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By Email – **Defamationcostsprotection@justice.gsi.gov.uk**

Dear Ms Bhamra

Cost protection in defamation and privacy claims: the Government's proposals

This is the response by the London Solicitors Litigation Association ("LSLA") to the Consultation Paper entitled Cost protection in defamation and privacy claims: the Government's proposals published on 13 September 2013 (the "Paper").

The LSLA

The LSLA was formed in 1952 and represents the interests of a wide range of civil litigators in London. It has over 1,500 individual members throughout London from all the major litigation practices ranging from sole practitioners to major international firms.

Members of the LSLA Committee sit on or have recently been members of the Civil Justice Council, the Civil Rules Committee, the Law Society Civil Litigation Committee, the Commercial Court Users Committee, the Chancery Division Users Committee and the Supreme Court Costs Group, to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London and it has, on many occasions, been at the forefront of the process of change.

Summary Response

In summary, the LSLA considers that the Paper needs a significant amount of clarification before any meaningful debate can be had as to whether it will achieve the rationale stated in paragraph 3, namely *"to ensure that meritorious cases are able to be brought or defended by the less wealthy, who should not be deterred from bringing or defending an appropriate*

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claim through the fear of having to pay unaffordable legal costs to the other side if they lose."

In principle, the LSLA supports the concept of a system which allows claimants and/or defendants of lesser means to bring such proceedings, although as currently drafted the proposals and rules are too imprecise to make sure that this objective is achieved. There are fundamental issues with the proposals and draft rules which need to be addressed before the LSLA can comment in detail on the Paper.

Paragraph 18 of the Paper states:

> "*The government believes that the proposals strike the right balance in allowing poorer claimants and defendants to be able to bring or defend cases, controlling costs and encouraging early settlement while not protecting wealthier parties (such as substantial businesses or very wealthy individuals).*"

The LSLA's view is that the draft rules do not achieve this objective. Indeed, the likelihood is that if these rules are implemented then there will be a significant rise in satellite litigation. The fundamental flaw in the rules as drafted is that the test for whether a party will be entitled to either a "*nil net liability*" Cost Protection Order pursuant to draft rule 44.22 or a "capped liability" Cost Protection Order pursuant to draft rule 44.23, is dependent on whether that party will suffer "*severe financial hardship*" if a Costs Protection Order is not granted. There is no definition of "*severe financial hardship*" in the draft rules. This means that it impossible for any constructive comment to be made as to whether the rules will succeed in achieving the Paper's objectives. Such a definition is vital as to understanding how the rules will operate.

We have been unable to find a statutory definition of "*severe financial hardship*". The phrase was used in Section 13 (3) of the Legal Aid Act 1974 which has now been repealed. Section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 only refers to "financial hardship". The phrase is also used in Section 132 of the Rent Act 1997 which deals with the powers of the court to mitigate hardship to mortgagors under regulated mortgages. The LSLA's view is that these statutes are not relevant in considering the draft rules and the definition of *"severe financial hardship"*.

The criteria for establishing "*severe financial hardship*" can either be subjective or objective. If it is to be objective then does it equate to Legal Aid means testing? If so, then a significant number of claimants and/or defendants may have sufficient assets to fail the equivalent of the Legal Aid means test and therefore potentially exclude them from being able to pursue *"publication and privacy proceedings"* because of the inherent costs exposure if those proceedings are unsuccessful. The whole purpose is to allow such claims to be brought.

If the criteria is to be based on something other than the equivalent of a Legal Aid means test then what is the criteria? If the criteria are to be subjective then how is "*severe financial hardship*" going to be determined? Does a party who has sufficient assets to pay private school fees for their children suffer "*severe financial hardship*" if they have to take those

children out of these schools in order to potentially pay an adverse costs order? Will a party whose only means of paying an adverse costs order would be by selling their family home suffer "*severe financial hardship*"? Will the criteria include future pension payments or a future inheritance? Will a party have to include their partner's/spouse's assets in any analysis of whether they will suffer "*severe financial hardship*"?

There are other fundamental flaws in the way the rules are currently drafted. For example, it is envisaged that a party who is in receipt of a Costs Protection Order may lose that protection if they behave unreasonably during the course of the proceedings. Paragraph 17 of the Paper states:

> "*One consequence should be earlier settlement as the making of reasonable offers – this includes either via the Offer of Amends process or 'Part 36' offers – should mean that costs protection is lost going forward if the Claimant insists on taking the case to trial.*"

This envisages that the reasonableness of an Offer of Amends or Part 36 offer may have to be determined by a Court if the party with the benefit of a Costs Protection Order refuses what the other side considers to be a reasonable offer. That will require a hearing before a Judge (who will be unable to hear the substantive trial) as to whether or not a particular offer is reasonable. In order to determine the reasonableness of that offer, the Court will have to have a mini-trial. A party with the benefit of a Costs Protection Order may be forced to accept an unreasonable Offer of Amends or Part 36 offer because they cannot run the risk of losing their protection if a Judge determines that the Offer of Amends or Part 36 offer was in fact reasonable.

The rules also envisage that the statement of assets which is required to support any application for a Costs Protection Order is not, as a matter of course, to be disclosed to the responding party. That appears to be entirely iniquitous. If a party is seeking a Costs Protection Order then the validity of that application and the basis upon which they consider they satisfy the "*severe financial hardship*" criteria (whatever that may be) has to be capable of being tested by the responding party to ascertain whether in fact that statement of assets is either accurate and/or does give rise to such "*severe financial hardship*". If the claim involves issues of privacy then it appears that a party's privacy may be further eroded by potentially having to disclose such a statement of assets although it cannot be right that a responding party has no right to challenge it.

It is also envisaged that the costs of any application for a Costs Protection Order may not be recovered from the "losing party" within that application. If that is the case, then a wealthy party determined to try and avoid the proceedings may well challenge any application for a Costs Protection Order solely on the basis that the applicant will incur costs in applying and having an oral hearing which may not be recoverable. It may of course be that that party has the benefit of a CFA or funding arrangement with their solicitors but that this will not always be the case.

In conclusion, the LSLA considers that these fundamental issues have to be addressed before any serious consideration can be given to the Paper

and the draft rules. That said we will endeavour to answer the questions as set out in the Paper.

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

The LSLA agrees with the scope of "publication and privacy proceedings" as defined in draft rule 44.19.

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

The LSLA agrees that a party wishing to seek a Costs Protection Order would need to apply to the Court if an agreement cannot be reached with the other side. The LSLA also agrees that such an application would need to be supported by evidence of the applying party's assets. Other than that the LSLA cannot comment on the process without further clarification.

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?

The LSLA agrees in principle with the concept of a system which allows claimants and/or defendants of lesser means to bring publication and privacy proceedings. However the LSLA cannot comment further without clarification as to "*severe financial hardship*" as referred to above.

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?

Please see our comments generally and answer 3 abov

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?

Please see our comments generally and answer 3 above.

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

Please see our comments generally and answer 3 above.

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?

Please see our comments generally and answer 3 above.

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 legal of costs for each party and how this varies across cases.

The LSLA represents more than 1,500 solicitors and it is therefore impractical for the LSLA to give meaningful information as to the legal costs in defamation cases.

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

The LSLA represents more than 1,500 members and it is therefore impractical for the LSLA to give evidence of the financial means of claimants and defendants in defamation cases.

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.

The LSLA cannot make any comment as to the impact on businesses.

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

Please see our comments above on the issues of confidentiality and the effect of a challenge to a Costs Protection Order in light of what is perceived to be a refusal to accept a reasonable Offer of Amends or Part 36 offer.

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?

The LSLA considers that the costs of applying for a Cost Protection Order should be at the discretion of the Court.

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

The draft rules envisage an application being made in the proceedings which, it is assumed, would have already been issued. The parties should still have complied with the Pre-Action Protocol for Defamation and should still suffer the cost sanctions if they have failed to do so. The Protocol may need to be amended but it is too early to comment at this stage.

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

Please see our general comments above.

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 LSLA cannot answer this question.

Should you wish to ask for further clarification of any of our responses, or to discuss these or any other issues with us, we would be very happy to speak to you either individually or through the LSLA Committee.

Yours sincerely

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