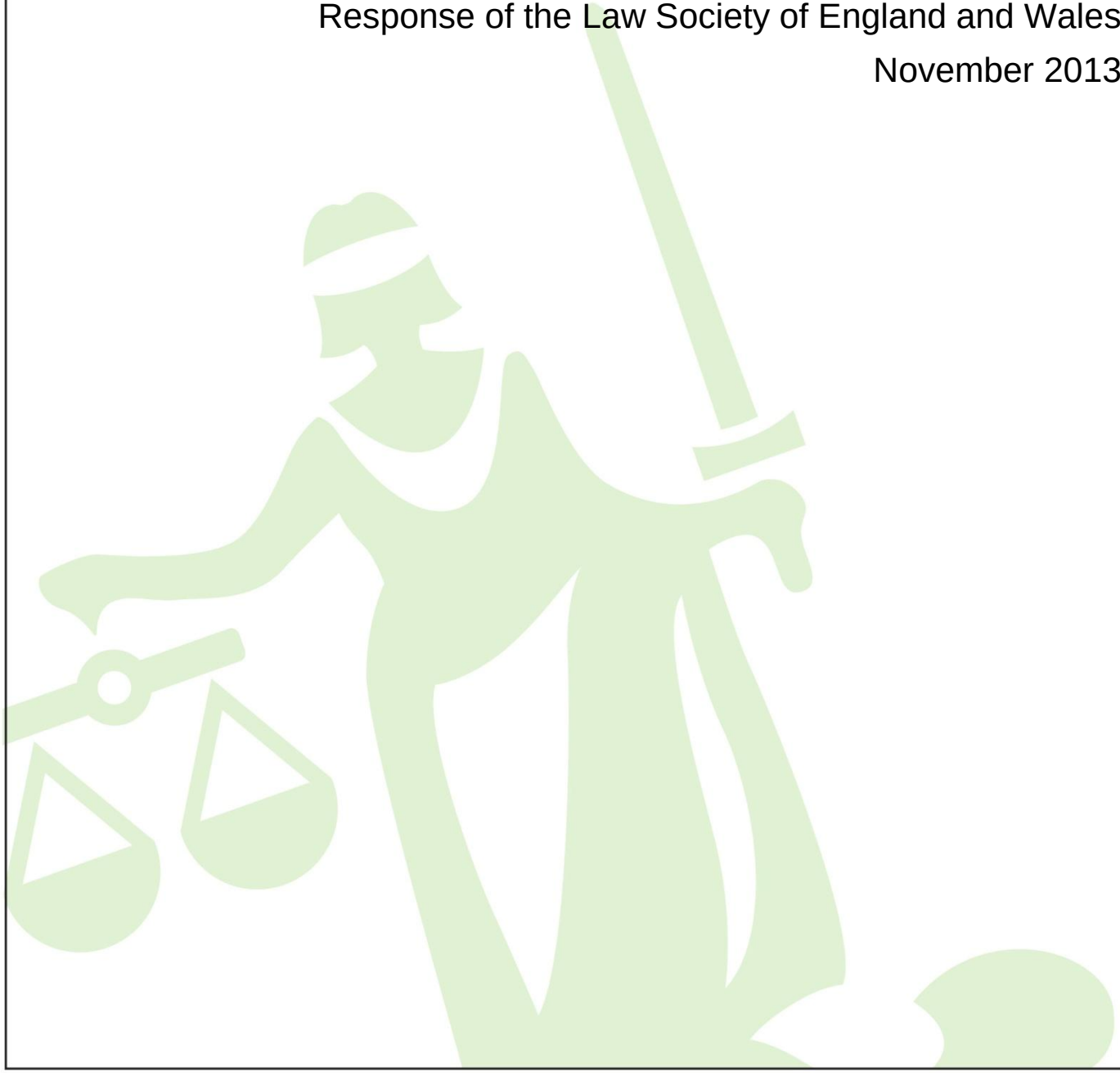
The Law Society

Costs Protection in Defamation and Privacy Claims

Response of the Law Society of England and Wales

November 2013



Introduction

The Law Society of England and Wales is the representative body of over 166,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both a Domestic and European arena. This response has been prepared with the assistance of members of the Society's Civil Justice Committee.

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

We agree generally with the scope of protections, although issues may arise with respect to "misuse of private information" proceedings as defined under rule 44.19(1)(b)(iv). Such proceedings can in practice overlap with data protection breach claims. There is therefore scope here for the cost protection proposals to apply only partially to claims that combine both information misuse and data protection breaches. Including data protection within the scope of the proposals does however raise further issues. In our members' experience, there is a higher proportion of litigants in person making data protection claims than claims in comparable areas. Because of the complexity of the law and the absence of legal advice, many such claims can be unmeritorious. Where such claims are not amenable to early determination (for example, applying for the court to strike out the claim), the ability of the defendant to recover their costs is very important, as the cost of fighting such claims can otherwise become unmanageable.

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

We agree generally with the process described, although we note that the process as proposed does not appear to include an opportunity for parties other than the applicant to make representations about the applicant's financial affairs during the application process. This will evidently reduce the costs of the application process. However, given the ability of any party to apply to have a cost protection order set aside under rule 44.20(2)(b) at any time after the order is made, it may save costs over the course of a case if other parties are given the opportunity to challenge the application at the point it is made, as part of the same process, rather than once an order has been granted. In instances where the applicant is involved in complex trust or company ownership models, there may be legitimate debate regarding the actual extent of the applicant's assets or liabilities or how 'severe financial hardship' should be judged in that party's circumstances (the example given in the consultation of a newspaper reporting a loss is pertinent to this point).

We note that there is a presumption against the applicant's statement of assets being revealed to any other party, which is likely to make challenging orders difficult for other parties. The courts will have to exercise their discretion under rule 44.26(4)(c) carefully, so as to ensure that parties are able to fairly challenge orders, while not divulging commercially sensitive information about the applicant.

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?

We agree with the general approach suggested, as an equitable means of achieving the Government's objectives. We note however that there will be a period of considerable uncertainty and satellite litigation while the courts establish case law on how the terms used to define the groups should be interpreted. Our comments on the Pre-Action Protocol, below, may help to reduce uncertainty where negotiation between the parties is possible.

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?

Given the myriad possibilities for a party's financial arrangements, we believe a specific definition of the levels of means of each group would make the law more complex and inflexible, and should be left to the court's discretion to decide.

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?

We agree that the test is appropriate, although by leaving it to the courts to decide the boundaries of the test on a case by case basis, the Government cannot guarantee that its specified example would not receive costs protection.

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

We agree with the proposed test, and emphasise that it should be kept as simple as possible. We would not favour a 'list of factors' approach, even where such a list was explicitly non-exhaustive, as it is very difficult to predict the enormous range of relevant factors relating to parties' financial positions, and any factors on such a list will tend to be given greater weight by the courts and the parties' representatives than those not specifically mentioned. There is precedent for this unintended consequence in the manner with which the courts tended to apply the *Reynolds* defence test in defamation proceedings as a 'shopping list'.

We would therefore suggest that the only factors specified in law should be the party's income, assets, liabilities, and outgoings. We believe that the courts are well equipped to judge reasonableness based on these factors, and will be able to account for further considerations under these factors (for example, it may be reasonable for a party whose outgoings include providing for dependants to have more protection than one whose outgoings all represent expendable income). It will important for the courts to balance these correctly. For example, a party that fully owns a house worth £100,000 may be in a better financial position than a party who has paid off £100,000 of a £500,000 mortgage on a more luxurious house, as they will not have large monthly repayments.

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

We do not systematically collect this data, and suggest this would be better requested directly from law firms.

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.

Any mechanism that improves the ability of parties to limit their liabilities or plan their exposure to risk will evidently benefit businesses. Recent CBI surveys demonstrate that businesses rely heavily on their reputation, so a better understanding of the costs involved when seeking access to remedies in defamation law (due to more accurate predictability of potential liability) will help businesses protect their reputations.

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

We agree generally with the additional provisions, subject to some comments. Our comments on confidentiality of the statement of assets are made under Question 2.

With respect to Rule 44.28 on enforcement of costs orders, we wish to highlight the utility of interim costs orders for defendants against potentially vexatious litigants (particularly litigants in person). Such orders would seem to be excluded by the rule, which otherwise provides a useful mechanism in making reckless or unreasonable claimants with few financial means (often litigants in person) take stock of their chances of success and the cost consequences for all parties. In the absence of interim cost orders, an interim payment into court mechanism might provide a similar incentive.

We would expect to see further consultation if means-tested costs protection were to be extended to other areas of litigation. As this response demonstrates, there are a number of issues that arise in its introduction that relate specifically to the area of law in question. Furthermore, the assertions made in paragraph 72 of the consultation, that the 'wealthy feature regularly as claimants in…defamation claims' does not itself provide sufficient justification for means testing – wealthy parties will typically have a more prominent public profile, and may have the resources to push litigation further, meaning they will understandably 'feature' more prominently in public discourse about defamation actions. This does not necessarily mean they are a representative sample of claimants (although we appreciate the Government is seeking data on parties' financial means as part of this consultation). We would expect the case for using means testing in any extension of costs protection to be made on stronger evidence, preferably before consultation on how to implement such protection.

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 agree that the parties should bear their own costs with respect to the application and subsequent hearings, subject to the discretion of the court. This would avoid inhibiting access to protection, while leaving a sanction for unreasonable behaviour (for example, with respect to negotiation under the PAP, below). We consider the “loser pays” presumption to be inappropriate in this instance, as the courts may in many cases make an order that represents neither of the parties’ applications; deciding who has ‘won’ or ‘lost’ in such instances may be difficult, and an inflexible presumption that one party has lost and is liable for all costs involved could prove unfair.

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

Yes. Given the importance of parties being able to predict their liabilities, anything that enhances this understanding will be beneficial. It may be advantageous to build into the Defamation PAP a requirement that the parties attempt to negotiate the application and extent of costs protection during the pre-action stage.

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

We have no further comments.

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?

The provision of (in some cases full) costs protection is likely to positively affect groups of individuals with protected characteristics that statistically tend to have fewer financial means by improving their access to justice.