MOJ CONSULTATION ON COSTS PROTECTION IN DEFAMATION AND PRIVACY CLAIMS

RESPONSE OF ADDLESHAW GODDARD LLP

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

In general, and subject to what we say below, we agree with the scope of the protection set out at paragraphs 21 and 22 of the proposals.

Incidentally, we assume that the qualifying words "where the defendant is a news publisher" is intended to apply to all five causes of action (and not just to harassment cases). If not, we consider that it should (perhaps also to include ISPs). The equality of arms issue tends to arise only in claims against media organisations and ISPs. In practice, it is much less likely to impede access to justice in other circumstances, e.g. in a 'trade libel' dispute (i.e. a dispute between competing businesses) or a dispute between two private individuals (which is increasingly common in the online environment).

Assuming that the regime is intended to apply, at least primarily, to claims against the media, for the reasons particularised below, we have serious reservations as to whether the proposals will in practice remedy the uneven financial playing field which will result from the proposed abolition of recoverability of CFA success fees and ATE premiums in publication and privacy cases. The unintended consequence of the proposals may well be a return to the pre-1999 days of media litigation, with the financial dice heavily loaded in favour of the media.

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

Whatever process is decided upon, policymakers would do well to bear in mind that media defendants will obviously have a strong financial interest in challenging any application for costs protection by a claimant.

It would therefore be unrealistic to assume that it is going to be possible for a claimant to reach agreement with a media defendant on the question of costs protection. In all probability, a claimant seeking costs protection will need to make an application, and that application is likely to be contested.

Further, the relevant regulations will need to spell out in some detail the required content of a statement of assets and also consider whether and, if so, to what extent, the assets of related parties are to be taken into account and/or exempted (e.g. a matrimonial home).

To help reduce the cost of this process, we would suggest the introduction of a standard form statement of assets, with a number of published examples demonstrating the kind of information which would be considered "sufficiently detailed". This could help to reduce costs and improve efficiency.

We would also suggest an express presumption in the rules that the application will be decided on the papers in the first instance.

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?

The proposed test of 'severe financial hardship', as opposed to 'financial hardship', is likely to exclude from the scope of 'full costs protection' most potential claimants in a publication case. While ordinary members of the public do from time to time become caught up in a media story, for example as a

result of a crime, accident or natural disaster, it is our experience as a firm which acts primarily for claimants against the media that the vast majority of potential claimants will be individuals or businesses with a measure of public profile and/or business reputation which has been damaged, or is likely to be damaged, by publication of an article or the broadcast of a radio or television programme.

In practice, therefore, a test of 'severe financial hardship' is likely to exclude all such claimants from full costs protection. While 'full costs protection' may make an attractive political soundbite, it is unlikely to be of much, if any, relevance in practice.

Most potential claimants would fall into the category of those entitled to 'partial costs protection'. The efficacy of the proposed regime will depend entirely on judicial discretion and it is therefore virtually impossible to predict its outcome in practice. Everything will depend on what a particular judge or master considers to be a "reasonable amount" in the circumstances of the case and having regard to the claimant's statement of assets and the defendant's costs budget.

Given that most judges have been career barristers and have little or no experience of the management and cost of litigation, any potential claimant will be faced with very considerable uncertainty as to the cap which the judge is likely to put on liability to pay an adverse costs order. Nonetheless, in order to get to that stage, such a claimant will need first to have issued proceedings and therefore to have put himself at risk on costs.

In other words, a claimant will be faced with having to decide whether or not to issue proceedings against a media defendant without knowing at that stage the extent of his potential liability for adverse costs. This plainly puts such claimants at a severe disadvantage and most prudent individuals or businesses of average means would simply be unwilling to take the risk of exposing themselves to an unknown financial downside in that way.

Given that it is envisaged that under the proposed regime, such a claimant will be unable to protect himself with an ATE policy and/or a no win no fee arrangement with his solicitors, this is likely to prove a powerful disincentive to challenging the media and is likely to have a severely chilling effect on the right of individuals and businesses to protect their reputations.

For these reasons, in practice such a regime is likely to have the consequence, albeit unintended, of a return to the pre-1999 days where the libel courts will once again be the preserve of wealthy individuals and large corporations. No other potential claimant is going to be in a position to risk exposure to an adverse costs order without knowing the level of the cap on that liability.

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. Attempting to assess the means of an individual or an organisation is likely in practice to be complicated and time consuming. It may well also encourage satellite litigation because media defendants will have a financial interest in seeking to contest any application for costs protection.

Accordingly, a clearer and simpler way of assessing entitlement to costs protection, e.g. by reference to income after tax, while not perfect, would be considerably simpler to administer.

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?

We do not agree that the test of 'severe financial hardship' is the right test to exclude the very wealthy. A test of 'financial hardship' would serve the same purpose. Given the level of costs in publication

cases, exposure to adverse costs will almost invariably cause financial hardship to all but the very wealthiest of private individuals.

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

See our comments under Q3 and Q5 above.

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?

We would suggest that the following factors are taken into account in determining what is a 'reasonable amount':

(a) the annual (net) income of the claimant;

(b) the means of the defendant;

(c) the circumstances in which any adverse costs orders were made and whether any such costs were ordered on the indemnity or standard basis;

(d) the conduct of the defendant in publishing the words or information complained of and its conduct of the proceedings (e.g. the extent to which any costs were incurred as a result of the manner in which it chose to conduct its defence of the claim).

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.

The level of costs varies hugely, not least depending on how far the case goes.

For example, in a case where a letter before claim is sent to a media defendant which relatively quickly agrees to correct the libel and compensate the claimant, the claimant's costs may be between £5,000 and £10,000.

On the other hand, a case which is defended all the way up to and including at trial, where the defendant runs a defence of justification, the claimant's costs could easily be between £500,000 and £1.5 million. Of course, only a tiny fraction of cases ever reach trial.

In virtually every case that is not settled at the very outset, the quantum of the damages will be dwarfed by each side's costs. This is a peculiarity of publication cases.

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

The financial means of media defendants are generally readily ascertainable from filings at Companies House and other equivalent documentation.

The financial means of claimants can vary, but it is in our experience unusual for a person of modest means to have cause to engage in litigation with a media organisation. As pointed out at Q3 above, the subject matter of media stories, whether an individual or a business, tend to be people or businesses of some substance. However, that is not to say that either the individuals or the businesses are necessarily wealthy enough to pay a costs order without such a liability causing some financial hardship. In practice, if CFAs and ATE insurance are no longer available to a private

individual who wished to make a claim against the media, only the extremely wealthy will be in a position to protect their rights in that way.

There is no doubt that the availability of CFAs and ATE insurance has been effective in levelling the financial playing field between claimants and media defendants and thereby affording access to justice for victims of unlawful conduct on the part of the media.

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.

For similar reasons, the proposals will act as a disincentive on SMEs and micro businesses to protect their reputations and otherwise enforce their legal rights.

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

We have no comment, other than those provided above.

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 would suggest that the costs of an application for costs protection should be costs in the case.

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

It would be beneficial for the pre-action letter of claim and/or the letter of response expressly to state whether or not that party intends to apply for costs protection. This would help clarify, at this early stage, the potential costs risk for the other party in continuing the action and hopefully encourage earlier settlement of cases. Paragraphs 3.2 and 3.5 of the Pre-Action Protocol could be amended accordingly.

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

None, beyond those comments already made above.

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?

For the reasons explained above, these proposals, together with the abolition of the recoverability of CFA success fees and ATE premiums, will have the effect of pricing all but the super-wealthy out of the libel courts. They will have a seriously chilling effect on the ability of individuals and businesses to protect themselves against unlawful conduct on the part of the media.