Libel Reform Campaign response to the Ministry of Justice's consultation on costs protection in defamation claims

The Libel Reform Campaign welcomes the Government's consultation on costs protection in defamation claims, and believes that the Government's proposals represent a big step towards ensuring access to justice in libel cases. We support a number of the proposals made by the government including the introduction of costs protection and the non-recoverability of after the event (ATE) insurance, but believe the proposals must be accompanied by a proper strike out procedure for vexatious and or trivial claims mandated in the civil procedure rules. We also have concerns over some of the detail of the costs protection proposals. For instance, we do not believe that claimants and defendants should be treated differently when it comes to the automatic granting of costs protection. There is also concern over the ability of defendants to be able to get access to legal advice after the abolition of the recoverability of conditional fee agreement success fees, and in order to ensure access to justice is preserved we make a number of recommendations.

The high cost of defamation claims

The Libel Reform Campaign has long argued that the legal costs in defamation proceedings are too high, a point recognised by the European Court of Human Rights in *MGN v UK*[1] and by the United Nation's Human Rights Council[2]. In 2008, research by Oxford University found the costs of defamation actions in England and Wales can be in excess of 100 times the European average[3], and in a survey by the Publishers Association its members said that defending a libel case that reached the courts cost an average of £1.33m[4].

This not only poses a problem for litigants caught up in defamation claims but publishers, or prospective publishers, who often choose to remove material from the public domain, or not publish in the first place, rather than face the threat of extraordinarily high legal costs and the financial ruin this could bring. The current costs system therefore chills freedom of expression and prevents valuable material, of public interest, from being published.

Costs in defamation proceedings are high for a number of reasons. The recoverable base

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[1] Case No. 39401/04, European Court of Human Rights
[2] Report of the United Nations Human Rights Committee, 21 July 2008 http://www.statewatch.org/news/2008/jul/uk-un-hr.pdf
[3] "A Comparative Study of Costs in Defamation Proceedings Across Europe" Programme in Comparative Media Law and Policy Centre for Socio-Legal Studies, University of Oxford, December 2008 http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf
[4] Appendix 1, The Publishers Association response to MoJ's consultation on Draft Defamation Bill http://www.publishers.org.uk/images/stories/Policy/pa%20response%20to%20draft%20defamation%20bill%20-%20final%20-%209%20june%202011.pdf

cost of hiring a lawyer can be over £400[5] per hour (and rates being paid privately are believed to be upwards of 800 per hour). Hardeep Singh, a journalist who was unsuccessfully sued for defamation, told the campaign "I have friends who work as airport baggage handlers, when I explained to them I spent the same amount on a barrister for a day as they earn in a year, they realised why free speech is imperilled by our libel laws."

Whilst proceedings are often too long and too drawn out, even to get a case struck out can costs millions, as the recent case of out of Karpov v Browder [2013] EWHC 3071 shows[6]. But on top of this, the model of funding via conditional fee agreements (CFAs) with recoverable success fees of up to 100%, and after the event (ATE) insurance to protect against potential losses – unduly pushes up costs. Success fees can double a lawyer's hourly rates and ATE insurance premiums routinely cost tens of thousands of pounds[7].

Furthermore, the costs incurred are completely disproportionate to damages, with the former dwarfing the latter. In the 2007 case of Martyn Jones MP vs. Associated Newspapers Limited, the MP won £5,000 in damages, yet his costs were £387,000[8]. In other words, Associated Newspapers was found to have caused £5,000 damage to the Mr. Jones' reputation but had a final bill of in excess of £392,000 with its own legal costs above and beyond this.

High costs do not serve claimants either: they cannot aid those whose reputation is impugned. For claimants who decide to pursue a case, as well as for those defendants who choose to defend their words, bankruptcy is a real threat. This means that claimants may not be able to protect their reputations, free speech is compromised and justice is not served. ATE insurance provided protection against such a risk but at disproportionate cost.

Access to justice

The introduction of a costs protection mechanism in defamation claims is an important step towards reducing costs overall, whilst helping to ensure that people have access to the courts regardless of their means.

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[5] The guideline hourly rate, which the judiciary used in assessing allowable costs, for an experienced solicitor in London is £409 http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guideline-hourly-rates-2010-v2.pdf

[6] http://www.theguardian.com/media/2013/oct/14/sergei-magnitsky-libel-claim-struck-out The Guardian reports that each side's costs are an estimated £2million.

[7] The claimant in Thornton v Telegraph Media Group Limited [2011] EWHC 1884 (QB) has said, for example, that the ATE insurance premium well exceeded her damages of £65,000 http://www.theguardian.com/commentisfree/libertycentral/2011/jul/29/sarah-thornton-review-journalists-telegraph

[8] Ibid 3, p.12

We thank the Government for listening to our call that the nature of the parties in defamation proceedings is different to that in personal injury claims, and for making suitable adjustments to the Qualified One Way Costs Shifting (QOCS) regime as a consequence. In defamation claims, the defendant or the claimant may have no means, or be a party of significant wealth. The adjusted QOCS proposals will offer costs protection to impecunious claimants facing well resourced publishers, but it will also offer protection to defendants with no means facing millionaire claimants, and this is to be welcomed.

Costs protection replaces ATE insurance by ensuring that parties who cannot afford to pay the other side's costs do not have to do so in the event that they lose; and it does so in a much more affordable way than ATE insurance does – ATE insurance can cost 65p for every pound of cover[9]. The introduction of costs protection will therefore enhance access to justice, but a question remains as to whether this goes far enough.

The Libel Reform Campaign is concerned that the concurrent removal of the right to recover success fees will limit the ability of those with few resources to find a lawyer willing to take their case. It is possible that defendants may suffer in particular, because they will have no damages out of which to pay a success fee if they win their case. It is worth noting that even for claimants in defamation proceedings, damages are often just a fraction of the legal costs and so recovering the success fee from the available damages is unlikely to alter the revised market significantly.

The market may well adjust so that conditional fee agreements are offered without a recoverable success fee, but it may not. The campaign has heard conflicting reports from law firms which represent defendants as to whether such agreements will be possible, with one firm adamant that it will not be able to continue to offer CFAs without success fees and another firm certain that it will be able to adjust its financial model to allow for this. Clearly, law firms have an incentive to argue for the retention of the recoverable success fee, but we think it is important to ensure that advice will continue to be available.

As concerns remain, we ask that the government publishes the evidence it has that legal advice will continue to be available to impecunious defendants and claimants after success fees cease to be recoverable. If the evidence exists and the recoverability of success fees is abolished entirely, this should be done on a pilot basis first. It is necessary that the government makes an assessment as to whether the market has adapted and that defendants with limited means, but with cases judged to have a reasonable chance of success, are still able to get legal advice.

Irrespective of the above point, those parties who would otherwise be able to find a lawyer to act on a no win, no fee basis, but whose opponents have the benefit of costs protection

[9] p.350, Volume 1, Review of Civil Litigation Costs: Preliminary Report, Lord Justice Jackson, May 2009

will be unable to rely on such funding arrangements as their lawyers would not be able to claim their costs in the event they succeed. Therefore, it is important that judges take into account the means of both parties in this context and are able, if it is necessary, to provide costs protection to both parties.

A party who cannot afford to pay a lawyer privately, or who cannot find a lawyer to act on a pro bono basis, may choose (if they are a claimant) or be obliged (if they are a defendant with no control over issuing proceedings) to act as a litigant in person. We therefore believe it is important that the courts are prepared for a wave of litigants in person and that the impact of this on the quality of justice is considered.

The risk of more unfounded cases

Finally by way of introduction, we would like the Ministry of Justice and the Civil Procedure Rules Committee to give careful consideration to whether applications for costs protection ought to be accompanied by a brief statement of case to ensure that parties have a cause of action. It would be undesirable for parties to be given costs protection in a case where there a party has no cause of action, as this would allow those with malicious intent to cause opposing parties to run up legal bills with no hope of recovering their costs. This is particularly important as Section 1 of the Defamation Act 2013 requires the claimant to have suffered serious harm for a statement to be capable of being defamatory; the introduction of this new bar to bringing a claim may lead to more claimants trying to bring a claim when they have no cause of action.

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

The Libel Reform Campaign believes that costs protection ought to be available to all parties involved in all defamation claims, subject to a means test.

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

We agree that parties who want the benefit of costs protection should be able to agree this with the other side or apply to the court for an order.

The consultation document accurately states that protecting one party from costs means that the opposing party will consequently lose their right to recover costs in the event they win their case. As we said in our introduction, it will be impossible for a party of modest means to retain a lawyer on a no win, no fee agreement (even if the lawyer was did not to charge a success fee) if the opposing party has the benefit of costs protection. We therefore suggest that the other parties' finances may be relevant for the purposes of determining whether an order for costs protection

(whether full or partial) should be made, and the process therefore ought to allow for two or more applications to be considered by a judge at the same time as each other.

We do not however agree that claimants who are not of substantial means should automatically entitled to costs protection unless the court was satisfied they would not suffer severe financial hardship, whereas defendants will also have to prove that it is in the interest of justice for costs protection to be granted.

It seems that the proposals, as drafted, are based on an assumption that it will always be in the interests of justice to get costs protection if they would suffer financial hardship without it, but that it will not always be in the interests of justice for defendants to get the same level of costs protection even if they would suffer the same level of financial hardship.

There is no good reason for claimants to be treated more favourably than defendants at the outset of a case. For justice to be served in an adversarial court system, both parties must have an equal chance of making their case from the outset.

The consultation document does not set out the grounds on which it would not be in the interests of justice for costs protection to be granted to defendants who would otherwise qualify. The only grounds which we can think of would be if the defendant had no possible defence. Whereas this approach may be justified, it is equally important that claimants with no cause of action are not granted costs protection and that the CPR are amended to ensure strike out of cases without merit at an early stage, before significant costs are incurred. Many defendants are of limited means such as Dr Peter Wilmshurst, Nigel Short (the "Owlstalk" case), blogger Alex Hilton and John Gray and writer Hardeep Singh. If they are subject to significant costs before a strike out application can be made, this will have a severe impact on freedom of expression.

Finally on the issue of process, careful consideration ought to be given to the ability of the court to order that statements of means be filed and for the ability of the court to make costs protection orders of its own motion, so that unrepresented parties can benefit from costs protection if they are unaware they are entitled to apply for this.

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?

Yes, we support this approach. It is logical to protect those who cannot afford to lose anything absolutely, to provide partial protection to those who can afford

something, and not to provide any protection to those who do not need it.

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 recognise it is difficult to prescribe what level of means a party must have to qualify for full, partial or no costs protection as each individual's situation will be different. The only way of ensuring that costs protection is granted appropriately is to give the courts discretion in making such orders.

The test of' severe financial hardship' appears to be appropriate. While it is clearly a higher test than that of 'financial hardship' used in legal aid proceedings, it will never the less be easier to satisfy in defamation proceedings than many other types of proceedings because of the exceptionally high nature of the legal costs involved.

Relying on a test that the courts are used to applying (even from 'old' case law relating to regulations which applied prior to 2001) seems a sensible approach, and adding specific factors to an established general test is only likely to confuse matters and push up the legal costs of applications for costs protection.

We do however believe it is important for the courts to consider not only the means of the party applying for costs protection, but means of the other party as well.

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?

The test of' severe financial hardship' appears to be appropriate. While it is clearly a higher test than that of 'financial hardship' used in legal aid proceedings, it will never the less be easier to satisfy in defamation proceedings than many other types of proceedings because of the exceptionally high nature of the legal costs involved.

We do not agree, however, that any particular category of defendant ought to be excluded from the financial means test.

The consultation says that a national newspaper which reports a loss should not qualify for costs protection, because "the fact that it continues to run and pay for a substantial organisation should mean that it can afford to pay a claimant's costs without facing severe financial hardship."[10] Whilst we would agree this is probably true in most cases, and we are conscious of the fact that the court must guard against the use of accounting

[10] Consultation document, paragraph 3

mechanisms and company structures to let organisations appear to be losing money when they are in fact making a profit, we believe that government should be wary of making assumptions.

Letting the court decide each application on its own merits, particularly if it is to take in to account the interests of justice in deciding whether to make an order, would seem to be a much fairer approach than the government assuming that one group of publishers should be excluded from these provisions come what may.

If national newspapers apply to get protection inappropriately they will be refused by the courts. They will not apply repeatedly if they get knocked back repeatedly.

In addition, there may be some cases where it is appropriate for national newspapers to get some protection from paying the other side's costs. If a national newspaper is sued by a billionaire, for example, and the costs budgets indicate that costs will run in to the many millions, it may well be appropriate for the courts to set a limit on what the defendant will have to pay to the claimant in the event that the defendant looses the case. This reflects the spirit of the judgement in MGN v United Kingdom at the European Court of Human Rights.

There may also be cases where both parties are extremely wealthy, and it is in the interests of justice for the case to be heard, where the court considers that both parties should be given costs protection orders. This may result in parties exercising greater control over their own costs, because they know they will have to pay these in any event.
In making these proposals for costs protection for both claimants and defendants the government has taken a significant step in recognising that the nature of the parties in defamation claims is varied. The proposal to prevent national newspapers from benefitting from costs protection come what may is a disappointing hark back to the views that defendants are always better off than claimants. The consultation document makes no such assumptions that individuals of certain wealth or status will correspondingly be barred from costs protection.

It may not be appropriate in most cases for national newspapers to benefit from costs protection, but the government's consultation seems to exclude this possibility altogether. In our view, this is the wrong approach, and the courts should be left to decide each case on its own merits.

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?

If 'severe financial hardship' is to be the test, then all factors which affect the applicant's

financial position should be taken in to account in deciding whether they should have a potential costs liability at all, as well as what a 'reasonable amount' for a party to pay should be.

In addition, as one party's protection from costs may affect the other party's (or parties') ability to pay for their own legal advice, the financial position of all parties in the case should be a relevant factor.

It must be noted as per the evidence in Lord Justice Jackson's review that costs in defamation proceedings are significantly greater than in other comparable areas of civil litigation. A 'reasonable' amount may be significantly less than current case costs in this area of law.

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.

The most comprehensive data we are aware of remains that submitted by the Media Lawyers Association and submitted to Lord Justice Jackson's review on costs. It is published here: http://www.judiciary.gov.uk/JCO%2fDocuments%2fGuidance%2fapp17.pdf

Of the 154 libel proceedings in 2008 identified in this research (of 259 taken to the High Court), the most expensive libel action cost £3,243,980 and the average cost for the 20 most expensive trials was £753,676.95.

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

The Inforrm blog keeps a useful record of cases that reached "final determination" at the High Court, the Court of Appeal and Supreme Court. It is published here: http://inforrm.wordpress.com/2013/10/04/defamation-trials-summary-determinations-and-assessments-2012-to-2013/

The table of cases shows that traditional media are involved in a small proportion of cases that reach court each year, and that many more cases involve individual defendants, who will have varying means.

The libel reform campaign has worked with many individual defendants, such as Dr Peter Wilmshurst, Simon Singh, Alex Hilton, John Gray and Hardeep Singh all of whom have faced defamation proceedings and been put at risk of having to face their opponents' huge costs.

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 believe that these proposals will be particularly beneficial for small publishers, including bloggers and website operators such as those who run websites who should be able to apply for costs protections as defendants. Many such website operators face requests for articles or comments to be taken down because they are allegedly defamatory, and choose to comply with these requests instead of defending the statements because of the legal costs involved in doing this. The removal of the threat of having to pay the other side's costs will give a defendant with few resources much more control over how those resources should be spent, as well as more confidence to leaving statements that they do not believe to be defamatory in the public domain.

Yet there could be an increase in overall levels of litigation. Wiggin LLP's survey suggests that a quarter of respondents who said they would not consider suing under the current system would reconsider if they were offered costs protection. Without early strike out through changes to the civil procedure rules to mitigate against a rush of vexatious, trivial cases (that could not pass the section 1 of the Defamation Act hurdle of causing "serious" harm), there could be an impact on small business costs.

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

Most of the proposed additional provisions seem logical.

Consideration may need to be give to whether the confidentiality rule (44.26(3)) needs amending if the government accepts our proposals (made above, in answer to consultation question 2) that other parties' means be taken in to account when making costs protection orders.

It is also important to consider whether rule 44.27 regarding the loss of costs protection ought to allow for a judge to set aside an order for costs protection if a party unreasonably refuses to try to resolve the dispute using alternative forms of dispute resolution.

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?

No. Leaving the judge to decide who should pay the costs of the application would allow for a fair approach in all cases. There are too many scenarios to fairly say in advance who should pay the costs of the application.

We do however believe that the recoverable costs (if any) of the application should be fixed. It would provide certainty and prevent a costs application becoming a significant part of proceedings in its own right.

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 ought to be amended to ensure that solicitors consider early on whether a position on costs protection can be agreed with the other side (either for the benefit of their client or for another party). The protocol should also oblige solicitors to tell other, unrepresented parties that costs protection may be available and direct them to more information regarding this issue.

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

No, the rules appear to be well drafted.

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?