newsmedia association

Civil Justice Council Costs Working Group

Consultation Paper Response

The News Media Association ("**NMA**") is the voice of UK national, regional and local news media in all their print and digital forms - a £4 billion sector read by more than 47.9 million adults every month. Our members publish around 900 news media titles - from The Times, The Guardian, The Daily Telegraph and the Daily Mirror to the Manchester Evening News, Kent Messenger and the Monmouthshire Beacon.

We welcome the Working Group's acknowledgement that *"access to justice for all plays a vital part of the rule of law in a democratic society and that affordability is fundamental to such access"*. Reducing the costs of litigation, increasing the certainty of costs exposure and speeding up the resolution of claims would improve access to justice.

Costs in media defamation cases are generally disproportionate to their outcome, and this has a chilling effect on the media's ability to fight cases. Cost budgeting in media claims has been in place for nearly a decade, but we understand that it is failing to deliver effective control over the costs of running public interest defences. There may be scope for developing a streamlined procedure with capped costs - along the lines of the Intellectual Property Enterprise Court ("**IPEC**") - within the Media and Communications List. This would deter wealthy claimants from suing individual journalists, with the tactical aim of intimidating the individual.

Strategic lawsuits against public participation ("**SLAPPs**") are being routinely employed to discourage investigative reporting into rich and powerful people because of the potential costs of defending a claim, even if it has little or no merit. Costs are weaponised, deterring the media from publishing on matters of public concern due to the very considerable financial risks involved. Journalists and publishers need protection against SLAPPs so that they can continue to hold power to account and inform the public without fear of being sued or silenced.

There appears to be a genuine consensus that serious consideration should be given to the introduction of some sort of managed 'costs-light' early resolution process where a claim is identified as a SLAPP. In regard to cases that come within the remit of the Media and Communications List CPR 53 would be the ideal place to position such a process, whereby there could be a fast-track preliminary stage filter system for all CPR 53/ Media and Communications cases that meet the definition of a SLAPP. Allowing or waiting for this to happen as part of case management is leaving things too late - by then costs have already often become prohibitive.

Once it has been determined that "*a statement complained of was, or formed part of, a statement on a matter of public interest*", then a case can go on a managed/ limited costs recovery basis for an early resolution process as to whether it should be allowed to continue.

These are part of a range of measures that the UK government could implement that would maintain access to justice, and achieve a fair balance between individual's rights to privacy and reputation and freedom of expression, whilst also preventing the UK legal system being used to intimidate and silence journalists and NGOs who seek to hold the powerful to account.

News Media Association, Second Floor, 16-18 New Bridge Street, London, EC4V 6AG
Tel: 0203 848 9620 Email: nma@newsmediauk.org www.newsmediauk.org Twitter: @newsmediaorg
The Newspaper Organisation Limited, trading as News Media Association, is a private company limited by guarantee registered in England and Wales.
Registered office: Second Floor, 16-18 New Bridge Street, London, EC4V 6AG. Registered number: 08963259

Responses to ANNEX B Questions

Part 1 – Costs Budgeting

1.1 Is costs budgeting useful?
1.2 What if any changes should be made to the existing costs budgeting regime?
1.3 Should costs budgeting be abandoned?
1.4 If costs budgeting is retained, should it be on a "default on" or "default off" basis?
1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?

Cost budgeting usefully delineates potential cost liabilities at an early stage, enabling costs to be considered in the context of commercial decisions to pursue litigation. However, there is a danger that any lengthy new statute or set of rules would provide a new battleground for further satellite litigation, thereby increasing the time and expense associated with defending such cases and favouring litigants with deep pockets.

The introduction of the designated Media and Communications List, in October 2019, brought a number of welcomed changes to the pre-action protocols and practice directions. However, our members believe that more could be done to keep costs proportionate, including:

- Better enforcement of pre-action protocols, proactive judicial oversight of practices that routinely lead to costs escalation and costs management throughout each stage of a case.
- Pre-action protocols could introduce a requirement for claimants to state the value of their claim in the letter before action. Settlement is often hampered by the defendant's inability to know precisely what a claimant is seeking.
- There should be an emphasis on making costs clearer and more tailored to the type of case. Further consideration should be given to the better use of measures currently available to the courts in respect of costs, especially those incurred before issuing proceedings (which give particular advantage in relation to SLAPPs).

Part 2 – Guideline Hourly Rates

2.1 What is or should be the purpose of GHRs?
2.2 Do or should GHRs have a broader role than their current role as a starting point in costs assessments?
2.3 What would be the wider impact of abandoning GHRs?
2.4 Should GHRs be adjusted over time and if so how?
2.5 Are there alternatives to the current GHR methodology?

The primary purpose of GHR is to provide a rough benchmark to enable parties to estimate costs. We are against abandoning this and believe that it should instead be annually updated as it provides a useful starting point to assess budgets. To lose it would risk increasing the costs of arguing about costs. It also provides non-profits a neutral and reasonable benchmark to estimate in-house legal costs to the business when drafting Precedent H.

We agree that it should continue to be banded by post qualification experience because this is how charging works and it also gives an indication of whether the budget has been drawn up reasonably (e.g. partner time charging improperly for preparing bundles). However, consideration should be given to whether hourly rates should be purely linked to the geographic area in which a firm is based, particularly given the move to remote working.

Part 3 – Costs under pre-action protocols/portals and the digital justice system

3.1 What are the implications for costs associated with civil justice of the digitisation of dispute resolution?
3.2 What is the impact on costs of pre-action protocols and portals?
3.3 Is there a need to reform the processes of assessing costs when a claim settles before issue, including both solicitor own client costs, and party and party costs?
3.4 What purpose(s) does the current distinction between contentious business and noncontentious business serve? Should it be retained?

We welcome the advancements triggered by the pandemic in the courts digitalisation programme. The main drawback, however, is that the digital justice system currently operates on a "*one size fits all*" basis and when a case does not fit the box it can lead to the need to expand further time, resources and ultimately costs.

We suggest exploring whether pre-action protocols should contain mandatory requirements with cost consequences that follow. If the sanctions were greater it could lead to stricter compliance which in turn should narrow issues and lead to less satellite litigation.

Part 4 – Consequences of the extension of Fixed Recoverable Costs

4.1 To the extent you have not already commented on this point, what impact do the changes to fixed recoverable costs have on the issues raised in parts 1 to 3 above?
4.2 Are there any other costs issues arising from the extension of fixed recoverable costs, including any other areas in which some form of fixed costs or cost capping scheme may be worthy of consideration? If so, please give details.
4.3 Should an extended form of costs capping arrangement be introduced for particular specialist areas (such as patent cases or the Shorter Trials Scheme more generally)? If so, please give details.

We agree with our members that that there should be early case management coupled with a fixed-costs regime, if not for all stages, then for some of the early/preliminary stages of a claim. Fixed costs have potential advantages over cost capping (and cost management) as a measure, as they are less likely to give rise to satellite litigation over costs. For example, one simple change in media cases could be to decide meaning applications on the papers only and to cap costs. A judge should be able to decide the ordinary meaning of a publication without a hearing and this will reasonably help keep this aspect of costs down for both parties and prevents the procedure being used tactically.

Concerns expressed in the Call for Evidence around the weakening of certain aspects of the legal protection accorded to freedom of expression could be addressed relatively quickly by small amendments to existing rules and legislation, including: reform of the Pre-Action Protocol for Media Claims and regulatory conduct rules (via the SRA and BSB) around how claimant lawyers respond to journalist's enquiries to their clients; actions that can be taken at the commencement of claims; and examining at costs and the chilling impact these have on freedom of expression. We would be happy to arrange a roundtable with our members publishers to discuss potential reforms further.

14 October 2022

Sayra Tekin and Catherine Courtney
Legal, Policy and Regulatory Affairs
News Media Association