CIVIL JUSTICE COUNCIL (CJC) RESPONSE -

COSTS PROTECTION IN DEFAMATION & PRIVACY CLAIMS

Opening remarks

As the consultation paper acknowledges, a CJC working group produced a comprehensive report on this topic ahead of the production of this consultation paper. We welcome its publication, and the inclusion of draft rules, as the special features of this field of litigation mean that great care is required in constructing a costs system that allows access to justice without exposing claimants or defendants to huge costs risks.

Moreover, this is a specialist area of law and one raising fundamental issues of principle in terms of freedom of expression and rights to privacy. Parliament has stressed the public interest in tackling costs and access to justice issues in this field. Costs protection is a key means of addressing this.

Since the Working Group met, the Defamation Act 2013 has received Royal Assent, but much of defamation and privacy law remains undefined and unregulated by statute. In addition, the post-Leveson arbitration system has still to be agreed. That arbitration system will play a key role in determining how many defamation cases actually proceed to litigation in future. However, a costs protection system being in place for those that do would be a welcome development.

Responses to individual questions

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

Yes. It makes sense for the types of proceedings to be subject to the new costs protection regime to replicate those defined in the Conditional Fee Agreement Order 2013.

While the definition is quite broad, it needs to be. New social media has changed the conventional definition of 'news publisher'. It is assumed that it will still be for the courts to determine in individual cases whether obscure blog sites constitute publication and breach of confidence, and thus qualify for costs protection.

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

Yes, broadly. While it will undoubtedly fall to the courts to provide more precise definitions of what modest, mid or substantial means translate to in practical financial terms, some degree of guidance at the outset should be provided.

The CJC working group concluded that a means test was warranted, though in common with the proposals here, it was anxious that an elaborate and costly process was avoided – a statement of assets accompanied by a statement of truth would seem adequate, and the latter would provide some form of come-back for any 'creativity' on the former.

The process does have the potential for prolonging proceedings and adding to their cost, and offers scope for satellite wrangling on extent of means and which banding a party should be placed in. Nonetheless, for costs protection – with all of its benefits in this area of litigation – to be offered, it has to be underpinned by some form of means test
.

Question 3: Do you agree with the approach of allowing full costs protection for those of modest means, partial (capped) protection for those in the 'mid' group, and no costs protection for those with substantial means? If not, what alternative regime should be adopted?

In principle, yes, subject to the qualifiers on costs protection being lost in certain circumstances (see11 below). We have mentioned (see answer to 2 above) the intrinsic difficulties that definition of the groupings in the process will bring, but some form of means based approach to degrees of cost protections seems the best course. This will place a lot of onus on the courts – for example it will fall to the courts to determine the 'reasonable amount' parties of some means need to pay when they only get partial costs protection.

There is some disquiet on the position of large media groups being placed in the 'no costs protection' group as such organisations can be facing a large number of actions that cumulatively give rise to high costs. It feels a rather stark statement to say that such a company's posted losses will be disregarded in not affording them costs protection.

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

Yes, as mentioned in the answer to 1 above, further guidelines should be developed, even if broad rather than specific. Regard should be had of means banding in related fields e.g. legal aid eligibility, any comparable case law decisions in other fields of law. It is anticipated that case law will in any event develop to provide definitions for each of the groupings. This is an area that will need to be kept under review if the types of access to justice issues that prompted these reforms are not to resurface.

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

In principle yes – see the detailed points made in section 7.10 of the CJC Working Group response on the means test, in particular 7.10.13. Such a test enables the availability of insurance to be taken into account alongside income and assets.

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

In theory yes, although the lack of definition both in terms of who qualifies as a 'mid' group and what represents a 'reasonable amount' will place a burden on the courts, and inevitably require litigation to resolve.

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

The sorts of factors will include:

- The economic circumstances of the individual – income, assets, ease of access to assets, insurance.
- The economic circumstances of the organisation – profitability, financial trends and outlook, debts and liabilities, links to other organisations with access to other funds.
- The circumstances of the case – complexity, length of proceedings, need for experts.
- Behaviour of the parties e.g. making a succession of applications not relevant to the case or use of very senior counsel may lead to the court feeling the contribution should be higher as the party's actions have been a driver of overall costs.
- Making an assessment of what a fair proportion of the overall costs of the case would be – for example if the opponent has been profligate is it reasonable for the losing party to pay all of the excessive costs?

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

This is a question for specialist practitioners and organisations involved in defamation and privacy law to answer. Costs vary greatly in this field of litigation, and as the report of the Joint Committee on the Draft Defamation Bill observed, "The full costs of libel actions are not always disclosed, which makes it difficult to obtain reliable statistics".[1]

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

We have no such evidence, this would need to be assembled on a case-by-case basis via the statement of means and statement of truth.

[1] http://www.publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20307.htm#a39

Question 10: What impact do you think the proposals will have on businesses? We would be particularly interested to understand the impact the proposals may have on Small and Medium sized Enterprises and Micro businesses, as both claimants and defendants.

This will vary from case to case – defamation cases often generate high costs, and this the potential impact on businesses, especially small media organisations or publishers as a category – is significant. However as the basis of the reforms is to provide forms of cost protection so as not to inhibit access to justice, the proposals may have an overall beneficial impact.

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

Confidentiality – we agree that is critical that a party's statement of assets remain confidential in view of the commercial sensitivity and privacy issues that may arise.

Variation of costs protection – we agree with the approach outlined in the proposals, as there may be a material change in means during the proceedings.

Loss of costs protection – in general we agree that there need to be measures that deter parties from unreasonable behaviour, and the threat of losing costs protection is a significant one. The CJC Working Group considered this issue in detail in Section 7.12 of its report, with fraudulent claims or abuse of process being examples of features that would lead to loss of costs protection. The Working Group also supported the application of judicial discretion in this area, which the draft rule 44.27 provides for.

Enforcement of costs protection – we agree that orders for costs against a party should only be enforced at the end of the proceedings once the costs have been agreed.

Costs of applications – it is clearly desirable, as the paper says, for applications for costs protection to be dealt with on the papers as far as possible. We agree with the proposals made in paragraph 39 of the consultation paper which are intended to be disincentives to satellite litigation.

Measures to control costs – we agree broadly that the court has other powers to control costs which should be exercised. We note in passing that costs budgeting can have the effect of adding to costs (by frontloading them) in the early stages of litigation.

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

As stated above, the hope would be that the costs of such applications would be minimised – for example those of limited means would automatically qualify, and guidance could set out a threshold based on income/capital/assets etc. the paper's suggestion that the court exercises discretion and parties are normally expected to bear their own costs seems the best approach. Given the flexible nature of this, practice

guidance may be more appropriate than a formal rule.

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

The Pre-Action Protocol (PAP) will need to be reviewed in the light of the introduction of the new costs regime and rules. For example both letter of claim and any defence would want to give notice of an intention to seek costs protection, which may of itself encourage settlement or ADR.

This should be for the Civil Procedure Rule Committee's Sub-Committee on PAPs to determine, perhaps co-opting defamation specialists for the task.

Question 14: Do you have any comments on how the drafting of the rules might be improved?

This is not an area the CJC feels qualified to comment on.

Question 15: From your experience, are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this consultation paper?

Grounds for defamation claims may sometimes be considered to be linked to membership of protected characteristic groups as defined in the Equality Act 2010, such as gender, race, religion, age etc. It therefore logically follows that measures to provide increased costs protection could – in a broad sense – have a potentially positive effect.