



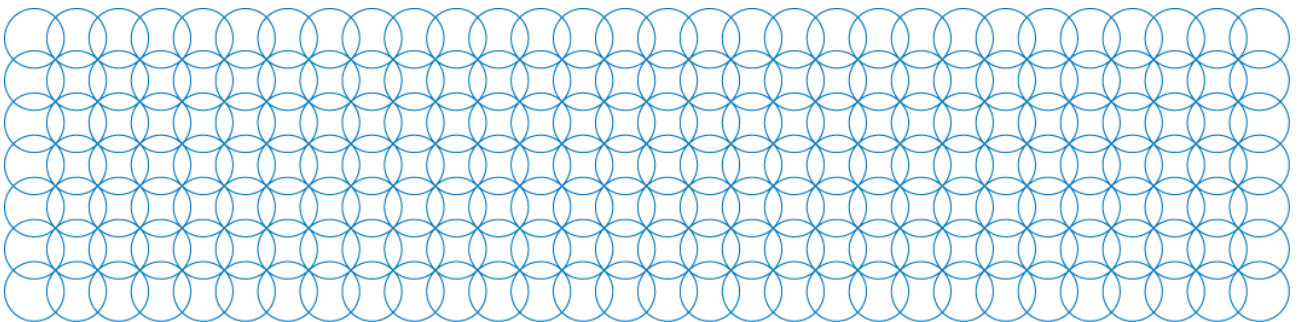
Ministry
of Justice

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

Consultation Paper

This consultation begins on 13 September 2013

This consultation ends on 8 November 2013





Ministry
of Justice

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

A consultation produced by the Ministry of Justice. It is also available on the Ministry of Justice website at <https://consult.justice.gov.uk/>

About this consultation

- To:** All stakeholders with an interest in defamation and privacy proceedings
- Duration:** From 13 September to 8 November 2013
- Enquiries (including requests for the paper in an alternative format) to:** Tajinder Bhamra
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- How to respond:** Please send your response by 8 November 2013 to:
Tajinder Bhamra
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102 Petty France
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Email: defamationcostsprotection@justice.gsi.gov.uk
- Response paper:** A response to this consultation exercise is due to be published by April 2014 at: <https://consult.justice.gov.uk/>

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Foreword



It is important that people of modest means should be able to bring and defend defamation and privacy claims: these cases should not be the preserve of the wealthy. It is also important that the legal costs of civil cases should be more proportionate than they have become. It is for both these reasons that the Government has accepted the separate recommendations of Lord Justice Jackson and Lord Justice Leveson to reform civil litigation funding and costs, to make civil costs more proportionate. We have already introduced reforms to no win no fee agreements in most categories of civil litigation, but not yet defamation and privacy. However, we have said that we will extend the no win no fee reforms to defamation and privacy when we can implement a costs protection

regime which will protect poorer parties – both claimants and defendants – from the costs that they might otherwise have to pay in litigating.

This consultation paper contains our proposals on costs protection in defamation and privacy claims. They are designed to help people and organisations of more modest means to be able to protect their reputations and privacy. While these proposals would affect a relatively small number of cases each year, they are nevertheless significant: they will help protect people's rights and should deter bad practice. Together with the no win no fee reforms, they will allow for access to justice – but at proportionate cost.

We would be grateful for your views.

A handwritten signature in black ink, appearing to read 'Helen Grant'.

Helen Grant
Parliamentary Under Secretary of State for Justice

Executive summary

1. This paper presents for consultation the Government's proposals to introduce a form of costs protection in defamation and privacy cases. It meets the Government's commitment to consult on the proposals announced during the passage of the Defamation Act 2013 in the House of Lords on 23 April 2013.¹

The Issue

2. Costs protection affects the liability that one party in civil litigation has in relation to the other party's costs – it offers protection in relation to the costs that might otherwise be payable. It is important to recognise that costs protection is an exception in England and Wales. It is not available in most cases, where parties which lose are generally liable for the other side's legal costs, as well as their own. This principle – that 'the loser pays' – is an important element in civil litigation in England and Wales; it helps deter non-meritorious cases.
3. However, the Government has long recognised that certain litigants should be generally protected from having to pay the other side's legal costs if their case is unsuccessful: this is the general provision in relation to civil legal aid, for example. In taking forward Lord Justice Jackson's recommendations on civil litigation funding and costs,² the Government accepted that costs protection – in the form of qualified one way costs shifting (QOCS) – should be introduced for personal injury claims, and this has happened from 1 April 2013. The Government has also accepted Lord Justice Leveson's recommendation³ that this costs protection – or a variant of QOCS – be extended to defamation and privacy cases. The rationale for introducing costs protection in these cases is quite simple: it is 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 claim through the fear of having to pay unaffordable legal costs to the other side if they lose.
4. The proposals would extend to defamation and privacy cases (as defined at para 21). However, for the sake of simplicity, all cases within the definition are described as 'defamation cases' in this paper.
5. The Government recognises that the costs of bringing or defending a defamation case can be substantial. While a claimant's own legal costs might be dependent on a 'no win no fee' conditional fee agreement (CFA) – such that a losing claimant does not have to pay the costs of his or her lawyer – a losing claimant would nevertheless ordinarily be responsible for the defendant's legal costs (and vice versa). Without some protection, claimants and defendants who lose can be presented with a sizeable legal bill, the payment of which may be beyond the reach of most people; those with a home may fear that they may lose that home in order to pay the legal costs of the other side. Protection has existed in the form of after the event (ATE) insurance.

¹ <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130423-0001.htm#13042379000274>

² See Annex C.

³ Inquiry Report, chapter 3, para 6.10.

ATE insurance can cover the other side's legal costs if the case is unsuccessful, but the price of this insurance is high. The premium is recoverable from the losing party, but is typically only ever paid by losing defendants. In addition, the premium can be substantial – almost as high as the sum insured. The Government has legislated in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the LASPO Act) to reform CFAs and to make the ATE insurance premium no longer recoverable from the losing party.⁴

6. The LASPO Act reforms take forward Lord Justice Jackson's recommendations and are intended to control the costs of civil litigation. The reforms address how civil cases are funded and the costs involved in bringing and defending them. The reforms apply across civil litigation in England and Wales and generally came into force on 1 April 2013, including the QOCS rule for personal injury cases in the Civil Procedure Rules (CPR).⁵ However, in the light of Lord Justice Leveson's recommendation, the Government delayed implementation of these reforms for defamation cases⁶ until a costs protection regime is in place. The Government sought the advice of the Civil Justice Council on what form of costs protection regime would be appropriate.
7. In this consultation paper, the Government sets out its proposals for costs protection in defamation cases in England and Wales, building on the QOCS rule for personal injury cases. It seeks views on the proposals – both the policy and the draft rules.
8. The Government will consider the responses before seeking the Civil Procedure Rule Committee's agreement to revised rules. The relevant provisions in the LASPO Act will be implemented for defamation cases at the same time as the new costs protection rules come into effect.
9. The proposed regime for costs protection in defamation cases, as set out in this paper, is intended to ensure that access to justice in these cases is as much a reality for poorer litigants as for the wealthy. Poorer parties, whether claimants or defendants, should be able to litigate where necessary, without the fear of exposure to the substantial costs that they might be ordered to pay to the other side in these cases. The proposals take forward the recommendations of Lord Justice Jackson and Lord Justice Leveson.
10. It is important to note that protecting one side's costs exposure deprives the other of costs to which they would otherwise be entitled, so a careful balance has to be drawn. The proposals therefore seek to balance the interests of the parties: those of modest means, of some means, and of substantial means; and claimant and defendant. It is hoped that the proposals might also encourage earlier settlement of cases. And taken together with the implementation of the CFA and ATE insurance reforms, they should control the costs in defamation cases.

⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 44 and 46.

⁵ Civil Procedure Rules Part 44.13–44.17

⁶ In addition to defamation cases, the implementation of sections 44 and 46 of the LASPO Act has been delayed beyond 1 April 2013 for mesothelioma cases, and proceedings in respect of, and relating to, insolvency proceedings.

The consultation

11. The consultation is aimed at people and organisations with an interest in defamation and privacy proceedings in England and Wales.
12. The proposals are set out in the next section, which includes a summary of the provisions at the end.
13. Copies of the consultation paper are being sent to the people and organisations listed at **Annex A**. The list is not meant to be exhaustive and responses to this paper will be welcomed from anyone with an interest in or views on the subject. The draft rules are in **Annex B**. **Annex C** sets out some of the background on the funding of defamation claims. **Annex D** sets out the details of the QOCS rule for personal injury claims.
14. The Government would welcome responses to the questions set out in this consultation paper. The 15 individual consultation questions are posed in the relevant chapters of the paper and repeated together in the 'Questionnaire' section towards the end.
15. The deadline for responses is midnight on 8 November 2013. After the consultation closes we will consider the responses we have received. We plan to publish a consultation response document by April 2014.

The Government's proposals

16. The Government's proposals have been developed in the light of its consideration of the policy issues in relation to QOCS in personal injury claims,⁷ the Civil Justice Council's report,⁸ and in consultation with the Civil Procedure Rule Committee (CPRC). The proposals draw on the QOCS costs protection rules for personal injury,⁹ but make allowances for the differences with defamation cases.
17. The proposals seek to ensure that poorer claimants would be able to bring claims without fear of not being able to pay substantial costs to the other side if the claim failed. Similarly, poorer defendants would be able to defend claims. Inappropriate behaviour would be discouraged – including the pursuit of weaker cases by the wealthy. One consequence should be earlier settlement as the making of reasonable offers – this includes either via the Offer of Amends process¹⁰ or 'Part 36' offers¹¹ – should mean that costs protection is lost going forward if the claimant insists on taking the case to trial.
18. Overall, 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).
19. Draft rules have been prepared on this basis in consultation with the CPRC and are set out in **Annex B**. The suggested location for the rules is as a new Section IV at the end of Part 44 of the CPR. References to the draft rules are set out in the text below, so that the policy issues can be considered alongside the draft rules.
20. The following issues are addressed in turn, with associated questions:
 - A. Scope (paras 21 to 22)
 - B. Process (paras 23 to 28)
 - C. Means (paras 29 to 34)
 - D. Additional provisions (paras 35 to 41)

⁷ See Annex D.

⁸ See paras 58 to 59 below.

⁹ CPR 44.13–17.

¹⁰ Sections 2 to 4 of the Defamation Act 1996.

¹¹ CPR Part 36, <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36>

A. Scope: rule 44.19

21. Costs protection will apply to the types of proceedings which are defined in the Conditional Fee Agreement Order 2013.¹² If there is a mixed claim involving proceedings which do not fall within the definition, the costs protection only applies to the costs of those proceedings which fall within this definition. The definition is:

“publication and privacy proceedings” means proceedings for—

(a) defamation; (b) malicious falsehood; (c) breach of confidence involving publication to the general public; (d) misuse of private information; or
(e) harassment, where the defendant is a news publisher.

“news publisher” means a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs.

22. Costs protection will be available, in principle, to both claimants and defendants, subject to satisfying the tests below. However, when it comes into effect section 40 of the Crime and Courts Act 2013¹³ will take precedence over any consideration of an application for costs protection.

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

B. Process: rules 44.20–23

23. A party seeking costs protection would apply for it and notify the other side.

24. The Government recognises that in defamation cases there can be a disparity in the relative means of each party. The typical public perception of a defamation case might be of a wealthy celebrity claimant against a well-resourced national newspaper. However, the reality is more nuanced, with a variety of scenarios of differing resources of both claimant and defendant, and their disparity. For example, such cases can also involve a claimant of modest means – or a wealthy claimant against a small publisher or an individual.

25. Unlike in relation to personal injury,¹⁴ the Government does not believe that it is right to provide full costs protection regardless of means to all claimants in defamation cases: rather it considers that it is right that those who can afford to pay all or some of the costs in these cases should do so. The Government therefore proposes to consider three groups (of both claimant and defendant, individual and non-individual) as set out in more detail below:

(i) those of modest means, who should be entitled to costs protection in full (‘nil net liability’);

¹² 2013 No. 689: <http://www.legislation.gov.uk/ukxi/2013/689/contents/made>

¹³ This provides for increased costs to be paid by publishers who choose not to join the new self-regulator which is intended to be established as a result of the Leveson report. In practice this would only affect less well resourced defendant publishers which chose not to join the new self-regulator, but which sought costs protection.

¹⁴ Where different considerations apply, see Annex D para 60 in particular.

- (ii) the 'mid' group of those of some means – who could pay something, but not the costs in full – who should be entitled to costs protection in part ('capped liability');
 - (iii) those of substantial means, who should not get any costs protection because they would not face 'severe financial hardship' if they were ordered to pay the other side's costs.
26. It would be open to the parties to agree the costs protection position – for example, a national newspaper could agree at an early stage that a claimant of modest means should have full costs protection. If the position cannot be agreed between the parties, it would be for the judge to decide, based on a statement of assets provided by the applicant. The statement of assets must be verified with a statement of truth, and must be sufficiently detailed (rule 44.26(2)).
27. Individual claimants who are not of substantial means would be entitled to costs protection unless the court was satisfied that they would not suffer severe financial hardship; however, they would have to apply formally to confirm this.
28. Claimants who are not individuals (such as businesses or charities), and all defendants, could also apply for costs protection. Again, this could be agreed between the parties, or the matter would be determined by the judge, based on the applicant's statement of assets. If the judge were satisfied that it was in the interests of justice for costs protection to be granted, then it could be granted on a full or partial basis (on the same basis of the consideration of means as for individual claimants).

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

C. Means

(i) Modest means – full costs protection ('nil net liability'): rule 44.22

29. The first group is those of modest means who could not afford to pay anything to the other side. The Government's approach is to ensure those of modest means should get full costs protection; the proposed test is that they will do so if they would face 'severe financial hardship' if they had to pay the other side's costs. This test is drawn from the test in relation to costs protection which has existed for some time in legal aid proceedings.¹⁵
30. A party of modest means granted full costs protection would be protected (like a personal injury claimant with the benefit of QOCS) from having to find any additional money to pay to the other side in the event that the case was lost. If the case was won, and damages awarded, they would not have to pay anything beyond those damages (and they would only have to pay something if the judge made a costs order

¹⁵ The current version of the legal aid test is set out in the Civil Legal Aid (Costs) Regulations 2013; that now has a test of 'financial hardship'. However, the case law (*LSC v F, A and V* [2011] EWHC 899 (QB)) suggests that, while that test might be suitable for legal aid purposes (where the balance is between private individuals and the state), a better test for defamation in order to exclude the very wealthy might be 'severe financial hardship' – which was the legal aid test until the rule was changed in 2000. While those considered by ordinary standards to be very wealthy might nevertheless suffer some financial hardship if they had to pay a costs order in full, they could not be said to suffer severe financial hardship.

against them, for example for pursuing a hopeless point, or if they failed to beat a Part 36 offer made by the defendant, notwithstanding their overall success).

(ii) *'Mid' group of some means – partial costs protection ('capped liability'): rule 44.23*

31. Those of some means would be expected to pay something, as they would be able to do so without seriously affecting their overall financial position. While they might not be able to pay all of the opponents' costs – and would suffer severe financial hardship if they did so – they could nevertheless pay a reasonable amount.¹⁶ This sum would be capped by the judge at the first judicial hearing (although it could be agreed between the parties). If determined by the judge, it would be based on the applicant's statement of assets (i.e. what that party could afford to pay), and the costs budget (i.e. what that party might otherwise be ordered to pay). In addition, it might be that the opponent's assets are also a relevant factor (given that the effect of partial costs protection would be to reduce the costs that the opponent might otherwise receive).

32. It is important that claimants or defendants who will be liable to pay something towards the costs should know as early as possible what their likely liability would be so that they can make properly informed choices in the litigation.

(iii) *Substantial means – no costs protection*

33. The third group is of very wealthy individuals or organisations – such as individuals of substantial wealth or substantial publishers – which can readily afford to pay the other side's costs. The Government does not believe that this group warrants any protection from having to pay the other side's costs and proposes the test of 'severe financial hardship' in order to ensure that they do not get protection. This provision is intended to apply even if a national newspaper, for example, reports that it is losing money; 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.

34. These provisions are intended to be sufficiently flexible to apply to individuals and organisations.

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?

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?

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?

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

¹⁶ A reasonable amount' was suggested by Lord Justice Jackson: *Final Report* Chapter 19, para 4.7, p 190.

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?

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?

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.

D. Additional provisions

Confidentiality: rule 44.26(3)

35. It is proposed that the applicant party's statement of assets will be confidential to that party, the court and the judge, unless the judge directs otherwise. The judge would be able to give directions, for example as to the disclosure of the identity and assets of any party who is not a party to the proceedings but who nevertheless has a financial interest in the proceedings, or in relation to further evidence that might be required.

Variation or removal of costs protection: rules 44.21, 44.24 and 44.25

36. It is open to the parties to agree to vary the costs protection awarded if the circumstances change. Alternatively, either party could apply to the judge for it to be varied. This is likely to be if the means of the party with costs protection changes substantially, or if a reasonable offer is made such that there is no real merit in the litigation proceeding.

Loss of costs protection: rule 44.27

37. It is proposed that costs protection be lost in the same circumstances as with personal injury. A party acting reasonably should have nothing to fear from these provisions. The judge can order that any costs protection order be set aside with retrospective effect if the party with the benefit of costs protection:

- has made a claim which has been found, on the balance of probabilities, to be fundamentally dishonest;
- has disclosed no reasonable grounds for bringing the proceedings;
- has abused the court's process; or
- has obstructed or attempted to obstruct the just disposal of proceedings.

Enforcement of costs orders: rule 44.28

38. Orders for costs made against a party with costs protection may only be enforced at the end of the proceedings, once the costs have been assessed or agreed.

Costs of applications

39. It is hoped that applications for costs protection can be dealt with on the papers as much as possible, in order to limit the costs that are incurred (see, for example, rule 44.26(5)). However, oral hearings on this issue may prove necessary in certain cases, and the question arises of how the court should approach the question of the costs of the application. It is proposed that the general position would be that the costs of those proceedings would be in the court's discretion. It might, however, be appropriate for there to be a default position whereby there would be 'no order as to costs of the application' such that each party would bear their own costs, unless the court considered it appropriate to make a different order. A disincentive to satellite litigation on costs protection might be provided by a presumption that a party who unsuccessfully opposes another party's application for costs protection would have to pay the costs of the applicant party on the indemnity basis.

Other measures to control costs

40. This proposal for costs protection would be in addition to the variety of measures available to judges to control costs, along with robust and effective case management. As now, parties will be expected to comply with the Pre-Action Protocol for Defamation¹⁷ and could face costs sanctions if they do not. Costs budgeting has been introduced more systematically¹⁸ and will in practice occur in all defamation cases, and the court's powers in relation to costs capping will continue.¹⁹

Other categories of costs protection

41. This paper and annexes set out in some detail the provisions in relation to QOCS for personal injury claims, and the proposed costs protection rules in defamation cases. The QOCS rule was drafted in relation to personal injury, with defamation being considered as a variant to the personal injury rule. The Government has stated that, while it has no current plans to extend this form of costs protection further, that is an option which will be considered in the light of experience. The Government is not seeking views on a further extension of costs protection to other categories of litigation at this stage, but would welcome any comments on the drafting of the rules, and whether they could be simplified or regularised in the event that it is extended further in future.

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

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?

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

¹⁷ http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def

¹⁸ CPR 3.12–3.18 and Practice Direction 3E

¹⁹ CPR 3.19–3.21 and Practice Direction 3F.

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

Summary of proposals

42. In summary, the rules would apply to protect the costs that a party might have to pay to the other side at the end of a case:

- Those of substantial means (whether individuals or organisations) would be excluded from the costs protection regime – on the basis that they would not face ‘severe financial hardship’ if ordered to pay the other side’s costs.
- Those of lesser means – whether claimant or defendant – could get costs protection, either in full (i.e. those of modest means – ‘nil net liability’ – would not have to pay anything), or in part (i.e. those of less modest means – the ‘mid’ group – might have to pay a reasonable sum, capped at a maximum amount). Importantly, it would be clear from the first judicial hearing what the maximum liability would be.
- A claimant individual of modest means would be able to get costs protection as of right (unless the court is satisfied that they would not suffer severe financial hardship); others (non-individual claimants and all defendants) would have to satisfy the judge that it was in the interests of justice to do so.
- It would be open to parties to agree the position; otherwise a judge would decide, based on (i) an applicant’s means – as evidenced by a statement of assets, and (ii) the costs that s/he might be ordered to pay (which would be indicated by the costs budget which now needs to be agreed in practice in all defamation cases).
- As with personal injury, costs protection would be lost if there were fundamental dishonesty, or the case were struck out.
- A winning claimant with costs protection might still have to pay costs out of damages recovered (but for a claimant with ‘nil net liability’ this would be no more than damages recovered).

Impact Assessment

43. The Government's Impact Assessment is being published separately on the Ministry of Justice website at <https://consult.justice.gov.uk/>. In summary, claimants may no longer pursue weaker or unmeritorious claims, which they might lose if they are pursued. A reduction in claims which are unsuccessful would be associated with improved economic efficiency. Less financially wealthy claimants and defendants should benefit from costs protection, but wealthier claimants and defendants would not. This represents an improvement in equity (fairness).
44. Under the Equality Act 2010,²⁰ public authorities have an ongoing duty to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between those with and those without protected characteristics. As part of this obligation, we have made an initial assessment of the estimated impact of these proposals on people with protected characteristics.
45. The proposals in the consultation paper look to protect poorer claimants and defendants, while ensuring that those of substantial means – very wealthy individuals or substantial businesses – do not get any costs protection. It is anticipated that the proposals will have a positive impact on claimants and defendants with protected characteristics who either bring or defend a defamation case.
46. We do, however, acknowledge that we do not collect comprehensive information about court users generally, and specifically those involved in defamation cases, in relation to protected characteristics. This limits our understanding of the potential equality impacts of the proposals for reform. We would welcome information and views to help us gather a better understanding of the potential equalities impacts that these proposed reforms might have.

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?

We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about those parties that either pursue or defend a defamation claim and their protected characteristics, as well as the grounds on which they brought their claim.

²⁰ The general equality duty covers the following protected characteristics: age (including children and young people), disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Public authorities also need to have due regard to the need to eliminate unlawful discrimination against someone because of their marriage or civil partnership status. This means that the first aim of the general equality duty applies to this characteristic but the other two aims do not. This applies only in relation to work, not to any other part of the Equality Act 2010.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- Question 1:** Do you agree with the scope of the protection? If not, what should it cover?
- Question 2:** Do you agree with this process? If not, how should it be improved?
- 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?
- 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?
- 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?
- 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?
- 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?
- 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.
- Question 11:** Do you agree with the proposed additional provisions? If not, how should they be improved?
- 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?
- Question 13:** Should the Pre-Action Protocol for Defamation be amended to take account of these new provisions? If so, how?

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

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?

Thank you for participating in this consultation exercise.

Annex A: Consultation list of individuals and organisations

List of individuals and organisations that have been sent a copy of the consultation paper

A number of MPs and Peers who spoke during the passage of the Defamation Act 2013

AOL

Associated Newspapers

Association of British Science Writers

Association of High Court Masters

BBC

Berrymans Lace Mawer

Carter-Ruck

Confederation of British Industry

Channel 4

Charles Russell LLP

Civil Court Users Association

Civil Justice Council

Civil Justice Council Defamation Costs Protection Working Group

Clifford Chance LLP

Collyer Bristow LLP

Council of Her Majesty's Circuit Judges

David Price Solicitors and Advocates

English PEN

Equality and Human Rights Commission

Express Newspapers

Facebook

Federation of Small Business

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Global Witness

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Hacked Off

Herbert Smith LLP

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International Association of Scientific, Technical and Medical Publishers

ITN

ITV

Johnsons Solicitors

Johnstone Press Plc

Lawyers for Media Standards

Liberty

Lord Justice Richards

Master of the Rolls

Media Law Consultancy

Media Lawyers Association

Media Standards Trust

Medical Research Council

New Scientist

News International

Newspaper Society

Olswang LLP

Pannone Solicitors

Press Association

Press Complaints Commission
Publishers Association
Publishers Trade Association
Reynolds Porter Chamberlain
Schillings
Sense about Science
Slater & Gordon LLP
Society of Editors
Telegraph Media Group
The Bar Council
The Bar Standards Board
The Booksellers Association
The Chartered Institute of Journalists
The Independent
The Law Society
The Newspaper Society
The Solicitors Regulation Authority
The Times
Thomson Reuters
Trinity Mirror
Twitter
Which? Magazine
Yahoo!

Annex B: The draft rules

IV. Costs Protection in Publication and Privacy Proceedings

Scope and interpretation

- 44.19.**— (1) This section applies to publication and privacy proceedings.
- (2) In this section—
- (a) a “costs protection order” means an order limiting the extent to which an order for costs made against the party in whose favour the order has been made may be enforced;
 - (b) “publication and privacy proceedings” means any proceedings which include a claim for a remedy in respect of—
 - (i) defamation;
 - (ii) malicious falsehood;
 - (iii) breach of confidence involving publication to the general public;
 - (iv) misuse of private information; or
 - (v) harassment where the defendant is a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs.

Costs protection

- 44.20.**— (1) A costs protection order may provide—
- (a) that any orders for costs made against the party in whose favour the order has been made may be enforced only to the extent that the aggregate amount in money terms of such orders for costs does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of that party; or
 - (b) that the liability of the party in whose favour the order has been made to pay the costs of the other party or parties shall not exceed such sum as is specified in the order (whether or not that sum exceeds the aggregate amount in money terms of any orders for damages and interest made in favour of that party).
- (2) Costs protection orders do not apply to the costs of the proceedings insofar as they are not publication or privacy proceedings.
- (3) At any stage of the proceedings—
- (a) any party may apply for a costs protection order;
 - (b) any party may apply for an order setting aside or varying a costs protection order made in favour of another party.
- 44.21.** A costs protection order may be varied with the consent of the parties.

Acquisition of costs protection: nil net liability

- 44.22.—** (1) Subject to paragraph (3), the court may make a costs protection order containing the provision in rule 44.20(1)(a) where the court is satisfied that—
- (a) the party applying for such an order would suffer severe financial hardship if an order containing that provision were not made and that party were ordered to pay another party's costs of the proceedings; and
 - (b) it is in the interests of justice to make such an order.
- (2) An order made pursuant to paragraph (1) may provide that the order shall have retrospective effect.
- (3) Where the party applying for the order is both—
- (a) the claimant; and
 - (b) an individual,
- the court will make a costs protection order containing the provision in rule 44.20(1)(a) unless the court is satisfied that that party would not suffer severe financial hardship without the benefit of an order containing that provision in the event that that party were ordered to pay costs of the proceedings of another party (in which event the court may make an order under rule 44.23(1)).

Acquisition of costs protection: capped liability

- 44.23.—** (1) Where the court is not satisfied that the party applying for a costs protection order would suffer severe financial hardship unless an order containing the provision in rule 44.20(1)(a) is made, the court may instead make an order containing the provision in rule 44.20(1)(b).
- (2) Where the court makes an order containing the provision in rule 44.20(1)(b), the sum specified must be such sum as the court considers it reasonable for the party in whose favour the order is made to pay, having regard to the factors in rule [*Criteria for determining level of liability*].

DRAFTING NOTE: The question arises of the criteria to which the court should have regard in determining what would be a reasonable sum for the party to pay. It is proposed that these should be set out in a separate rule rather than listed here (partly to avoid duplication, because they are relevant for rule 44.25 also).

- (3) Where the court is satisfied that it is reasonable for there to be no restriction on the liability of the party in whose favour the order was made to pay any other party's costs, the court may refuse to make a costs protection order.

Removal of nil net liability costs protection

- 44.24.—** (1) The court may make an order setting aside a costs protection order containing the provision in rule 44.20(1)(a) where the court is satisfied that—
- (a) that party would not suffer severe financial hardship without the benefit of a costs protection order in the event that party were ordered to pay costs of the proceedings of another party; and
 - (b) it is in the interests of justice to make such an order, for example in the light of any offers made to that party.
- (2) Where the court makes an order setting aside a costs protection order under paragraph (1), the court may make in its place an order containing the provision in rule 44.20(1)(b).
- (3) An order made pursuant to paragraph (1) or (2) shall have not have retrospective effect save as provided in rule 44.27.

Variation or revocation of capped liability costs protection order

- 44.25.—** (1) Where an order has been made containing the provision in rule 44.20(1)(b), the court may—
- (a) revoke the order if it is satisfied that it is no longer reasonable for there to be a restriction on the liability of the party in whose favour the order was made to pay any other party's costs; or
 - (b) vary the order by substituting for the sum specified in the order such revised sum as the court considers it reasonable for the party in whose favour the order was made to pay, having regard to the factors in rule [*Criteria for determining level of liability*].

DRAFTING NOTE: As above with rule 44.23, the question arises of the criteria to which the court should have regard in determining what would be a reasonable sum for the party to pay. These would be the same criteria for this rule and rule 44.23, so it is proposed that they should be set out in a separate rule cross-referenced to both.

- (2) An order made pursuant to paragraph (1) shall have not have retrospective effect save as provided in rule 44.27.

Assessment of severe financial hardship

- 44.26.—**(1) Unless otherwise ordered or agreed by the parties—
- (a) a party making an application under rule 44.20(3)(a) must file a statement of assets with the application notice;
 - (b) where a party makes an application under rule 44.20(3)(b), the respondent must file a statement of assets within 28 days of service of the application notice.
- (2) A statement of assets must be verified with a statement of truth and must set out in sufficient detail for the purpose of assessing severe financial hardship the assets of the party making the statement, including but not limited to details of income and capital wherever they may be and any insurance that may be relevant to the question of costs.

- (3) The court will not disclose a statement of assets to any other party without a hearing or the consent of the party making it.
- (4) The statement of assets will be referred to a judge who will give directions—
 - (a) as to the disclosure of the identity and assets of any person who is not a party to the proceedings but who has a financial interest in the proceedings;
 - (b) as to any further evidence that may be required for the purpose of assessing severe financial hardship;
 - (c) as to whether the statement of assets and any such further evidence are to be shown to any other party and, if so, whether subject to restrictions as to their further use or to whom else they may be shown;
 - (d) to the effect that failure to comply with any direction given under paragraph (c) may be a contempt of court;
 - (e) for the determination of the issue of severe financial hardship.
- (5) Directions under paragraph (4) will be given on paper without a hearing unless the judge directs otherwise.

Further provisions for the removal of costs protection

- 44.27.** The court may make an order setting aside a costs protection order with retrospective effect where it determines that the party who has the benefit of such an order—
- (a) has made a claim which has been found, on the balance of probabilities, to be fundamentally dishonest;
 - (b) has disclosed no reasonable grounds for bringing the proceedings;
 - (c) has abused the court's process; or
 - (d) has obstructed or attempted to obstruct the just disposal of the proceedings.

Miscellaneous

- 44.28.—** (1) Orders for costs made against a party who has the benefit of a costs protection order may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.
- (2) An order for costs which is enforced only to the extent permitted by a costs protection order shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

Criteria for determining level of liability

[This rule, when drafted, might be placed after rule 44.26.]

Annex C: The funding of defamation cases

47. While it seems that conditional fee agreements (CFAs) are a minority form of funding for defamation cases,²¹ there is no doubt some cases would not be funded in the absence of CFAs. CFAs are a type of 'no win no fee' agreement under which a lawyer does not receive a fee from their client if they lose a case, but can charge an uplift (known as a 'success fee') on top of their base costs if they win. The maximum success fee that a lawyer may charge is 100% of the ordinary legal costs. For those of modest means, the only option for funding a defamation case might be through a CFA; legal aid has never been available for these cases.
48. The other side's costs can be covered by after the event (ATE) insurance. ATE insurance protects the claimant from having to pay certain legal costs; this is a form of costs protection. It is a type of insurance taken out after the decision is made to begin legal proceedings, with the premium typically increasing as the case progresses and the costs incurred increase. ATE insurers undertake to pay the defendant's costs in the event that the claimant loses the case. They may also cover the claimant's disbursement costs and other expenses. The premium is typically never paid by claimants, but is recovered from defendants in cases which defendants lose. These additional costs – CFA success fee and ATE insurance premiums – are paid by the losing party, which is often a news publisher in defamation cases.

Lord Justice Jackson's Review

49. The Government has been concerned about the disproportionate costs of civil litigation, and the relatively risk free nature of bringing claims funded by 'no win no fee' CFAs. This issue was looked at in detail by Lord Justice Jackson, a Court of Appeal judge, who was appointed by the then Master of the Rolls in 2008 to investigate the high costs of civil litigation and to make recommendations for reform.
50. In January 2010, Lord Justice Jackson published his *Review of Civil Litigation Costs: Final Report*. He found that the CFA arrangements which then existed were 'the major contributor to disproportionate costs in civil litigation in England and Wales'.²² The rules on the recoverability of success fees and ATE insurance premiums, which still apply to defamation cases, mean that losing defendants have to pay winning claimants significantly more than they would be required to without this recoverability (often nearly three times their legal costs – base costs, (up to) 100% success fee, and ATE premium which can be 85% of the sum insured). He recommended that the recovery of CFA success fees and ATE premiums be abolished; he said that this

²¹ Statistics from the High Court suggest that 158 defamation proceedings were commenced in the Queen's Bench Division in 2010, although these do not provide a further breakdown of how these cases were funded. Data provided by the Media Lawyers Association to Lord Justice Jackson suggested that 27 out of 154 libel and privacy cases against the media in 2008 were funded by way of a CFA.

²² *Review of Civil Litigation Costs: Final Report* p. xvi.

would lead to 'significant costs savings, whilst still enabling those who need access to justice to obtain it'.²³

51. The Government consulted on the Jackson recommendations in November 2010 and published its response²⁴ in March 2011. The Government accepted the recommendations so far as they affected the funding of defamation cases and these reforms have been taken forward in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. A regime of costs protection, in the form of qualified one way costs shifting (QOCS), as recommended by Lord Justice Jackson was drawn up for personal injury cases. While the Government did not at first accept the case for costs protection in defamation cases (as recommended by Lord Justice Jackson),²⁵ it subsequently accepted Lord Justice Leveson's recommendations, which endorsed Lord Justice Jackson's recommendation on this point.
52. In addition, in January 2011, the European Court of Human Rights (ECtHR) delivered its judgment in *Mirror Group Newspapers (MGN) v UK*. This case involved a privacy claim by a very wealthy celebrity against a newspaper publisher. The ECtHR found that requiring the defendant media organisation to pay the success fee and ATE insurance premium of a very wealthy claimant was contrary to the Convention. The relevant provisions in the LASPO Act will address this and the Government intends to implement them at the same time as costs protection is introduced.

The Leveson Inquiry

53. In July 2011, the Prime Minister announced a two-part inquiry, chaired by Lord Justice Leveson, investigating the role of the press and police in the phone-hacking scandal. The Inquiry published the Leveson Report in November 2012, which reviewed the general culture and ethics of the British media, and made a number of recommendations including introducing a costs protection regime for defamation cases.
54. Lord Justice Leveson, in particular, recommended that '...qualified one way costs shifting be introduced for defamation, privacy, breach of confidence and similar media related litigation as proposed by Lord Justice Jackson'.²⁶
55. The Government has accepted Lord Justice Leveson's recommendation on costs protection and, as a result, on 12 December 2012,²⁷ the Government announced that implementation of the LASPO Act reforms – recoverability of CFA success fee and ATE insurance – would be delayed in defamation cases until a costs protection regime has been introduced.

²³ *ibid.*

²⁴ <http://webarchive.nationalarchives.gov.uk/20111209131620/http://www.justice.gov.uk/consultations/jackson-review.htm>

²⁵ The Government confirmed during the passage of the LASPO Act that QOCS would initially be available for personal injury cases only but it would consider the extension of QOCS – or a variant – to other categories of law, in due course, once there is some experience of the regime in personal injury.

²⁶ Inquiry Report, Chapter 3 para 6.10.

²⁷ Government written ministerial statement at: <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121212/wmstext/121212m0001.htm#12121236000008>

56. The Government gave its commitment to provide some form of cost protection so as not unduly to damage the interests of impecunious parties and, as a result, the Government announced on 9 October 2012²⁸ that it had asked the Civil Justice Council an independent advisory body, chaired by the Master of the Rolls, to look at the issue of costs protection in these cases, and report by the end of March 2013.
57. The Leveson Inquiry proposed a new self-regulatory body for media cases. Discussions on that proposal continue. The proposals in this paper would not cover those cases which are dealt with by a new self-regulatory body, but they would cover any cases which go to court (subject to the effect of section 40 of the Crime and Courts Act 2013 when implemented).

The Civil Justice Council (CJC)

58. The Government asked the CJC to undertake the following work:
1. To identify whether there are meritorious actions for defamation and privacy, which could not properly be brought or defended without some form of costs protection;
 2. If so identified, to advise –
 - (a) in which types of cases (or stages of cases) some form of costs protection should apply; and
 - (b) what options for costs protection might be considered, with their advantages and disadvantages.
 3. To provide written advice to the Ministry of Justice by the end of March 2013.
59. The CJC set up a Working Group and its report was published on 18 April 2013.²⁹ The Working Group's membership was drawn from a representative range of interested parties and its report sets out many of the issues involved. While the report recommended a variation of the QOCS regime, it did not seek to provide definitive answers and conceded that further work would be necessary. The Government welcomed the report and committed to consult on proposals for costs protection in defamation cases before they come into effect.³⁰

²⁸ Hansard, 9 October 2012: Col 935:
<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121009-0001.htm#12100930000302>

²⁹ http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/CJC%20papers/Defamation%20costs_final%20report_18%204%2013%20d.doc

³⁰ <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/130423-0001.htm#13042379000274>

The benefits of a reformed CFA regime with costs protection

60. When the costs protection regime for defamation cases is implemented alongside the LASPO Act reforms, a claimant whose claim is funded under a CFA and qualifies for full or partial costs protection, and wins, will be liable to pay the success fee out of damages. However, it is worth noting that general damages for non-pecuniary loss such as pain, suffering and loss of amenity are being increased by 10%,³¹ in part to compensate for claimants having to pay the success fee. The 10% increase applies in all tort cases and successful claimants in a defamation case will receive the 10% increase when the Part 2 reforms apply to these cases.
61. A losing party will remain liable for the winning party's costs in the usual way but will not pay either the success fee or the ATE insurance premium. This will lead to considerable costs savings for defendants.

³¹ *Simmons v Castle* [2012] EWCA Civ 1288.

Annex D: Costs protection in personal injury cases – the building blocks for defamation

Lord Justice Jackson's recommendation

62. In his *Review of Civil Litigation Costs*, Lord Justice Jackson recommended the introduction of a costs protection regime for personal injury claims (including clinical negligence). This regime is known as qualified one way costs shifting (QOCS). He proposed a rule³² to the effect that the costs that a claimant should be required to pay a defendant:

'shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:

- (a) the financial resources of all the parties to the proceedings, and
- (b) their conduct in connection with the dispute to which the proceedings relate.'

63. While that rule was based on the 'legal aid shield' which had existed for some time, the Government considered that it needed to be modified in two important respects before the rule could be adopted for personal injury cases, in relation to resources (or means) and conduct. In both respects it was felt that much greater certainty from the outset would be needed than the draft rule allowed.

Financial resources: a means test

64. Lord Justice Jackson proposed that there should be a financial test for the application of QOCS – i.e. that the 'conspicuously wealthy'³³ should not benefit from this form of costs protection. However, as development of the QOCS regime progressed, it became clear that there was no appetite for a means test in relation to personal injury claims. There are hundreds of thousands of these cases each year, typically brought by an individual against an insured or otherwise well-resourced body. It did not seem proportionate to introduce a means test for all of these cases which would only have an impact in a very small number of cases (there was no evidence that the very wealthy were bringing unsuccessful personal injury claims in any number; in any event, the vast majority of personal injury claims settle, very few fail). The Government therefore accepted that means was not a relevant issue in personal injury cases, although it could well be an issue in other categories of proceedings were the scope of QOCS to be expanded.

Conduct

65. Secondly, the Government considered that there should be some certainty about when QOCS (costs protection) is lost through the claimant's conduct. The Government accepted that claimants, defendants and judges needed to have greater certainty from the outset about what behaviour might result in the loss of QOCS protection. This would assist the hundreds of thousands of claimants across the country to make better informed decisions about the handling of cases.

³² *Review of Civil Litigation Costs: Final Report*, pp. 189–190, para 4.7.

³³ *Review of Civil Litigation Costs: Final Report*, p. 190, para 4.8.

The QOCS regime for personal injury cases

66. The QOCS regime for personal injury cases is now set out in the Civil Procedure Rules (CPR).³⁴ It will provide protection limiting the costs that a claimant might have to pay to the other side if the claim is lost.³⁵ A losing defendant remains liable for the claimant's costs in the usual way. This general protection is subject to exceptions in the light of the claimant's behaviour,³⁶ and their acceptance of appropriate offers to settle. As a result, QOCS is generally available to claimants in personal injury cases from 1 April 2013, but it is (as its name suggests) a one-way protection: it is not available to defendants.
67. QOCS protection in personal injury claims does not prevent costs orders being made against a claimant (unless one of the exceptions applies). Rather, although costs orders may be made in the usual way, they can only be enforced by way of set-off against any damages (and interest on those damages) secured by the claimant. A losing claimant will accordingly (unless one of the exceptions applies) pay no costs to the defendant because the claimant has secured no damages against which the defendant's costs can be set-off.
68. In the exceptional case where there is a costs order specifically against a winning claimant³⁷ the costs would be recoverable – but only (because of the nature of QOCS protection) by way of set-off against the damages. Unless one of the exceptions to QOCS protection applies, a winning claimant will never have to pay in costs more than the damages awarded. The rationale for the approach is to retain case management discipline by deterring claimants from arguing unnecessary points or including dishonest elements within a genuine claim which incur costs.
69. The effect of 'Part 36' offers³⁸ is an important consideration. A claimant who does not accept the defendant's Part 36 offer to settle, but does not ultimately beat that offer will, on the standard Part 36 offer basis, be liable for the defendant's additional costs incurred after the time of the offer that the claimant did not accept and failed to beat. Those additional costs may be recovered by the defendant, but only by set-off up to the level of the damages awarded (on the same basis as costs of 'bad applications in good cases').

Why not simply extend the QOCS regime to defamation cases?

70. Clearly, if it were possible to do so, it would be a relatively simple process to amend the CPR to extend the existing QOCS regime. The issue would be limited to the merits of doing so, and the Government has already accepted the case for a costs protection regime in defamation cases.

³⁴ CPR 44.13–44.17, <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs#sectionII>

³⁵ ATE insurance will no longer be necessary, although it remains available to claimants at their own expense.

³⁶ CPR 44.15 in particular.

³⁷ For example, in relation to a failed application in the case.

³⁸ CPR Part 36, <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part36>

71. However, the Government believes that there are two fundamental differences between personal injury and defamation cases as far as costs protection is concerned that require some amendment to the existing rule.
72. First, means ought to be taken into account in a way which is simply not necessary or practical for personal injury claims: the very wealthy feature regularly as claimants in the relatively small number of defamation claims. The Government therefore believes that it is important to have a means test in defamation cases. The Government does not believe, for example, that an extremely wealthy individual who is able to pay the other side's legal costs should get any costs protection in a case.
73. Second, QOCS works to protect a claimant against a well-resourced defendant. However, in defamation cases, the less well resourced party can often be the defendant, perhaps against a very wealthy claimant. As a result, costs protection in defamation needs to be capable of applying to either (and perhaps each) side.
74. The existing QOCS rule for personal injury cannot therefore simply be extended to defamation cases. That said, the Government accepts – as recommended by the Civil Justice Council – that it provides a sound basis on which to build. This option, which seems more flexible and adaptable to the variety of scenarios that might arise in defamation cases, is preferred as a regime to protective costs orders (PCOs), as introduced in Environmental Judicial Review claims falling within the Aarhus Convention.³⁹ That said, these proposals do not seek to restrict the court's powers, for example in relation to the making of PCOs more generally.

³⁹ From April 2013, the Civil Procedure Rules have been amended (see CPR 45.41–44) to provide a certain and affordable level of costs protection for applicants in judicial review cases within the scope of the Aarhus Convention. Protective costs orders, or PCOs, will limit claimants' liability to pay the defendant's costs to £5,000, if they are an individual and, £10,000 where the claimant is an organisation. The liability of defendants to pay the claimant's costs will be set at £35,000. The fixed recoverable costs for both the claimant and defendant cannot be challenged, but the fixed costs regime will not apply if the claim is not within the scope of the Convention.

About you

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Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 8 November 2013 to:

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If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

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Publication of response

A paper summarising the responses to this consultation will be published by April 2014. The response paper will be available online at <https://consult.justice.gov.uk/>

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

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<https://www.gov.uk/government/publications/consultation-principles-guidance>

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