RESPONSE TO MINISTRY OF JUSTICE CONSULTATION ON COSTS PROTECTION IN DEFAMATION AND PRIVACY CLAIMS: THE GOVERNMENT'S PROPOSALS

We are grateful for the opportunity to respond to the consultation of the Ministry of Justice on "Costs Protection in Defamation and Privacy Claims: The Government's Proposals" (the "**Consultation**"). Clifford Chance is an international law firm with experience of these types of proceedings in a number of jurisdictions, in addition to broader commercial litigation experience. Our comments below are based on this experience. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.

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

We do not agree with the scope of the protection, because we do not consider that 'defamation cases' (to adopt the wording of the Consultation) are any more deserving of costs protection than many other types of cases.

The Executive Summary to the Consultation notes that costs protection has been adopted for personal injury claims, and that "The Government has also accepted Lord Justice Leveson's recommendation that this costs protection…be extended to defamation and privacy cases." However, the Leveson Inquiry was not set up for the purpose of examining costs in these types of cases. The recommendations on the issue of costs were incidental to the main purpose of the report, which was an inquiry into the culture, practice and ethics of the press. A judge examining some other issue may well have made similar recommendations about cases involving that issue, and there is no reason evident to us why costs in defamation cases should be treated any differently from costs in other types of litigation.

The 'people of modest means' referred to in the foreword to the Consultation may also wish to bring other types of proceedings. They might be threatened with the loss of their homes, for example, or with bankruptcy due to non-payment of debts owed to them. Defamation cases are not, in our view, more important than those types of cases, and should not receive special costs treatment.

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

We do not agree with this process, at least as it is currently described in the draft rules annexed to the Consultation paper. It does not appear that the respondent to an application for costs protection will automatically see the evidence that the applicant has filed with the court.

Draft rule 44.20(3)(a) states that "any party may apply for a costs protection order".

Draft rule 44.26(1)(a) requires a party making an application under rule 44.20(3)(b) to file a statement of assets with the application notice.

Draft rule 44.26(3) states that "The court will not disclose a statement of assets to any other party without a hearing or the consent of the party making it".

Draft rule 44.26(4) states that the statement of assets will be referred to a judge who will give directions "as to whether the statement of assets and any …further evidence are to be shown to any other party…"

These rules read together suggest that a party filing an application notice for a costs protection order will be under no obligation to serve its statement of assets on the other party or parties to the case unless an order is made by a judge that it must do so. However, the consultation paper states at paragraph 27 that "Individual claimants who are not of substantial means would be entitled to costs protection unless the court was satisfied that they would not suffer severe financial hardship." We do not see how the court is to be satisfied of this unless the statement of assets is served on the other party or parties to the case so that they have an opportunity to make representations. Those parties will not even be able to judge whether to raise the issue with the court if they have not seen the evidence that the applicant has put before it.

We suggest that the rules make it clear that the applicant must serve its statement of assets on the respondent party or parties.

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?

Subject to our comments in response to Question 1 above, we agree that there should be some differentiation between different classes of claimant, but foresee satellite litigation about how the groups are to be defined.

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?

We consider that clarification of this point is essential, although we would not support thresholds of specific amounts. There should be clarification of the term "severe financial hardship", and the information a party is expected to provide in order to prove that potential hardship. Draft rule 44.26 says only that the information should include, but not be limited to, details of income and capital wherever they may be and any insurance that may be relevant to the question of costs. At the very least, the court should require an applicant to provide to it the types of information that are required to be provided by an applicant for legal aid. Outgoings should be taken into account, as well as assets and income.

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?

Subject to our comments in response to Question 1 above, we agree with this test.

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

The difficulty we perceive with this test is that the court will set an amount at the beginning of the case which will then only be able to be changed by means of a further application. Both parties could potentially be put to the expense of a further application, evidence and a

hearing depending on how the other party conducts the litigation after a costs protection order is made. This would be unfortunate given the generally accepted aim of reducing the cost of civil proceedings.

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 Consultation states, at para 31, that "Those of some means would be expected to pay something, as they would be able to do so without seriously affecting their overall financial position." However, the term 'some means' is not defined. Nor is it clear how 'overall financial position' is to be determined.

Draft rule 44.26 requires assets and income to be included in the statement of assets, but says nothing about outgoings. However, a claimant living in even a modest property in London, for example, which has no mortgage, is likely to be viewed as having significant means compared to many others in England, but may have considerable expenses. It might nevertheless be argued that such people have an asset against which they can borrow to pay costs, or from which they can release equity and that, depending on their age, they will be able to pay back that money so that their 'overall financial position' is not damaged in the long run. However, we suggest that a claimant's overall financial position at the time of the case should be considered, rather than any longer-term view, and that the claimant's ability to pay costs in cash as required during the case should be taken into account by the court.

The fact that a costs protection application may be made at any time during the proceedings means that the court could be asked to consider this issue before it has certain important information about the case, including the extent or bases of the defendant's likely defence, the likely extent of disclosure, the possible number of witnesses and experts, the estimated length of the trial and so on. This could mean that a claimant in the 'mid' group is ordered, early in the proceedings, to pay a sum which is not a 'reasonable amount' by the end of the proceedings, but potentially too large or too small. As we have noted above, changes will only be possible by means of a further application to the court in the absence of agreement from the other party or parties, which we would view as unlikely.

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

We have no comment on this question.

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

We have no comment on this question.

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.

We foresee that businesses will face an increase in the number of claims against them if claimants are able to obtain costs protection orders. The default position under draft rule

44.22 is that the court will made a costs protection order for an individual who is a claimant, unless it is satisfied that the party will not suffer severe financial hardship. The burden of proof is therefore shifted to the respondent to show that the claimant would not suffer this harm, despite the fact that the rules as they are currently drafted do not appear to require the claimant applicant's evidence to be served on the respondent. Once the "loser pays" rule for costs no longer applies, claimants are likely to be encouraged to start proceedings which do not necessarily have any merit, in the hope of some sort of settlement offer just to bring the matter to an end.

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

We do not agree with the proposal that the applicant party's statement of assets will be "confidential to that party, the court and the judge, unless the judge agrees otherwise". Applicants for any sort of application which is not made without notice should, as a matter of course, serve the evidence in support of that application on the other party or parties so that they may assess it and respond to it. If a judge has to consider the matter first, and then require disclosure of the evidence so that the respondent may file and serve evidence of its own, that appears to us to be adding an unnecessary step to the application process, with consequent costs.

We agree with the potential to vary or remove costs protection although, as we have noted above, this will require another application notice (and possibly more than one, depending on how the case progresses) and possibly the expense of another hearing (or hearings).

We agree with the loss of costs protection in the circumstances proposed.

We do not agree with the proposal that costs orders made against a party with costs protection may only be enforced at the end of the proceedings. That party should be in the same position as others in respect of costs. If a party has liability capped at a certain sum, it should pay costs until that sum is reached. If the court has ordered that it only pay a percentage of costs, it should pay that percentage of any costs order.

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?

We consider that this should be left to the discretion of the judge. We do not support the suggestion in the Consultation of a presumption that costs should be paid on an indemnity basis by a party which unsuccessfully opposes another party's application for costs protection.

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

We not consider that the Pre-Action Protocol for Defamation requires amendment in light of these suggested changes to the costs regime.

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

As we have stated above in response to Question 2, the draft rules are currently unclear on the subject of whether the respondent to any application for protection will be served with, or

have any right to ask for, the applicant's statement of assets. If it is intended that the respondent will be served with the statement of assets, the rules should make this clear. If it is currently not intended that the respondent will be served with the statement of assets, the rules should be changed to include this requirement.

We have noted above that there are no criteria currently listed which the court should consider in determining what would be a reasonable sum for the party to pay. These would appear to us to be crucial in an assessment of the rules.

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?

We have no comment on this question.

Clifford Chance LLP

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