quarters.

4 In response to concerns over the effect on the media of the costs of defamation proceedings a pilot costs management scheme was introduced in October 2009 in relation to defamation proceedings. That scheme is now embodied in Practice Direction 51D (the Defamation Proceedings Costs Management Scheme), which applies to all defamation proceedings started in the Central Office of the Royal Courts of Justice and the Manchester District Registry on or after 1st October 2009 and is to run until 31 March 2013. Its purpose is set out in paragraph 1.3, which provides as follows:

“The Defamation Proceedings Costs Management Scheme provides for costs management based on the submission of detailed estimates of future base costs. The objective is to manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing.”

5 The practice direction requires each party to prepare a costs budget for consideration and approval by the court at the first case management conference and a revised cost budget at various stages of the proceedings thereafter. Under paragraph 5 the court has a responsibility to manage the costs of the litigation as well as the case itself in a manner which is proportionate to the value of the claim and the reputational and public interest issues at stake, a task which it is expected to fulfil by taking account of the costs involved in each proposed procedural step when giving case management directions. Solicitors are expected to liaise monthly to check that their respective budgets are not being exceeded (paragraph 5.5); if they are, either party may apply to bring the matter back before the court for a costs management conference.

6 Paragraph 5.6 provides:

*“When assessing costs on the standard basis, the court –
(1) will have regard to the receiving party's last approved budget; and
(2) will not depart from such approved budget unless satisfied that there is good reason to do so.”*

- 6.5.4 Following the end of the successful piloting of the system, it will now be extended to apply generally after 1 April 2013 (to be detailed in new CPR provisions at 3.12-18).
- 6.5.5 The concept of costs budgeting and its implementation across the board received the Working Group's unanimous support, albeit that some members of the Working Group recognised that their experience of the success of the costs budgeting system to date varied. Some claimant representatives had found the system to be very positive, whilst others noted that they had experienced many issues with it.
- 6.5.6 At any rate, all members of the Working Group expressed their firm belief that judges should be able to grapple with costs at the earliest possible opportunity, and that costs budgeting represented the best method by which this could be done. The Working Group also explicitly recognised a clear need for more discipline in the incurring of costs by parties.
- 6.5.7 There was a particular concern expressed by one member of the Working Group of the need to recognise, early on, the risk of one party taking advantage of the system, i.e. incurring a significant amount of costs because they think this would pressure the other side into settling. They felt that costs budgeting was a way to address that issue.
- 6.5.8 Costs budgeting would also address the perceived problem in some cases of parties making unnecessary applications throughout an action solely designed to inflate costs, as well as over-representation by parties once they believed that they had a strong likelihood of costs recovery under the current system (e.g. attendance at the hearings in ***Campbell v MGN (No 2) [2005] UKHL 61.***)
- 6.5.9 If necessary (in order to enable the judiciary to do so) the Working Group felt that there should be additional appropriate specialist judicial training provided on the costs budgeting regime. The general view held was that costs budgeting, whilst undoubtedly a cumbersome exercise, has already proved its value.
- 6.5.10 Some members of the Working Group believed that, where there were particularly complex costs issues in play in a claim, the costs budgeting system would be better carried out by a specialist costs judge under the directions of the assigned judge. Those members believed, however, that the issue should only be passed onto a costs judge after the assigned judge had given directions as to the management of a case (which could well have a significant impact on costs issues).

7 HOW WOULD A QOCS-TYPE COSTS PROTECTION MECHANISM BE APPLIED AND MANAGED IN PUBLICATION AND PRIVACY PROCEEDINGS?

- 7.1 In most cases there is going to be some inequality of arms between the parties, such as a wealthy corporation acting as claimant and a small, independent regional newspaper as defendant or, conversely, a person of limited means who feels they have been defamed by a powerful media group. As explained above however, such inequality is not always going to be in the defendant's favour in these types of proceedings. The question is, therefore, what ought to be done by way of costs protection (if that is deemed an appropriate approach), and which option would be most suitable given the unique nature of these types of proceedings?
- 7.2 The majority of the Working Group was in agreement that a variation on QOCS would be the most appropriate type of mechanism for use in these types of proceedings as outlined above.
- 7.3 However, a minority of members of the Working Group were completely opposed to the introduction of any type of costs protection system at all, because they believed the risk of facing a costs liability to be an extremely important part of civil litigation. Those members felt strongly that it would be disproportionate and unnecessary to interfere with that fundamental principle in order to address the consequences that will likely result from the impending changes to the CFA regime.
- 7.4 Those who took that approach drew attention to the fact that part of the stated aims of the Jackson LJ reforms was to move away from 'risk free' litigation, because this was a key driver of costs. They believed that the introduction of a QOCS-type system would only risk inflating costs, once account was taken of the likely impact of a system which would be needed in order to determine who could actually benefit from protection in the first place.
- 7.5 They also felt that the judge in any given case already has the ability to vary the nature and extent of costs orders depending on the individual facts of that case, and that was sufficient. They also noted that parties have the ability to utilise Part 36 offers in order to limit their costs exposure (a point which is addressed in more detail below in this report at paragraph 7.11.3 below). They believed that an inability to recover legal costs would result in serious access to justice issues for all parties concerned.
- 7.6 They placed a great deal of emphasis on the fact that a lawyer's willingness to act when a potential client approaches them often depends significantly upon the ability to recover costs at the conclusion of successful litigation. If any type of costs protection was introduced, which had the effect of limiting (or completely avoiding) costs recovery, they were certain it would lead to more cases being turned away if only for that reason alone.

7.7 In what types of cases should costs protection be considered?

- 7.7.1 Whilst acknowledging at the outset that a party that can afford to litigate does not require costs protection, the Working Group recognised that determining who can and cannot afford to litigate publication and privacy proceedings without any sort of costs protection was not a straightforward issue.
- 7.7.2 The Working Group recognised that, because of the potentially huge costs which parties litigating in these areas could be faced with, in part because of the complexities of these areas of law and the fact they were inevitably litigated in the High Court, there would be many parties who would potentially fall into the bracket of struggling to be able to litigate without protection.
- 7.7.3 In particular, the Working Group recognised that there may well be parties who might otherwise be able to afford to litigate without costs protection if they had a claim concerning another area of law, who simply would not be able to afford to take the risk in these types of proceedings, where overall costs of both parties in libel or privacy trials have been known to exceed £1m.
- 7.7.4 The Working Group therefore discussed in depth the potential for costs protection to apply to certain parties automatically.
- 7.7.5 Some members felt that it should automatically apply to claimants in all publication and privacy claims, but that it should be open to defendants to apply for that protection to be removed in certain circumstances. Others felt that costs protection should not apply automatically, but should be something that is applied for at an early stage in the litigation.
- 7.7.6 There was also the question of whether defendants should be able to benefit from costs protection as well in certain situations and, if so, what would be the position in relation to that. In particular, should protection apply automatically, or would it always be for the defendant to apply for it where it was appropriate? If it were to apply automatically, would that then not conflict with automatic application to claimants as well?
- 7.7.7 A further issue was whether or not costs protection should be enjoyed by anyone other than private individuals. On this point, whilst some members felt that it was appropriate to limit it to individuals only, the majority of the Working Group believed that if costs protection was to be made available, it should be *prima facie* on offer for every type of litigant.

7.8 If there is automatic application of costs protection as a default position to which party should that apply?

- 7.8.1 The Working Group was deeply divided on this issue. On the claimant side there was strong support, unsurprisingly, for the default position to be that claimants benefited from costs protection from the outset of proceedings (subject only to an application by a defendant to the effect that the claimant is 'of sufficient means' (based on a means test described further below) and therefore should not benefit from such protection).
- 7.8.2 One claimant representative did not agree however that such costs protection, if applied by default to claimants, ought to be subject to an application for that protection to be disapplied by the defendant, on the basis that such a test would be unworkable.
- 7.8.3 In addition, the defendant representatives of the Working Group, felt quite differently about what the default position should be. They did not believe that there were grounds for giving the claimant costs protection by default. Having identified, based on a table of defamation cases compiled on the *Inform* website²⁶ that, since 2010, approximately 74% of the cases were not against the media (i.e. there should be no *assumption* that the defendant was of means in those cases), they felt that there was no justification for claimants to benefit by default.
- 7.8.4 Instead they suggested that the starting position should be that neither party gets automatic costs protection, but that each side bears its own costs.
- 7.8.5 A number of members of the Working Group believed that determination of a default position in relation to costs protection should ultimately depend on whether a majority of parties would be eligible for protection. If they would be, then it would seem to make sense for it to apply automatically to that type of party.
- 7.8.6 However, the Working Group did acknowledge the risk of the system becoming unworkable if, for example, both claimants and defendants were to be eligible for it, who were both deemed as likely as one another to satisfy the eligibility criteria in any given case, which would therefore point to automatic application for both sides in the first instance.
- 7.8.7 In light of this, the majority of the Working Group believed that costs protection, to the extent it is implemented, should apply by default to a claimant, subject to an application by the defendant for it to be disapplied.

²⁶ <http://inform.wordpress.com>

- 7.8.8 Several members of the Working Group however suggested that, in the event costs protection did not apply automatically by default to claimants, instead, as a default position, parties should still be encouraged to agree to costs protection for the claimant so that they could be protected at least up until the point when they could determine whether there is a good claim or not. It was noted that this would not be too dissimilar to the current practice, of some newspaper groups inviting claimants not to take out ATE insurance until they can determine whether the claim is in theory a meritorious one, which they would then be willing to enter into discussions about.
- 7.8.9 Those members suggested that this could be done through the issuing of new Practice Guidance on the matter, either in stand-alone form, as a new pre-action protocol for these types of claims or in a Practice Direction to the relevant part of the CPR, to state that parties *should* be agreeing to costs protection for claimants at least for a certain period of time, probably until the first CMC (provided they are not of such means that it is obvious they should not be protected, even for that short period of time). If such agreement is not forthcoming, the party seeking the benefit of costs protection would be at liberty to apply to the courts to have that ordered.
- 7.8.10 Some members of the Working Group raised the point that this would theoretically cover pre-issue situations, in respect of which no cost consequences arose, and it was therefore unnecessary to do. Others however noted that, in certain circumstances, there can be costs consequences flowing from such conduct (and that is why claimants are currently encouraged to take out ATE policies as soon as they feel that there might be a claim initiated).
- 7.8.11 Those defendant representatives on the Working Group who advocated against the default position of the claimant having costs protection either by way of an automatic application of costs protection, or by way of a direction through Practice Guidance that the parties *agree* to this at least up until the first CMC (as outlined in the paragraphs above), suggested instead that each side should bear their own costs until the point of issue, so that they both get automatic costs protection. This would give the parties the certainty they are seeking (i.e. they will only be responsible for their costs and not the other party's costs up until the point of issue). Further, it then allows the court to take control of the matter once proceedings are issued, when it is able to properly consider matters on a case by case basis, determining at that point what costs protection (if any) is appropriate (whatever form that may be in).
- 7.8.12 Those members believed that this would be in line with the suggestion in relation to Costs Management Orders that costs that pre date a costs budget, i.e. pre issue costs, are not subject to Costs Management Orders, but the court can still make comment about them (such powers to be contained within the new PD 3E, paragraph 2.4, coming into force on 1st April 2013).

7.8.13 This could also include a staged approach to the application of costs protection (discussed further in the next section below) in line with the MoJ's commissioning brief to this Working Group in November 2012²⁷: *"only to take steps that are necessary to allow claimants and / or defendants to get necessary cases off the ground where there are no appropriate alternatives to litigation. If practical, any costs protection should be limited to meritorious cases where a genuine need (in terms of the merits of the case and means of the party) has been identified; this would include the possibility of protection being limited to specific stage(s) in the proceedings to which a claimant / defendant might be exposed"* (emphasis added).

7.9 The stage, and the level, at which costs protection should be implemented

7.9.1 The Working Group was split over the issue of whether or not costs protection should be 'all or nothing', in the sense that it was either implemented at the outset of a piece of litigation or not at all, and/or that it was either in respect of all of the costs which a party incurred, or none at all.

7.9.2 The majority of the Working Group felt that costs protection should be flexible: parties should be able to apply for it at any stage of the proceedings, and it should give them the opportunity to apply for, and the judges to order it up to, certain levels of protection.

7.9.3 However, there was also a strong dissent amongst some members. One of the claimant representatives who was completely against a 'flexible' system, believed that if any costs protection mechanism were available to a party it should be determined: (i) as soon as possible after the issue of proceedings whether it does in fact apply and (ii) should remain in place unless there were grounds for it to be subsequently lost. That member felt that if, instead, there was a flexible system as proposed by other members of the Working Group, it would be a recipe for uncertainty and costly satellite litigation.

7.9.4 In contrast, those members who favoured a flexible approach felt that costs protection could well be something which is revisited as a matter of course during the different stages in the course of litigation. At each stage there could be a new determination of whether the circumstances were now such that one (or both) of the parties was no longer deserving of the protection.

7.9.5 Even if costs protection was still deemed appropriate at that stage, there could still be a determination of whether the conditions attached to that protection (if any were) remained apt.

7.9.6 Any such assessment of changing circumstances, justifying the loss, introduction, or amendment of any costs protection, would be in addition to the assessment of whether or not a party benefitting from costs protection had acted in such a way as to justify being subsequently stripped of that protection for 'bad faith' behaviour (in the manner described at 7.12 below).

²⁷ See www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc

7.10 A means test acting as a gateway to costs protection

- 7.10.1 It was acknowledged by the Working Group that one of the greatest difficulties of introducing any kind of costs protection mechanism was the method by which deserving parties could be identified. The Working Group was completely divided on this issue: whilst the majority supported the idea of the introduction of some kind of means test in order to do so, there was no agreement on what form that test should take.
- 7.10.2 Others, particularly on the claimant lawyer side, were completely against the introduction of any type of means test at all, believing that any test which even began to attempt to investigate the finances of the parties would lead to huge amounts of wasteful satellite litigation. This, they felt, would result in hugely inflated costs at the outset of cases, simply to determine whether a party should even have the right to benefit from costs protection in the first place. This would also lead to a great deal of uncertainty for parties at the beginning of a piece of litigation and, therefore, also for the legal practitioners advising such clients.
- 7.10.3 Similarly, there were concerns that a means test assessment process would *itself* (even if the result is uncontested) contribute to costs, and may be difficult to administer effectively. It was emphasised by the members that held this view that, in the event such concerns materialised, they would undermine one of the key drivers behind the introduction of costs protection.
- 7.10.4 One member raised the possibility, rather than having a means test, of leaving the decision as to whether a party could benefit from costs protection entirely down to the judge's discretion. This did not however receive widespread support from the Working Group.
- 7.10.5 In spite of these concerns, the majority of the Working Group felt that it was necessary to have *some kind* of means test in place, in order to distinguish between (i) those that *can* afford to litigate (or more specifically, can afford to take the risk of having to pay the other's side's costs), who should not, as a matter of principle be entitled to protection (the ability to litigate risk-free being recognised as a significant advantage), and (ii) those who genuinely needed such protection in order to achieve any sort of meaningful access to justice.
- 7.10.6 Those members of the Working Group that adopted that view did explicitly accept however, taking on board the concerns of those that opposed means testing, that any test would need to be as straightforward as possible, thereby minimising the risk of satellite litigation, as well as being capable of clearly dividing those who can and cannot afford to litigate. It was also acknowledged that the form of the test would be dictated, in part, by what the default position would be in relation to the costs protection on offer e.g. whether it would automatically apply to claimants, but not to defendants, for example.

- 7.10.7 The Working Group went on to consider what the relevant threshold for the means test could be. Although the Working Group believed that the concept of ‘affordability’ was useful conceptually, it was felt that the term was too vague to translate into a workable means test, because it would essentially extend from “*I would prefer to spend my money on something else*” to “*I could pay but I would be on the verge of bankruptcy*”.
- 7.10.8 The Working Group felt that “*financial hardship*” and “*severe financial hardship*”, on the other hand, were terms which have already been used in another similar context, to determine whether a non-assisted party should be able to recover their costs from the Legal Services Commission under the Community Legal Service (Costs Protection) Regulations 2000 (the “**Regulations**”).
- 7.10.9 Those terms have also received some judicial consideration in ***Legal Services Commission v F, A & V [2011] EWHC 899 (QB)***, where the court held that non-funded parties who had intervened in ancillary relief proceedings and successfully defeated a claim brought against them by a funded party were entitled to recover their costs from the Legal Services Commission under the Regulations, in part because they would suffer ‘financial hardship’ unless such an order was made. The case makes for useful reading in this context because of the court’s discussion of what would constitute financial hardship/severe financial hardship, on the basis that the earlier legislation had required non-funded parties to suffer the latter before they could recover costs from the Legal Services Commission (but the Regulations had removed the “severe” requirement).
- 7.10.10 On the basis of that jurisprudence the Working Group concluded that these tests would seem to equate broadly to affordability. A party could therefore be said to be able to afford litigation if the effect of paying the opponent’s costs would not cause (severe) financial hardship.
- 7.10.11 One member of the group noted:

‘Although “affordability” is useful conceptually, it is too vague to be the test applied: extending from “I would rather spend my money on something else” to “I could pay but I would be on the verge of bankruptcy”. “Financial hardship” and “severe financial hardship” are terms which have been used in another context – whether a non-assisted party should be able to recover their costs from the Legal Services Commission under the Community Legal Service (Cost Protection) Regulations 2000 and have received some judicial consideration (see *eg Legal Services Commission v F, A & V [2011] EWHC 899 (QB)* where the court considered the earlier authorities). These tests would seem to equate broadly to affordability. A party can afford litigation if the effect of paying the opponent’s costs would not cause [severe] financial hardship.

Thus: a party cannot afford litigation if the effect of having to pay the opponent’s costs would cause [severe] financial hardship. One benefit of a more general test of “affordability” as against a set financial hurdle (*eg* top rate taxpayer) is that the availability of insurance (before the event or liability indemnity) can be taken into account.

The appropriate time for assessing affordability would be at the first case management

conference. It is inevitable that publication and privacy proceedings will be made subject to Costs Management Orders (under the new CPR 3.15) and accordingly all parties will be required to file costs budgets before the first case management conference (CMC). In any assessment of affordability the court would need to balance the estimated costs (both sides') against the means of the party. The first CMC would be the first occasion on which that information would/could be available.'

- 7.10.12 In contrast, one claimant representative of the Working Group disagreed strongly with 'severe financial hardship' being the appropriate test. Instead they felt that the test of "*conspicuous wealth*" as proposed by Jackson LJ in his report would be more appropriate²⁸.
- 7.10.13 Ultimately however, the majority of the Working Group did favour the (severe) financial hardship test. Based on this a party would be deemed *unable to* afford litigation if the effect of having to pay the opponent's costs would cause (severe) financial hardship. One benefit of a more specific means test as compared with a set financial hurdle (e.g. equating 'affordability' to those that are top rate taxpayers) is that the availability of insurance (before the event or liability indemnity) can be taken into account with this kind of test.
- 7.10.14 One member of the Working Group, for example, held the view that all defendants involved in commercial publishing should carry insurance in the normal course of business and therefore should not be eligible for costs protection in any circumstances. That member felt that it should be a requirement that parties to a media related claim that either send or receive a letter before action should be required to state if they carry the relevant insurance. Not only would this enhance certainty but it would also make it easier for the parties to know where they stood before they engaged in litigation, and should encourage both sides to make early and reasonable settlement offers, as well as encouraging people to represent themselves, thereby minimising costs.
- 7.10.15 Those that favoured the introduction of means testing believed that the appropriate time for assessing affordability of either party would be at the first Case Management Conference (CMC). In order to assist judges reviewing the issue at CMCs some members of the Working Group felt that guidance could be issued on the question of exactly what financial assets could be taken into account to determine whether a party *would* suffer financial hardship as a result of potentially being liable for the other side's costs.
- 7.10.16 Discussions amongst the Working Group seemed to favour essentially only accessible liquid assets being determinative for the purposes of this assessment; a main residence, furniture and pension entitlements, for example, would be excluded.

²⁸ Part 4, Chapter 19: One way costs shifting, para 4.8

7.10.17 The Working Group felt that it was inevitable that all publication and privacy proceedings will be made subject to Costs Management Orders and, accordingly, all parties will be required to file costs budgets before the first CMC. In any assessment of affordability, for the purposes of a means test, the court would need to balance the estimated costs of both sides against the means of the party. The first CMC would be the first occasion on which that information could be made available. See the section entitled Judicial Case Management further above at section 5.

7.10.18 Of the members who were in favour of a means test, they all acknowledged that the operation of such a test would become easier if the default position was that claimants should benefit from costs protection, (albeit open to challenge on the basis that the party in question was either conspicuously wealthy and/or that they have insurance in place to cover the costs risks (or should have had that insurance in place)).

7.10.19 If this were the default position, any such means test would then need only be formulated on an 'exceptions' basis; it would only have to address the relatively narrow section of parties which should be 'scooped out' of the protected group.

7.10.20 Ultimately however, whilst the majority of the Working Group agreed that some kind of means test was necessary, it could not reach any sort of agreement as to what the wording of that kind of test could be.

7.11 **The interaction of a QOCS-type costs protection mechanism with existing settlement mechanisms in publication and privacy proceedings**

7.11.1 Costs protection as generally understood is protection against the enforcement of costs orders, not protection against the incidence of costs (e.g. the costs protection for legal aided parties under s11 Access to Justice Act 1999). Any QOCS-type system would therefore work in the same way, i.e. it would limit the incidence of costs.

7.11.2 It is important therefore to distinguish between those behaviours which may affect the incidence of costs (e.g. exaggeration of a claim, failure to beat a Part 36 offer, conduct, potentially a failure to pursue ADR etc) from those which should affect the enforcement of costs. This report deals first with those elements of the current system which the Working Group believed ought to have an impact on the *incidence of costs* incurred, when one of the parties concerned benefits from costs protection.

7.11.3 **Part 36 offers Generally**

7.11.3.1 Part 36 offers are equally applicable (and important) in publication and privacy proceedings as they are in any other area of law. Such offers can be made at any time (including before the commencement of proceedings). Any settlement agreement in such proceedings should contain provisions as to any statement or apology which the defendant is to make, the sum he will pay in damages, how the

costs which have been incurred should be borne, and how publicity should be given to the settlement.

- 7.11.3.2 Very broadly, where an offer is made which the claimant does not accept, and then he fails to obtain a judgment which is “more advantageous” than the defendant’s offer, he will usually be ordered, unless it is unjust to do so, to pay the costs from a period (not less than 21 days after the offer was made) specified in the offer (the “relevant period”), and interest on those costs.
- 7.11.3.3 Conversely, if a claimant makes an offer, which is rejected by a defendant, but that claimant then goes on to achieve the same or better at trial, there can be significant benefits. The claimant may be awarded interest on the damages running from the latest date the defendant could have accepted the offer, and costs from such date on an indemnity basis.
- 7.11.3.4 The Working Group believed that parties in publication and privacy proceedings should be strongly encouraged, whether by way of making a Part 36 or an open offer, to be transparent in what it was they would be willing to offer, or accept, in order to settle an action. This should include, from a claimant’s perspective, quantifying the level of damages they are seeking, and setting out the wording of an apology and/or retraction (if applicable). The terms of any injunction sought should also be proposed by the claimant as early on as possible.

Possible implications of a refusal to accept a Part 36 offer on costs protection in publication and privacy proceedings

- 7.11.3.5 Whilst the Working Group unanimously agreed that Part 36 offers must have some kind of impact on a party that benefits from costs protection, the details of what the effect should be proved to be one of the most contentious issues discussed.
- 7.11.3.6 Some members felt that logically if, as a claimant, you fail to accept the Part 36 offer, and then fail to win at trial, you should lose any costs protection that would otherwise apply. Several of the members who adopted this stance sought to draw parallels between such cases and the days when applications for security for costs were much more common, when the courts invariably looked at payments into court to assess the real risk of a costs order being made which could not be recovered or enforced.
- 7.11.3.7 In the same way, they believed that Part 36 and open offers should be looked at for the purposes of determining whether a party should be stripped of costs protection that they would otherwise have benefitted from. They referred to the recent case of *KC v MGN (2013) 163 NLJ 108* as an example of a case in which it would have been appropriate to strip the claimant of costs protection (had they benefitted from it). This was based on the claimant’s rejection of an open offer of £50,000 early on in the litigation, only for the Court of Appeal to end up subsequently holding, about a year later, that that was in fact the appropriate level of damages (and the claimant suffering significant costs consequences (even on the rules as they currently stand) as a result). In this sort of scenario the majority of the Working Group believed that it should be open to the opposing party to apply to Court to displace costs protection.
- 7.11.3.8 Other members of the Working Group believed that a variation on that theme was preferable: costs protection should not be lost whatever sum is offered by way of a

Part 36 offer in damages, unless, in a libel case for example, the defendant offered to publish a proper apology and to withdraw the relevant allegations in a reasonably prominent position as compared to the material complained of, and also agreed to desist from publishing the relevant allegations again. Only then should the claimant be at risk of possibly losing the costs protection that (s)he would otherwise have benefitted from and, even then, only at the judge's discretion.

- 7.11.3.9 In complete contrast, other members of the Working Group, particularly claimant representatives, felt that under no circumstances should parties be at risk of losing their costs protection as a result of any Part 36 offer that was made. Otherwise they felt there would be no ability to satisfy the party that wanted to have costs certainty from the outset.
- 7.11.3.10 In addition, those members were concerned that defendants would always seek to make an early Part 36 offer in order to effectively hold the claimant to ransom, knowing full well that refusal of the offer carried with it the risk of losing costs protection from a very early stage (in addition to the existing risks that follow from refusing to accept such an offer).
- 7.11.3.11 Adding to the difficulties of determining whether acceptance or rejection of a Part 36 offer should have implications for costs protection is the fact that, given the nature of publication and privacy proceedings, it is not always entirely straightforward to determine what constitutes "more advantageous" for the purposes of assessing the impact of Part 36 offers.
- 7.11.3.12 The issue of what constitutes "more advantageous" was explicitly grappled with by Eady J in *Jones v Associated Newspapers Limited [2007] EWHC 1489*. He held that a judgment award for £5,000 was not as advantageous as the defendant's Part 36 offer to settle for £4,999 and an apology. In comparing the value of the offer with the award the Judge held that the claimant would have avoided the concern and distress as well as the disclosure of some matters unfavourable to them which, as a result of the trial, were aired publicly, when they otherwise would not have been. Accordingly, the award was less advantageous than the offer.
- 7.11.3.13 If costs protection were dependent on Part 36 offers, then this uncertainty in determining what constitutes "*more advantageous*" could also therefore potentially cause difficulties in respect of determining whether costs protection should continue to apply or not. This is especially so in publication and privacy proceedings because of the importance that apologies and retractions can play in settlements.
- 7.11.3.14 One point on which the Working Group was in nearly complete agreement, in respect of Part 36 offers, was that the rules contained within the CPR on the topic ought to be re-visited by the CPRC, so that the interaction between such offers and any system which introduced costs protection, was clear.
- 7.11.3.15 At the moment, for example, the Working Group noted that parties are completely barred from even disclosing the existence of a Part 36 offer to the court. It was felt however, that in order to be able to properly determine whether circumstances have changed during the course of a piece of litigation, such that any prior costs protection decisions should be re-visited, the court would need to know whether a Part 36 or other open offer has been made and, if so, at what level. Parties need to

be able to understand what risks that cost protection would face if they chose to reject such offers.

- 7.11.3.16 All of those members of the Working Group who supported the disclosure of settlement offers did, of course, acknowledge the need for it to be a different judge to the trial judge which was able to have sight of the offers that had been made.
- 7.11.3.17 It should be noted that one claimant representative of the Working Group strongly disagreed with the disclosure of settlement offers to a judge, on the basis that it would lead to uncertainty as to whether or not costs protection would remain in place for a party. They also felt that it was likely to create difficulties in terms of the management of the costs of an action, i.e. whether or not it was the assigned judge or some other judge who would be in control of the costs element of the case.
- 7.11.3.18 If the MoJ was minded to direct that the CPRC re-visit the rules on Part 36 offers however, at the same time as reviewing the provisions as to who those offers can be disclosed to, the Working Group believed that it should also take the opportunity to set out, in the clearest terms, what would constitute an offer being considered to be “*more advantageous*”. This would be both in financial terms, and also setting out whether an offer of an apology and/or a retraction would affect the assessment, the latter being perceived to be a very important consideration in relation to publication and privacy proceedings because of the frequent use of multi-faceted settlement offers in these types of cases.
- 7.11.3.19 The Working Group acknowledged that determining what constituted ‘more advantageous’ would not be an easy task. One claimant representative believed, for instance, that if a proper apology and retraction was sought at the outset of proceedings, it would be completely wrong for any monetary settlement that might be offered (in the absence of it being alongside an apology and retraction) to be deemed by the court to be more advantageous.

7.11.4 Interaction between the ‘offer of amends’ procedure under ss2 and 3 of the Defamation Act 1996 and costs protection in defamation actions.

- 7.11.4.1 The offer of amends procedure can also be regarded as a means of settlement provided by statute in which the court is given a role in enforcing the settlement and determining suitable compensation. Its objective is to enable media defendants who have made a mistake to avoid prolonged and expensive litigation in circumstances where they are prepared to acknowledge the wrong and to make reasonable amends²⁹. Take up of the scheme appears, to date, to have been very favourable³⁰.
- 7.11.4.2 The offer of amends under this procedure is defined in the legislation as an offer to make a suitable correction, provide a sufficient apology, and to publish those in a reasonable manner, and to pay the complainant such compensation and costs as may be agreed.
- 7.11.4.3 If the offer is accepted, the party doing so may not continue to bring the proceedings (or begin to, if not yet initiated), but they may apply to court to have

²⁹ *Abu v MGN Ltd* [2003] 2 ALL ER 864 Eady J at [4].

³⁰ See Gatley, 11th Ed, Sweet & Maxwell, at 31.28.

that offer enforced if need be, or if the parties cannot agree on the level of damages between them. If an offer of amends is not accepted, the fact that it was made is a defence to defamation proceedings in respect of the publication complained of by that claimant against the offeror, unless the claimant can prove, with the burden being on him to do so, that the publisher knew that the words were both false and defamatory of the person to whom they knew they referred, i.e. where they have acted in bad faith.

7.11.4.4 The majority of the Working Group believed that offers made under ss2 and 3 of the Defamation Act 1996 should be taken into account, on an on-going basis, for the purposes of determining whether any costs protection that has been put in place should be able to continue/continue beyond a certain level. For this reason, the Working Group believed that the MoJ should consider also setting out how the different constituent parts of an offer of amends package should be 'valued', specifically the level of damages offered as well as the effect of an apology and/or retraction.

7.11.4.5 One claimant member of the Working Group strongly disagreed with this recommendation however, believing that whilst a ss2/3 offer should be taken into account when determining whether or not costs protection should be applied in the first place, it should not then remain an on-going issue in the proceedings, because of the risk of a lack of certainty as a result. They believed that to do so would also be inconsistent with the circumstances in which costs protection should be subsequently lost (as set out at paragraph 7.12 below).

7.12 What behaviours should result in costs protection being subsequently lost, after it has initially been granted to a party in a case?

7.12.1 In contrast, the Working Group acknowledged the importance of recognising, through the drafting of any rules, that parties which benefit from costs protection in the first instance should not be able to act with impunity if they engage in certain kinds of behaviour which, if they were to retain that costs protection, would arguably amount to an abuse of the system.

7.12.2 On that basis the Working Group felt that there were certain obvious behaviours which should justify the subsequent disapplication of costs protection (i.e. the stripping of protection, such that costs *could* then be *enforced* against that party). In doing so the Working Group had regard to the types of situations identified by those that drafted the personal injury QOCS rules, that would justify the loss of costs protection in those cases.

7.12.3 Having done so, the Working Group identified that the following situations should result in the loss of costs protection in publication and privacy proceedings:

(a) If the claim is found to be fraudulent (or fundamentally dishonest) on the balance of probabilities (although the Group could not come to a complete

agreement about whether the entire case would need to be ‘fundamentally’ dishonest, or whether it was enough for costs protection to be lost simply on the basis that some elements of the claim were dishonest). They did agree however that the key determining factor should be whether the issue went to the *underlying merits* of the case;

(b) The claim has been struck out on the basis that it discloses no reasonable cause of action or where it is otherwise an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) Where the claimant has failed to beat a defendant’s Part 36 offer but the claimant’s liability for the defendant’s costs should not exceed the amount of damages recovered by the claimant.

7.12.4 It was also suggested that disapplication of costs protection be applied where a claim has been brought for the benefit of another person, or where a claim is being funded in whole or in part by a wealthy sponsor³¹. One claimant representative however was concerned about the recommendation of this as a relevant limb of the ‘subsequent loss’ test, citing the fact that a case may be in the public interest and funded by an altruistic “public funder”³².

7.12.5 Others in the Working Group went further than this, believing that, aside from fundamental dishonesty in relation to the claim or defence, all factors that went to conduct and merits of the claim or defence, ought to be taken into account *only* for the purpose of determining the incidence of costs, and not in relation to the enforcement of costs.

7.12.6 Claimant representatives cited, for example, the risk that, in respect of the limb (b) proposal, a claim might be made in good faith, on the advice of experienced lawyers, but may still be struck out by a judge, perhaps because the words complained of were, to their mind, ‘not capable’ of being defamatory, or because their view differed as to the ‘threshold of seriousness’ required for the claim to be permitted to proceed. On that basis they believed it would be unjust for costs protection to then be lost.

7.12.7 The Working Group was in complete agreement that, in any case, a judge should have ultimate discretion when it comes to the loss of costs protection. Given that each case is fact specific, in respect of the proposed limb (a) of the test in particular, it should be the judge who determines, in the end, whether or not dishonest behaviour goes to the root of the case, so as to warrant protection being stripped from the party concerned.

7.12.8 The Working Group discussed the issue of what would be determined to go to the ‘root of the case’ as opposed to something which was only an incidental issue, but it was felt that this is something that was impossible to establish rules to deal with in advance, and would need, instead, to be

³¹ Such a point may have limited application; unsurprisingly, this is not a field in which commercial funders have seen it fit to make an appearance.

³² See CPR 48.22 (page 1653) in the 2013 White Book

decided on the facts of each individual case.

7.12.9 The Working Group did note, however, that a test which dictated that a party should continue to enjoy costs protection provided it was ‘just and reasonable’, would be too wide a test.

7.12.10 One member felt that it was valuable in this context to make reference to the case of **Browne v Associated Newspapers Ltd**³³ in which the claimant still succeeded in obtaining a remedy against the defendant (in the form of the continuation of a privacy injunction), despite the fact that he had lied in his witness evidence to the court as to the circumstances in which he had met the person with whom he had an intimate relationship, in respect of which the privacy proceedings had been brought. Whilst the lie was trivial in the context of the evidence on which the application had been based as a whole, the defendant sought to rely on it to argue that the claimant should be deprived of the injunction on that basis.

7.12.11 Eady J, dealing with the case at first instance, clearly identified that the fact the claimant had lied was wrong, and meant that he did not come to the court with entirely clean hands, but still found that this was not enough, on its own, to deprive him of the remedy that he would have otherwise been entitled to. The claimant was however ordered to pay his ex-partner’s costs on an indemnity basis, which the judge made clear was a decision that was much affected by the lie.

7.13 **The interaction between alternative dispute resolution (“ADR”) and costs protection**

7.13.1 It is well established that the failure of parties to engage in ADR can be taken into account in determining the level of costs. As Leveson LJ explained in his report³⁴:

“in *Halsey v Milton Keynes General NHS Trust*; *Steel v Joy*³⁵, the court considered the consequences of failure to participate in mediation as a form of alternative dispute resolution. It recognised that unreasonable refusal to agree to ADR could properly be reflected in adverse orders for costs and identified the relevant factors to be taken into account. In those cases, mediation was intended to encourage parties to reach an agreement on a sensible resolution of their dispute; arbitration (as here proposed) provides an alternative to a trial and is intended to be speedy, effective and without the cost implications of litigation in court. It results in a solution that is imposed by a judgment. The case for recognising the value of this form of dispute resolution (and the consequential saving of costs) is, therefore, much stronger and entirely consistent with the overriding objective of the Civil Procedure Rules.”

7.13.2 Later in that same Chapter Leveson LJ went on³⁶ to set out what he believed the costs consequences should be for a failure to engage in the ADR model that he had recommended for publication and privacy proceedings:

³³ [2007] EMLR 19 and in the Court of Appeal at *Browne v Associated Newspapers Ltd* [2008] QB 103

³⁴ Chap 3, para 6.4

³⁵ [2004] EWCA Civ 576

³⁶ Chap 3, paras 6.7- 6.9

“6.7 If an arbitral mechanism was set up through the regulator, however, I see no reason why the courts should not embrace it as an extremely sensible method of pursuing the overriding objective in civil cases. In those circumstances, costs consequences could flow both ways. Thus, if the relevant media entity was regulated and thus able to utilise the availability of the arbitration service, it would be strongly arguable that a claimant who did not avail himself of that cheap and effective method of resolving his dispute but, instead, insisted on full blown High Court litigation, should be deprived of any costs even if he is successful: that might also be a powerful incentive for a publisher to join the regulator, particularly if concerned that an extremely wealthy claimant might otherwise seek to overwhelm the publisher with expensive litigation out of all proportion to what was at stake.

6.8 Equally, however, if a publisher did not join the regulator, with the result that the specialist arbitral system was not available to a claimant wishing to pursue a remedy (particularly if of limited means and, thus, unable otherwise to obtain access to justice), I see no reason why the court should not be able to deprive even the successful publisher of costs that would not have been incurred had the alternative arbitration been available. I go further and suggest that, in a case legitimately brought and potentially borderline, the court would even retain the discretion to order the successful publisher to meet the costs of an unsuccessful claimant (although I recognise that this would not be the case if the court was dealing with vexatious or utterly misconceived litigation). Ultimately, the discretion of the court would govern all these issues, but I see only advantage in supporting an arbitral system that could be seen to have been independently set up and operated by a regulator, albeit itself set up by the press but managed and run independently of it.

6.9 It is obviously important that there should not be an ever-running argument about the adequacy of the arbitral mechanism. In the circumstances, I recommend that the Civil Procedure Rules should be amended to require the court, when considering the appropriate order for costs at the conclusion of proceedings, to take into account the availability of an arbitral system set up by an independent regulator itself recognised by law. The purpose of this recommendation is to provide an important incentive for every publisher to join the new system and encourage those who complain that their rights have been infringed to use it as a speedy, effective and comparatively inexpensive method of resolving disputes.”

- 7.13.3 ADR is, however, the area most affected by the current uncertainty about the legislative future concerning publication and privacy proceedings as described above at section 4. Lord Puttnam’s amendment to the Defamation Bill, for example, envisaged indemnity costs and even exemplary damages being available where a party fails to use a recognised arbitration service.
- 7.13.4 In spite of this, the Working Group still concluded that a failure to engage in ADR if ordered by the judge, given that it would be very fact specific to each separate case, *should only* impact on the incidence of costs, rather than the availability of costs protection altogether. Such an approach would broadly reflect the new rules that have been put in place for the interaction between the QOCS system and ADR in personal injury cases. See, for example, *Dunnett v Railtrack plc* [2002] EWCA Civ 303³⁷ in which the Court of Appeal imposed a costs sanction against a party that had refused to mediate.
- 7.13.5 It was not believed by the Working Group that a failure to engage in ADR was so heinous that it should have the very serious effect of stripping a party of costs protection. Some members felt that, if such a provision were to be introduced, there would be a risk of parties being forced to undergo ADR so as to avoid costs protection being lost, which could end up being a waste of both time and expense.

³⁷ www.bailii.org/ew/cases/EWCA/Civ/2002/303.html

Also, the view was expressed that there are many cases, particularly those involving disputed issues of fact, where judicial resolution in a public court is a legitimate desire of a party, as a result of which considerations of a party's right to a fair trial under Article 6 of the European Convention of Human Rights come to the fore.

- 7.13.6 One member of the Working Group felt that, instead of taking a blanket approach to the interaction between ADR and costs protection, it was preferable to draw a distinction between different types of ADR, in particular mediation on the one hand and arbitration on the other. They felt that a refusal to arbitrate, even despite a recommendation by a court to do so, should not result in the stripping of costs protection, both because of the Article 6 considerations, but also because the courts already have powers to exercise in relation to costs where there is an unreasonable refusal to arbitrate.
- 7.13.7 However, they felt that there was no reason why a judge should not be able to direct mediation, if they believed it to be appropriate, failing which the refusing party *should* be at risk of losing costs protection. There should not be a completely un-fettered right to litigate through the courts where this is unreasonable and, accordingly, there should be some disincentive to those who seek to do so.
- 7.13.8 That member did express the view, however, that the stripping of costs protection should not be the default position; it should be for the opposing party to make an application that there are grounds for that to be done, on the basis that it was 'unreasonable' for the other party to have refused to mediate, with the burden being on the applicant to prove that was the case. This suggestion did not, however, receive the support of the Working Group as a whole.

8 CONCLUDING REMARKS

- 8.1 The Working Group felt that it was being asked to review costs in publication and privacy proceedings at a very difficult and uncertain time, in light of the significant legislative changes currently being proposed to the relevant areas of law. As such, it is keen to emphasise that its hands are tied to a certain extent; its recommendations can only be made based on the legislative backdrop as it stands at the date of publication (which is, for want of a better term, in a constant state of flux).
- 8.2 Although the old CFA regime (in which success fees of up to 100% could be claimed by lawyers and ATE premiums could be deferred and then recovered from the losing party) could not be defended any longer, the Working Group recognised that it did at least afford access to justice for the first time to meritorious claimants in publication and privacy proceedings, who had never been entitled to legal aid. The problem was, however, that it did so at quite an unacceptable cost.
- 8.3 The Working Group felt that Jackson LJ's proposal to increase damages in publication and privacy actions by 10% in order to alleviate the issues with access to justice by claimants would be insufficient. They did not think that such an offer, (i.e. a modest share of modest (albeit slightly increased) damages), would attract those lawyers that were formerly willing to conduct

CFAs under the old regime, to do so once the LASPO changes are implemented.

- 8.4 The reason for this, as is well known, is that damages in publication and privacy proceedings simply are not comparable with those in personal injury cases, and often the primary remedy sought is not pecuniary, e.g. an apology or correction in defamation actions. Whilst very valuable to the claimant, such remedies are not nearly as attractive to the lawyers when they are considering whether to act for that client in the first place.
- 8.5 The obvious concern is therefore that some meritorious cases on which lawyers acted on CFAs in the past would, if brought after the LASPO changes are implemented in these areas of law, simply not be able to secure representation. Four examples of such cases include:
- ***Sylvia Henry v NGN*** – Baby P social worker libelled by The Sun newspaper in 80 articles, including 11 front page articles. She was subject to what The Sun described as the largest newspaper campaign of its kind in newspaper history and a petition calling for her immediate sacking and that she never be allowed to work with vulnerable children again, which gathered 1.6 million signatures and was delivered to Downing Street. Ms Henry would not have been able to afford to pay any legal fees but was able to receive justice because she had access to a CFA and ATE Insurance. She could not have afforded to put her family's home at risk.
 - ***Paramaswaran Subramanyam*** was a Tamil who went on hunger strike in Parliament Square in protest at atrocities committed in Sri Lanka. Some seven months later the Daily Mail ran a double page story alleging that he had secretly eaten during his fast. He was not contacted prior to publication. The Sun repeated the allegations made by the Daily Mail. As a consequence Mr Subramanyam's reputation was destroyed. He received death threats from fellow Tamils who wrongly believed, having read the defamatory articles, that he had betrayed them. It took seven months of litigation before the Daily Mail would publish an apology.
 - Very recently, in ***Mengi v Hermitage***, the Defendant who succeeded in seeing off a claim by a very wealthy Tanzanian businessman, had the benefit of a CFA and ATE insurance. She was thus able to advance and prove a justification defence during a 10 day trial.³⁸
 - ***NMT Medical Incorporated v Dr Peter Wilmshurst*** – the case of a scientist sued by an American corporation. Dr Peter Wilmshurst is a cardiologist who questioned the findings of a clinical trial conducted by NMT Medical. They sued him for defamation and Dr Wilmshurst was only able to successfully defend the claim and receive justice because he had access to a CFA.
- 8.6 In contrast, and in support of the idea that the abolition of the recoverability of

³⁸ See <http://inform.wordpress.com/2012/12/11/mengi-v-hermitage-and-access-to-justice-in-libel-cases-andrew-stephenson/> for more details.

success fees will not result in meritorious cases failing to attract any legal representation, the Working Group noted the case of *Lillie & Reed v Newcastle City Council and others (No 2) [2002] EWHC 1600*. In that case two nursery workers brought a defamation claim, having been labelled by a newspaper with the most egregious libels, to the effect that they had physically, sexually and emotionally abused children that were in their care. The claim was successfully pursued on behalf of both claimants by lawyers on a CFA basis, in the days before the CFA regime provided for the recoverability of success fees. Whether or not a similar case would still attract representation under the new proposed regime is unclear: that case occupied both Leading and Junior Counsel for the best part of a year.

- 8.7 As such, the Working Group believed that the changes being implemented via the provisions of LASPO 2012 would require changes to the costs system in publication and privacy proceedings, in order to address the inevitable negative impact of the changes to the CFA regime on access to justice for parties with limited means.
- 8.8 The Working Group explicitly recognised that the concerns that people have in respect of those changes, which stem from an acknowledgement of the need to ensure access to justice in publication and privacy proceedings (both for claimants and defendants) underline the need for:
- (1) Alternative means of resolution, where mediation or arbitration are appropriate and it is reasonable to expect the parties to participate, rather than litigate;
 - (2) Significant measures of costs protection where litigation is unavoidable – not least to ensure equality of arms; and
 - (3) Effective judicial case management, including costs budgeting and if necessary capping, to control the expense of litigation which is the single most significant obstacle to access to justice.
- 8.9 Taking each of those three issues in turn: the Working Group did not feel able to make any recommendations in respect of an alternative means of resolution given the ongoing debate about the new arbitration system to be set up pursuant to Leveson LJ's proposals.
- 8.10 In respect of point (2), namely providing for significant measures of costs protection where litigation is unavoidable, the Working Group came to the conclusion that the implementation of a variation of the QOCS system, as currently used in personal injury claims, would be the most appropriate mechanism to adopt in publication and privacy proceedings. That system should be available to both claimants and defendants, and should be given an appropriate tag which accurately reflects its operation, such as Variable Costs Protection.
- 8.11 The majority of the Working Group believed that costs protection should apply

by default to claimants, but also be available to defendants, provided that they satisfied the relevant means test.

- 8.12 In respect of point (3), all the members of the Working Group were in complete agreement that there should be enhanced judicial intervention and management of publication and privacy cases from an early stage. This, members believed, must go hand-in-hand with any implementation of a costs protection system. Effective case management contributes greatly to keeping costs in check and that, ultimately, is key to ensuring that a QOCS-type system, if one were to be implemented, would not have the undesired side effect of an unnecessarily disproportionate impact on the party against which the party with the costs protection is litigating.
- 8.13 The Working Group believed that a crucial part of any new costs mechanism would be the effective roll-out of the costs budgeting system from 1st April 2013. All the members of the Group believed that it was very important for the courts to make clear to parties that adherence to costs budgets was not optional.
- 8.14 On that note, certain members of the Group believed that it would be regrettable if the recent Court of Appeal decision in ***Henry v News Group Newspapers [2013] EWCA Civ 19*** (in which a decision by the first instance Costs Judge to disallow costs which had been incurred over and above the approved costs budget was overturned) was interpreted as being a green light for costs recovery irrespective of what was set out in an approved budget. As the Chairman of the Association of Costs Lawyers has commented, *“the Appeal Court’s weak decision undermines efforts to constrain legal costs and adds to judges’ burden”*³⁹.
- 8.15 The solution proposed by this Working Group therefore, whilst it cannot offer anything close to the level of incentive still currently available to lawyers willing to act on CFAs (specifically recoverability of success fees from the losing party), can at least attempt to alleviate the risks for litigating parties themselves, and therefore some of the access to justice concerns.
- 8.16 On that basis, the Working Group sets out in the schedule below a list of its key recommendations for reform of costs in publication and privacy proceedings. It should be emphasised that these have been drafted on the basis of the consensus reached by the majority of this Working Group. Therefore, to the extent that certain individual members dissented from the majority’s view on different issues, each individual member of this Working Group *cannot* be assumed to support every single recommendation.

³⁹ See <http://www.thelawyer.com/news-and-analysis/opinion/here-come-anything-goes-costs/1016727.article>

SCHEDULE RECOMMENDATIONS

Judicial Case Management

Use of specialist and assigned judges

1. Specialist judges should be allocated to hear all publication and privacy proceedings. In relation to each individual case there should be one Master and one High Court Judge assigned to it (the “**Assigned Judges**”) who are responsible for the overall management of the action. They should determine any applications made during the course of the proceedings, as well as hearing the claim should it make it to trial.
2. The Working Group recommends that the Assigned Judges be allocated to claims by way of a ticketing and docketing system.
3. The Assigned Judges should take responsibility for ensuring that the case is progressed as efficiently as possible through the court system. They should do so by setting a timetable for the different stages of the action and ensuring that parties adhere to relevant deadlines, failing which they are subject to costs penalties.
4. The Assigned Judges should bear in mind the way the parties conduct themselves throughout the course of the proceedings with a view to identifying, early on, a situation where one party has acted in such a way as to potentially justify their costs protection being lost (to the extent that behaviour falls within one of the categories set out at recommendation [35] below). In that situation the Assigned Judges should take appropriate steps to determine whether, in fact, the protection should be lost. This may include requesting written submissions from the parties on the issue, or ordering there be a hearing to determine the matter.
5. In addition to the Assigned Judges, the Working Group recommends that there should be a specialist costs judge allocated to publication and privacy proceedings which involve particularly complex costs issues, especially those concerning costs budgeting.
6. The Assigned Judges should be responsible for approving, in conjunction with the costs judge (in the small number of cases where their involvement is necessary), the costs budget drawn up by each of the parties. Those same judges should also be responsible for dealing with any subsequent applications made for alterations to the costs budgets. If necessary, additional specialist judicial training should be provided on costs budgeting.

Early and effective judicial intervention

7. There should be a clear emphasis placed on early judicial intervention, it being fundamental to keeping costs down in proceedings. Similarly, there should be an increased focus on the court's case management powers under CPR Part 3, and encouragement given to the Assigned Judges to give clear and cogent case management directions from the first CMC in a case. These should include, as a matter of course, directions on the maximum length of statements of case, witness statements, skeleton arguments and, where the matter proceeds to a hearing, speeches as well.
8. The Assigned Judges should endeavour to organise the first CMC as early as possible after the proceedings have been issued, so that directions can be given at the earliest possible juncture. These should set out how the matters in issue can be determined in the most proportionate and expeditious manner. Where appropriate, this hearing should also address the possible use of ADR.
9. The Assigned Judges should be encouraged to order paper determination of as many issues within the proceedings as possible (where it is in the interests of justice to do so). This should extend, in particular, to determinations of meaning wherever possible. Where it would otherwise compromise the principle of open justice for a matter to be determined on paper, the parties' written submissions should be made publicly available at the same time the decision is made public, and published on a suitable forum.

The recommended model of costs protection that the Working Group would advise for use in publication and privacy proceedings

10. The Working Group had particular regard to the operation of the QOCS system in personal injury claims when considering the question of what the most appropriate type of costs protection mechanism would be in publication and privacy proceedings. Having done so, it recommends that a variation of that QOCS system be implemented in these types of proceedings, to protect those parties who have a meritorious claim or defence, but where the burden of litigating is such that they would not undertake to do so without some kind of costs protection. This would be where the risk of the consequences of having the other side's costs (or a portion of them) being enforced in full against that party would simply be too great a burden to bear. Any costs protection mechanism implemented should therefore limit that risk to the extent necessary to enable such parties to litigate. .
11. As in personal injury claims, generally speaking, parties who were granted costs protection would continue to benefit from it throughout the proceedings provided that their behaviour was reasonable (i.e. that their behaviour does *not* fall within one of the categories outlined at paragraphs

33 et seq below which would justify the subsequent loss of costs protection), and the material circumstances have not changed.

12. The QOCS-type system that the Working Group recommends for use in publication and privacy proceedings would differ in several respects from that currently applied in personal injury claims. One key respect in which it would is the recommendation that costs protection be made available to both claimants and defendants. Given the asymmetric party imbalance which features in publication and privacy proceedings (which is not typically in either claimants' nor defendants' favour), the Working Group recommends that costs protection be made available to both parties, irrespective of whether they are individuals or companies.
13. For that reason the Working Group recommends that the new system be called Variable Costs Protection (VCP), so as to more accurately reflect the operation of that mechanism. This system should operate to prevent the enforcement of a costs order against the protected party.

Costs capping

14. In addition to any new costs protection mechanism that is implemented, costs capping, pursuant to the powers that the courts already have to make such orders under CPR 44.18, should remain available to the Assigned Judges.

Costs budgeting

15. The Working Group supports the general application of this scheme. It recommends that early judicial intervention be focussed on, in particular, ensuring that realistic costs budgets are drawn up by each of the parties early in the course of litigation, and that there is adherence to those costs budgets. The Assigned Judges should take a pro-active role in ensuring compliance in all cases.

The specifics of the operation of the QOCS-type system recommended by the Working Group in publication and privacy proceedings

What should the default position in relation to costs protection be?

16. The Working Group recommends that if costs protection is to apply by default at all, it should only be to claimants. Even then, the decision as to whether or not that should be the case ought to depend on what means test is adopted, determining who would be able to benefit, and who would not.
17. If the majority of claimants would satisfy the test, and therefore *would* be able to obtain costs protection, the recommendation is that costs protection *should* apply by default to claimants, but should be subject to an application by the defendant for it to be disapplied. That application would be made on

the basis that the claimant is 'of sufficient means' to be able to litigate without protection against the defendant's costs being enforced in full against them.

18. If the new rules are drafted so as to provide that the costs protection mechanism is also available to defendants, the Working Group recommends that they should be able to apply for costs protection, provided they can establish they have insufficient means to be able to litigate based on the potential costs consequences that could follow. This assessment should be made on the basis of the same means test used for claimants. The Working Group believed that costs protection should not apply by default to defendants.
19. Deserving defendants should be encouraged to apply for protection as early on in proceedings as possible, ideally at the first CMC, so as to provide an element of certainty for the opposing party from the outset.
20. In the event it is decided that costs protection should not apply by default to either party, the Working Group recommends that new Practice Guidance should be issued directing that parties agree on costs protection for the claimant up until the point of the first CMC in any event. If such agreement is not forthcoming, the party seeking protection should be able to apply to court, for a quick determination of whether they will get that protection.

The form of the mechanism

21. The mechanism should be sufficiently flexible, so that it does not require an 'all or nothing' type application. Whilst parties should be encouraged to apply as early as possible for costs protection (if appropriate to do so), provision should still be made for such protection to be applied for at any stage in the proceedings.
22. Provision should also be made within the drafting of any costs protection mechanism for the Assigned Judges to have the power to order costs protection only in respect of a certain stage of the proceedings and/or for it to apply only above a certain level of costs.
23. Where costs protection has been granted to a party in an action, the position should be regularly reviewed by the Assigned Judges throughout the duration of the proceedings, to determine whether it should be continued and/or extended.

The means test

24. Whether or not a party has sufficient means to litigate without costs protection should be a decision taken by the Assigned Judges on the basis of a means test, at the first CMC in the case.

25. The Working Group recommends that any means test be based on the concept of whether or not litigating without costs protection would cause the party concerned 'severe financial hardship' if a costs order was later enforced against them.
26. The drafting of the means test should be as straightforward as possible. General guidance should be issued on which assets can be taken into account when determining whether a party would end up being in 'severe financial hardship' in the event a costs order, (or one above a certain level), was enforced against them. Ideally that Guidance should direct that the assessment of whether or not litigating without costs protection would put a party at risk of 'severe financial hardship' be determined on the basis of a party's accessible liquid assets.
27. Whatever the form of the means test agreed upon (if one is implemented), the Assigned Judges should have the ultimate discretion in any event as to whether or not a party is deserving of costs protection.

Interaction of a new costs protection mechanism with other settlement concepts

28. Parties should be strongly encouraged to behave in a transparent way in relation to the terms on which they would be willing to settle a claim, right from the outset, whether this be by way of a Part 36 or an open offer. This should include, in particular, a quantification of the level of damages that the claimant is seeking and, from a defendant's perspective, the level they would be prepared to offer. A claimant should also make clear if they are seeking an apology and/or a retraction (if it is a libel claim), and any prohibition on re-publication, and a defendant similarly on whether it would provide these things.

Part 36 offers and open offers

29. Part 36 and open offers should have an impact on whether or not a party that has the benefit of costs protection is able to maintain that protection, or maintain it beyond a certain amount. For this reason the Working Group recommends that the CPRC revisits the current rules in relation to Part 36 and open offers. The Working Group recommends that provision be made to enable such offers to be disclosed to a judge (albeit not one of the Assigned Judges), so that an informed decision can be taken on any costs protection issues.
30. Consideration should be given to the provision of clear guidance setting out what constitutes a "*more advantageous offer*" in the context of Part 36 offers and publication and privacy proceedings. This should address, in particular, what is required for an offer to be deemed more advantageous in financial

terms, and whether the offer of an apology and/or retraction would affect that assessment.

Offers of amends

31. In a similar fashion, in defamation actions, the Assigned Judges should also have the opportunity to look at any offers that have been made pursuant to the offer of amends scheme under s2 Defamation Act 1996, and be able to take that into account when determining whether a party's costs protection position should be reviewed.

ADR

32. The Working Group believed that a failure to engage in ADR should not result in costs protection being lost but should (to the extent the Assigned Judges believe it was an unreasonable refusal) affect the level of any costs award that might ultimately be made.

In what circumstances should costs protection be subsequently lost?

33. The Working Group believed that there should be certain behaviours, specifically those which involve the protected party acting in bad faith, that justify the subsequent loss of any costs protection it may have been granted.
34. Such a system should operate in addition to the general review of costs protection on an on-going basis, if the MoJ determines that a flexible system is preferable (i.e. one where the parties' circumstances and settlement offers are re-considered at the different stages of litigation, with the potential for the availability of any costs protection to be impacted by such circumstances).
35. The behaviours which should justify the subsequent loss of costs protection should include:
 - a. If the claim is found to have been fundamentally dishonest. Whether or not dishonesty would be deemed 'fundamental' would depend on whether the deceit went to the underlying merits of the case;
 - b. If the claim has been struck out on the basis that it discloses no reasonable cause of action, or whether it is otherwise an abuse of the court's process or is likely to obstruct the just disposal of the proceedings;
 - c. Where the claimant has failed to beat a defendant's Part 36 offer but the claimant's liability for the defendant's costs should not exceed the amount of damages recovered by the claimant; or

- d. Where the claim has been brought for the benefit of a person other than the claimant, or where it is being funded in whole or in part by a wealthy sponsor.
36. In any case the Assigned Judges ought to have the ultimate discretion to determine whether or not a party should lose its costs protection subsequently (on the basis that a provision of paragraph 35 applies AND it is just in all the circumstances).