

## **Litigation Committee response to the Ministry of Justice's consultation paper entitled *Costs protection in defamation and privacy claims: the Government's proposals***

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The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response to the Ministry of Justice's Consultation Paper entitled *Costs protection in defamation and privacy claims: the Government's proposals* has prepared by the CLLS Litigation Committee (the "Committee").

The Committee considers that the Consultation Paper is premature. The Consultation Paper proposes a scheme that would allow a court to exclude or limit the normal costs liability of an unsuccessful party to publication proceedings because that party would suffer severe financial hardship if it were ordered to pay the successful party's costs. In any such scheme, what constitutes severe financial hardship and how it is to be determined is not a mere point of detail but is at the heart of the scheme. Unless this is clear in the rules, the scheme will itself generate endless and costly satellite litigation as parties apply to the courts in order to work out how the rules should be applied in practice. There is also a real risk of inconsistency in approach and of a resulting lack of fairness (whether to the claimant or defendant).

The Consultation Paper does not (and acknowledges that it does not) set out any criteria as to how the court should assess severe financial hardship. Without an understanding of these criteria, it is impracticable to address the questions raised by the Consultation Paper or to assess whether the scheme will work effectively and fairly in practice. For example, matters that need to be covered by the rules include the following:

- An assessment of severe financial hardship depends upon, essentially, four factors: income, outgoings, assets and the costs of the proceedings. Should

the first three be determined by reference to strict financial criteria in the same way that legal aid is assessed or should they be matters in the discretion of the judge?

- If discretionary, how will consistency be ensured? For example, is severe financial hardship to be assessed by reference to the applicant's existing standard of living or to an objective standard? What should that objective standard be? How does an objective standard differ from a strictly financial approach?
- If strictly financial, what should the limits be? Should they be the same as for legal aid and, if not, why not?
- Paragraph 35 of the Consultation Paper refers to non-parties who have an "interest in the proceedings" being forced to disclose their assets. Does this include a spouse and/or parents? Who else has such a financial interest? Will these third parties be forced directly to give this disclosure (by joinder to the proceedings?) or will the applicant be required to do so? If the latter, what if the third party declines to provide the information?
- Should the manner in which the applicant is financing the litigation be relevant? If an applicant can pay the applicant's own lawyers, should the applicant be able to avoid liability for the respondent's costs? Can voluntary contributions by third parties towards legal costs be considered?
- Should the costs of childcare be considered? To what age? Should the (non-financial) impact on children be considered?
- Should severe financial hardship to the respondent be considered? What if a publisher is loss-making? Should a publisher's parent company's resources be considered?
- Is it severe financial hardship to require the applicant to incur indebtedness to meet legal costs if the applicant has the income to pay off that indebtedness over, say, five or ten years, if the applicant will or could receive a lump sum from a pension fund in the future or if the applicant's wider family might reasonably be expected to help the applicant?
- Is it severe financial hardship to impose on the applicant the risk of being forced to sell his or her home, whether to move into a less expensive house or into rented accommodation?

These are just some of the myriad of issues that will arise on an application for costs protection. The huge advantage conferred by costs protection is likely to encourage many parties to apply for it. Similarly, the corresponding disadvantage to the respondent, especially if the respondent considers that privacy proceedings may be abandoned or their scope limited if costs protection is not granted, is likely to

encourage respondents to fight any application for costs protection intensely. Indeed, there is a serious risk that an application for costs protection will itself lead to incursions on privacy if a respondent does not accept at face value the applicant's statement of the applicant's assets and liabilities. If the respondent wishes to check these matters – for example, whether the applicant's lifestyle is consistent with the applicant's description of his or her means – this will involve watching or otherwise investigating the applicant.

In these circumstances, the Committee considers that the Consultation Paper should be withdrawn and a new paper issued that sets out the options for determining severe financial hardship and assesses how they might operate in practice. Without that, any consideration of the questions in the Consultation Paper will be incomplete at best, and probably flawed.

On a related procedural point, the Consultation Paper and the draft rules say that the respondent will have no right to see the applicant's statement of assets (for example, paragraph 35 of the Consultation Paper and draft rule 44.26(3)). The Committee is doubtful whether this can be justified. An order providing costs protection will have a significant effect on the respondent and on its approach to the proceedings. In principle, a respondent should have the opportunity to make submissions before any such order is made. This requires that the respondent is able to see the evidence upon which the application is based and to test that evidence. Indeed, a refusal to allow the respondent to see the evidence on which the application is based could constitute a breach of article 6 of the European Convention on Human Rights.

30 October 2013

**THE CITY OF LONDON LAW SOCIETY  
Litigation Committee**

Individuals and firms represented on this Committee are as follows:

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