

Title: Costs protection in defamation and privacy claims: the Government's proposals IA No: 217 Lead department or agency: Ministry of Justice Other departments or agencies:	Impact Assessment (IA)		
	Date: 06/09/2013		
	Stage: Consultation		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
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Summary: Intervention and Options	RPC Opinion: Not applicable
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out?	Measure qualifies as
£m	£m	£m	Yes	Zero net cost
			Yes	Zero net cost

What is the problem under consideration? Why is government intervention necessary?

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 base costs of his or her lawyer - without costs protection a losing claimant would nevertheless be responsible for the defendant's legal costs (and vice versa). Without costs protection, the losing party may be presented with a sizeable legal bill, the payment of which may be beyond the reach of most people. The proposals take forward recommendations of Lord Justice Jackson and Lord Justice Leveson. Government intervention is necessary as the proposals require secondary legislation.

What are the policy objectives and the intended effects?

The primary objective of the proposals is to enable poorer parties in defamation cases, whether claimants or defendants, to be able to litigate where necessary, without the fear of exposure to substantial costs that they might be ordered to pay to the other side if they lose. The objective is not to extend that protection to very wealthy parties.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 0: Do nothing, i.e. apply the same claimant cost protection measures which have already been implemented for personal injury (PI) cases (i.e. the 'qualified one-way costs shifting' (QOCS) regime). QOCS in personal injury cases only protects claimants and does not extend to defendants. Under this scenario, the defendant would always be liable to meet their own legal costs, even in cases which the defendant wins, no matter how wealthy the claimant is. The QOCS regime applies to all cases, not just those funded by 'no win no fee' arrangements. **Option 1:** Apply a restricted version of the QOCS regime, again applying to all cases, not just those funded by 'no win no fee' arrangements. **Option 1a)** Provide full cost protection only to claimants with lowest financial means, and provide partial cost protection to claimants with higher, but still modest financial means. **Option 1b)** Provide full cost protection for defendants with lowest financial means, and apply partial cost protection to defendants with higher, but still modest financial means. The preferred option is to apply both **Option 1a** and **Option 1b** as this meets the objectives.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 04/2016-2018, as part of the PIR of Part 2 of Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY:  Date: 12/09/2013

Summary: Analysis & Evidence

Policy Option 1a

Description: Reduce the degree of cost protection provided to claimants, compared to the base case

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

Current data and evidence does not enable costs to be monetised.

Other key non-monetised costs by 'main affected groups'

Claimants with modest or more substantial financial means would become more exposed to the defendants' legal costs in cases which the claimant loses because they would not qualify for as much costs protection. This is a transfer payment. Relating to this, claimants may pursue fewer weaker claims. Legal services providers may experience a reduction in business if fewer weaker defamation claims are brought. HMCTS receive less overall court fee income from fewer defamation cases, comparable to the overall reduction in court costs from fewer cases.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Current data and evidence does not enable benefits to be monetised.

Other key non-monetised benefits by 'main affected groups'

Defendants could pass all or part of their costs to claimants who no longer benefit from complete costs protection, in cases where the defendant wins. This is a transfer payment. Defendants gain if there is a decrease in the number of weaker claims brought. A reduced volume of cases may save legal costs for claimants as well as for defendants. Legal services providers may allocate resources freed up from fewer defamation cases to other profitable activities. HMCTS incur reduced overall court costs from fewer defamation cases, comparable to the overall reduction in court fee income.

Key assumptions/sensitivities/risks

Discount rate (%)

We assume that there is a reduction in weaker cases pursued by claimants affected by the proposals, due to their increased legal costs exposure.

We assume that the change in overall HMCTS court fee income is comparable to the change in overall HMCTS court costs.

BUSINESS ASSESSMENT (Option 1a)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Summary: Analysis & Evidence

Policy Option 1b

Description: Increase the degree of cost protection for defendants, compared to the base case

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised costs by 'main affected groups'

Current data and evidence does not enable costs to be monetised.

Other key non-monetised costs by 'main affected groups'

Claimants would recover less of their own legal costs from defendants in cases which the defendant loses and where the defendant has low or modest financial means. This is a transfer payment. Relating to this, defendants may challenge an increased number of weaker claims, which may increase legal costs for claimants and for defendants. HMCTS may incur higher overall costs from an increase in cases challenged.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Current data and evidence does not enable costs to be monetised.

Other key non-monetised benefits by 'main affected groups'

Defendants could avoid paying all or part of the claimant's costs where the defendant secures cost protection, in cases where the defendant loses. This is a transfer payment. Relating to this, defendants may challenge a greater number of weaker cases in the future if they have the benefit of costs protection. Legal services providers may gain from an increase in business from an increase in cases being challenged. HMCTS receive more overall court fee income from more defamation cases, comparable to the overall increase in court costs.

Key assumptions/sensitivities/risks

Discount rate (%)

We assume that there is an increase in the number of weaker cases challenged by defendants with low or modest financial means, because they are less likely to be exposed to the legal costs of the claimants. We assume that the change in overall HMCTS court fee income is comparable to the change in overall HMCTS court costs.

BUSINESS ASSESSMENT (Option 1b)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	IN/OUT/Zero net cost

Evidence Base (for summary sheets)

1. Introduction

Background

- 1.1 In civil litigation in England and Wales it is usually the case that the winning party can recover their legal costs from the losing party. The losing party remains liable for their own legal costs. In cases where legal costs are high this exposure to costs can influence whether a case is brought, how quickly it is settled, and the settlement outcome. Potential exposure to costs can also influence prior behaviours, for example a business or an individual may avoid getting into a situation when a claim might be brought given associated costs exposure.
- 1.2 The Government has recognised that some particular litigants should generally be protected from having to pay the other side's legal costs if their case is unsuccessful. Without some costs protection, claimants and defendants who lose can be presented with a sizeable bill, the payment of which may be beyond the reach of most people. The Government has already introduced costs protection in the form of Qualified One-way Costs Shifting, or QOCS, for personal injury (PI) claims, which came into effect on 1 April 2013. The QOCS PI regime provides protection by strictly limiting the costs that a claimant might have to be pay to the defendant in cases which the claimant loses.
- 1.3 The Government has also accepted Lord Justice Leveson's recommendation¹ that this costs protection - or a variant of QOCS – should be extended to defamation and privacy cases (referred to as 'defamation cases' from here on for the sake of brevity). 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. Under the proposals, defendants, for example, may decide to defend a defamation claim which they consider should be challenged, rather than settling unmeritorious claims in order to avoid exposure to legal costs. This rationale also includes claimants maintaining a credible threat of challenge rather than not pursuing meritorious claims in order to avoid exposure to costs.
- 1.4 The rationale for the reforms is also to ensure that defendants do not engage in excessively risk averse behaviour in order to avoid potentially being subject to a claim and potentially being exposed to costs.

Problem under consideration

- 1.5 The Government has delayed implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) for defamation cases until a costs protection regime is in place. The Part 2 reforms take forward Lord Justice Jackson's recommendations to control the costs of civil litigation, especially in relation to 'no win no fee' funded cases. The Part 2 reforms address how civil cases are funded and the costs involved in bringing and defending them. These reforms apply across civil litigation and generally came into force on 1 April 2013 (although the Part 2 reforms do not yet apply either to mesothelioma cases or to proceedings in respect of, and relating to, insolvency proceedings).
- 1.6 In January 2011, the European Court of Human Rights (ECtHR) delivered its judgment in *Mirror Group Newspapers (MGN) v UK*. This case involved a very wealthy celebrity pursuing a case against a newspaper publisher. In that case, the ECtHR found that requiring the losing defendant media organisation to pay all of the legal costs (including the success fee and After The Event (ATE) insurance premium where applicable) of a very wealthy claimant in cases funded by 'no win no fee' agreement was contrary to the law. The relevant provisions in the LASPO Act will address this as they require claimants with 'no win no fee' cases to pay success fees and ATE premiums where applicable themselves rather than the losing defendant paying these. The Government intends to implement the LASPO provisions at the same time as costs protection is introduced.

¹ Inquiry Report, chapter 3, para 6.10

1.7 One 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 varied, with a variety of scenarios of differing resources of both claimant and defendant, and their disparity. For example, cases can also involve a claimant of modest means against a well-resourced newspaper, or a wealthy claimant against a small publisher or an individual. Defamation cases do not always involve publishers; they may also involve other types of business or organisations. Likewise, defamation cases also do not always involve individuals.

1.8 As a result of this disparity in means which applies in some cases, the primary objective of the proposals is to provide appropriate costs protection depending on the circumstances of each case: complete costs protection for those claimants and defendants with the lowest financial means; partial costs protection for those claimants or defendants with higher, but still modest financial means; and no costs protection for very wealthy claimants or defendants. If not otherwise guided by these reforms, the level of any costs protection would be determined by a judge on a case by case basis, possibly requiring additional court hearings. This proposal will enable parties with the lowest financial means, whether claimants or defendants, to pursue legal action in defamation cases, without the fear of exposure to substantial legal costs that they might be ordered to pay to the other side in cases that they lose.

Rationale for intervention

1.9 The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there is a perceived failure in the way a market operates (“market failures”) or if it would like to correct existing institutional distortions (“government failures”). The Government may also intervene for equity (fairness) and redistributive reasons (e.g. to reallocate goods and services to the more needy groups in society).

1.10 In this case, the intervention would be justified primarily on equity (fairness) grounds. Providing proportionate cost protection for defendants and claimants with low and modest means may generate improvements in equity (fairness) by enabling litigation to be pursued on the merits of the case, rather than dissuading meritorious actions by defendants and claimants on account of potential financial exposure.

Policy objectives

1.11 The specific policy objectives and intended effects are as follows:

- Claimants should be able to pursue meritorious claims rather than not pursuing them in order to avoid costs exposure. Claimant access to justice should be maintained. Where defendants are media companies this may have a positive impact on editorial and publication decisions, and this may be in the public interest.
- Claimants may no longer pursue weaker or unmeritorious claims, which they might lose if these claims were defended. A reduction in claims which are unsuccessful would generate benefits for both claimants and defendants.
- 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).
- Defendants should be able to defend unmeritorious claims rather than settling them in order to avoid costs exposure.
- Defendants may engage in less excessively risk-averse behaviour in order to avoid potentially being subject to defamation claim, including weaker or unmeritorious claims.

Policy options under consideration

1.12 The base case for this Impact Assessment is that the same claimant costs protection measures – QOCS in personal injury cases – would apply. QOCS only protects claimants and it is not available for defendants. Claimant costs protection is not dependant on means. Under QOCS the defendant would always be liable to meet their own legal costs, even in cases which the defendant wins, no matter how wealthy the claimant is.

1.13 The policy options under consideration – relative to this base case – are:

- **Option 1a:** Remove claimant cost protection for claimants with substantial means, provide full cost protection for claimants with the lowest financial means, and provide partial cost protection for claimants with higher, but still modest financial means.
- **Option 1b:** Provide full cost protection for defendants with the lowest financial means, provide partial cost protection for defendants with higher, but still modest financial means, and provide no cost protection for the wealthiest defendants
- The Government would prefer to adopt both Option 1a and Option 1b.

Quantification issues

1.14 The majority of the impacts on different parties identified in this Impact Assessment cannot currently be monetised with certainty, in part due to a lack of robust baseline data and also due to unknown behavioural responses. These might relate to decisions to bring cases and to settle cases. Over the consultation period we would hope to obtain the necessary data and evidence to make quantitative predictions of how relevant variables would change compared to the baseline in future.

1.15 The following key data and information would be required in order to monetise the main expected aggregate impacts of the proposed reforms.

- The total volume of defamation cases
- The average damages per case
- The average legal costs per case for claimants and for defendants
- The overall success rate of all cases
- The proportions of defendants and of claimants which are businesses
- In each of the above, baseline information before the reforms would be required as well as estimates of how these variables would change following the reforms.

1.16 This section describes three current sources of evidence and data on defamation cases. In addition we set out the information we would need to create a robust baseline and to monetise the impacts of the proposals.

(i) Published court statistics

1.17 Published statistics from the Judicial and Court Statistics provide information on the number of defamation cases where court proceedings are issued, and the expected value of the claim as specified at the outset. An average of 226 defamation cases per year issued court proceedings from 2004 to 2012, as summarised in Table 1.

Table 1: Defamation claims issued in the Royal Courts of Justice²

Nature of claim (Royal Courts of Justice only)	Value of claim			Total
	Year claim issued	£15,000 - £50,000	Over £50,000	
2004	30	31	206	267
2005	43	70	139	252
2006	24	39	150	213
2007	43	45	145	233
2008	43	77	139	259
2009	52	62	184	298
2010	27	47	84	158
2011	28	61	76	165
2012	65	60	61	186

(ii) Published data from industry bodies

1.18 The Media Lawyers Association (MLA) provided information to Lord Justice Jackson's *Review of Civil Litigation Costs*. This was published as part of Lord Justice Jackson's final report. The report and appendices can be found here: <http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/reports>.

1.19 This information relates to 154 cases pursued by MLA members in 2008, which include nine national newspaper groups, broadcasters and news agencies as well as local newspaper publishers. The MLA did not provide information on claims against non-media organisations.

1.20 The MLA data suggests that 33% of cases are won by defendants and 67% are won by claimants. The MLA information has not been verified by the Government.

1.21 Table 2 below provides some summary information on the costs and damages recorded by the MLA. In over half of the cases no defendant costs are recorded at all. The Jackson Review notes that these are likely to be cases handled by media defendants' in-house lawyers and settled quickly. This might be because they were claims where the defendant saw immediately that it made an error and admitted liability. In some cases either no damages are specified or damages are explicitly rolled in with costs in a single payment.

² Judicial and Court Statistics from 2004 to 2011, Ministry of Justice.
<https://www.gov.uk/government/organisations/ministry-of-justice/series/courts-and-sentencing-statistics>

Table 2: information on legal costs in cases involving Media Lawyers Association (MLA) in 2008³

	Number of cases	Min (to nearest £100) - Max (to nearest £100)	Average (mean) (to nearest £100)
Defendants' costs in cases where damages are recorded as zero, interpreted as cases won by defendants	51	£0 - £49,000	£2,500
Claimants' cost in cases where damages are not recorded as zero, interpreted as cases won by claimants, and there is no conditional fee agreement	72	£0 - £2,000,000	£44,000

Note: zero costs are included in the average cost calculations. Cases won by claimants that included conditional fee agreements were excluded to give an indication of base costs. An additional 7 cases were excluded because the damages were included in the costs paid, and an additional 24 cases were excluded where the claimant won but there was CFA included in the costs. This takes us to the total of 154 cases.

(iii) Unpublished internal HMCTS management information

- 1.22 In 2013 the MoJ conducted an internal case file review of defamation cases where court proceedings were issued. This covered 127 cases over the years 2009 to 2013.
- 1.23 In many cases these court case files did not capture much information on legal costs, case outcomes nor on damages awarded, had especially when cases were settled out of court after proceedings been issued.
- 1.24 This case file review did, however, provide useful information on the nature and identity of claimants and defendants, including whether they were businesses or individuals. This information is summarised below. Information was recorded on the employment status and occupation/industry in which the claimant and defendant were employed, or previously employed. While this information was not explicitly recorded in the file, it could often be deduced from the case details.
- 1.25 Claimants and defendants were placed in one of the SIC 2007 industry codes. Table 3 gives the occupation of the claimant by SIC code. While the industry code of the claimant was unknown in 35% of cases, 13% of claimants fell into the category 'arts, entertainment and recreation'. Other common industry codes included 'professional, scientific and technical activities' (10%) and 'public administration and defence' (9%).

³ The full dataset can be found at <http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/reports>

Table 3: Claimant occupation by industry

Industry	Number	Percentage
Unknown	44	35%
Arts, entertainment and recreation	16	13%
Professional, scientific and technical activities	13	10%
Public administration and defence; compulsory social security	11	9%
Human health and social work activities	9	7%
Education	8	6%
Information and communication	6	5%
Financial and insurance activities	5	4%
Real estate activities	5	4%
Transportation and storage	5	4%
Administrative and support service activities	1	1%
Agriculture, Forestry and Fishing	1	1%
Construction	1	1%
Other service activities	1	1%
Unemployed	1	1%
Total	127	100%

Note: individuals who were identified as businessmen were placed in the 'professional, scientific and technical activities' industry.

1.26 The occupation of the defendant was known in a higher proportion of cases as this often related to the nature of the claim, with industry code 'unknown' in only 16% of cases. The most common industry code which defendants fell into was 'Information and communication'; 46% of defendants fell into this category.

Table 4: Defendant Occupation by Sector

Industry	Number	Percentage
Information and communication	59	46%
Unknown	20	16%
Public administration and defence; compulsory social security	13	10%
Financial and insurance activities	7	6%
Professional, scientific and technical activities	6	5%
Arts, entertainment and recreation	5	4%
Human health and social work activities	5	4%
Education	3	2%
Real estate activities	2	2%
Transportation and storage	2	2%
Wholesale and retail trade; repair of motor vehicles and motorcycles	2	2%
Administrative and support service activities	1	1%
Agriculture, Forestry and Fishing	1	1%
Manufacturing	1	1%
Total	127	1

Main Affected Groups

1.27 The following groups are expected to be affected by the proposals:

- Claimants or potential claimants in defamation cases. This may include individuals, businesses and other organisations;
- Defendants or potential defendants. This may include primary publishers and authors including journalists, NGOs, academics and scientists, as well as other individuals, businesses and organisations in other sectors;
- HM Courts and Tribunals Service (HMCTS) and the judiciary; and
- Legal services providers.

2. Costs and Benefits

1.28 This Impact Assessment (IA) identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding the overall impact of implementing the options considered. The costs and benefits of each option are compared with the 'do nothing' option. In the description of costs and benefits below, it should be noted claimants and defendants can both be either individuals or businesses.

Option 0: Base case (do nothing)

1.29 In this Impact Assessment under the 'do-nothing' option the QOCS regime for personal injury cases would also apply to defamation cases. Claimants would have full cost protection irrespective of their financial means and would not pay the defendant's legal costs if the defendant wins. Defendants on the other hand would have no cost protection and would be liable for the claimant's legal costs if the claimant wins. The 'do nothing' option is compared against itself and therefore its costs and benefits are necessarily zero, as is its Net Present Value (NPV).

Assumptions

1.30 The following key assumptions apply to the assessment of expected costs and benefits of Options 1a and 1b:

- Claimants with modest or substantial financial means pursue fewer unmeritorious cases, as they benefit from less costs protection compared to the base case. Such claimants are therefore exposed to more costs if they lose, and hence are less likely to pursue weaker cases. This is assumed to lead to a reduction in case volumes.
- Defendants with the lowest or with higher, but modest, financial means contest more cases, as they benefit from more costs protection compared to the base case. Such defendants are therefore less exposed to costs if they lose, and hence more likely to contest weaker cases. This is assumed to lead to an increase in case volumes.

Option 1a: Restrict full cost protection to claimants with the lowest financial means only. Claimants with higher, but modest, financial means are entitled to partial cost protection. Claimants with substantial financial means would have no cost protection.

1.31 Under this option, compared to the base case used in this Impact Assessment, claimants would benefit from less costs protection, depending upon their financial means. The wealthiest claimants who lose a case would pay all of the defendant's costs, and claimants with modest financial means would pay some of the defendant's costs – compared to the base case position where claimants who lose do not pay the defendant's costs, for claimants of all financial means.

Benefits

Benefits to Claimants

- 1.32 It is assumed that claimants with some or with substantial financial means will pursue fewer weaker cases as a result of the reforms. Such claimants may avoid incurring legal costs as a result of bringing fewer claims.

Benefits to Defendants

- 1.33 Defendants are able to pass some or all of their legal costs to claimants in cases where the claimant loses. This would take the form of a transfer payment from defendants to claimants.
- 1.34 Defendants could benefit from fewer weaker cases being brought by claimants with modest or more substantial financial means. These benefits may include reduced legal costs.

Benefits to HM Courts and Tribunals Service (HMCTS) and the judiciary

- 1.35 It is assumed that claimants with some or substantial financial means will pursue fewer weaker cases as a result of the reforms. This would reduce overall court costs and also reduce overall HMCTS court fee income.
- 1.36 The net financial impact on HMCTS is expected to be neutral as HMCTS operates on a cost recovery basis in the longer term. Overall, HMCTS court fees are set to recover the costs associated with court cases. In this instance the reduction in overall court fee income associated with defamation cases is assumed to match the reduction in overall court costs associated with defamation cases. The court costs per defamation case are also assumed to remain the same, as are court fees per case. The reforms would lead to some HMCTS resource which was previously allocated to the existing defamation cases affected by this Option being freed up for other court cases (including new defamation cases which arise under Option 1b).

Benefits to Legal Service Providers

- 1.37 There are no direct benefits to legal services providers.

Costs

Costs to Claimants

- 1.38 Under the reforms the claimants who have more substantial financial means and lose their case will now be fully liable for legal costs incurred by the defendant, and those with modest financial means will be partially liable. This cost takes the form of a transfer payment from claimants to defendants.
- 1.39 It is assumed that there will be a reduction in the number of weaker defamation cases brought by such claimants due to the increase in their legal cost exposure.

Costs to Defendants

- 1.40 There are no direct costs to defendants.

Costs to HM Courts and Tribunals Service (HMCTS) and the judiciary

- 1.41 As explained above, the overall impact on HMCTS is expected to be neutral. Whilst a reduction in defamation case volumes would lead to a reduction in overall court fee income, this would be balanced by a comparable reduction in overall court costs relating to defamation cases.

Costs to Legal Services Providers

1.42 Legal services providers may experience a fall in demand due to fewer weaker cases being pursued by claimants. This would be a secondary impact of the reforms. This would free up resources to be devoted to other profitable activities.

Option 1b: Defendants with the lowest financial means are entitled to full cost protection. Defendants with higher, but modest financial means are entitled to partial cost protection. Defendants with substantial financial means have no cost protection.

1.43 Under this option, compared to the base case, defendants with some or full costs protection would be less exposed to claimants' legal costs in cases where the defendant loses. Claimants would have to pay all or some of their own legal costs in cases where the defendant loses and has full or partial cost protection.

Benefits

Benefits to claimants

1.44 There are no direct benefits to claimants.

Benefits to defendants

1.45 Defendants with the lowest financial means experience a costs saving when the claimant wins the case, as they would no longer be liable for the claimant's legal costs. Defendants with higher, but modest financial means benefit from a partial costs saving in legal costs when the claimant wins the case, as they would no longer be fully liable for the claimant's legal costs. This benefit takes the form of a transfer payment from claimants to defendants.

1.46 Defendants with the lowest financial means and those with modest financial means may be more willing to contest weaker cases because of their decreased exposure to the claimant's legal costs if the claimant wins the case. It is assumed that this may lead to an increase in cases contested.

1.47 These benefits would only apply to defendants who lose their case. Such defendants are classed as being 'non-compliant' for the purposes of the One In Two Out calculation (see later section on this).

Benefits to HM Courts and Tribunals Service (HMCTS) and the judiciary

1.48 It is assumed that defendants with the lowest and with modest financial means will defend weaker cases as a result of the reforms. This may increase overall court costs and also increase overall HMCTS court fee income.

1.49 The net financial impact on HMCTS is expected to be neutral as HMCTS operates on a cost recovery basis in the longer term. Overall, HMCTS court fees are set to recover the costs associated with court cases. In this instance the increase in overall court fee income associated with defamation cases is assumed to match the increase in overall court costs associated with defamation cases. The court costs per defamation case are also assumed to remain the same, as are court fees per case.

Benefits to Legal Service Providers

1.50 Legal services providers may experience an increase in business from defendants with the lowest and with modest financial means being more willing to defend themselves against weaker defamation claims.

Costs

Costs to Claimants

- 1.51 Claimants who win their case will be liable to pay some or all of their legal costs if the defendant has partial or full cost protection. This cost takes the form of a transfer payment from claimants to defendants.
- 1.52 It is assumed that there will be an increase in the number of defamation cases contested, in particular, those challenged by less financially well off defendants. This may result in an increase in legal costs for claimants as they have to pursue, possibly through the courts, cases that previously would have been settled.

Costs to Defendants

- 1.53 As above, it is assumed that there will be an increase in defamation cases, in particular those challenged by less financially well off defendants. This may result in an increase in legal costs for defendants (if they do not benefit from complete costs protection).

Costs to HM Courts and Tribunals Service (HMCTS) and the judiciary

- 1.54 As explained above, the overall impact on HMCTS is expected to be neutral. Whilst an increase in defamation case volumes would lead to an increase in overall court costs relating to defamation cases, this would be balanced by a comparable increase in overall court fee income relating to defamation cases.

Costs to Legal Service Providers

- 1.55 There are no direct costs to legal services providers.

Risks

- 1.56 Under Option 1a it is assumed that claimants affected by the reforms will make fewer weaker claims, leading to a reduction in case volumes. Defendants are less financially exposed when such claimants bring a case. There is a risk that where such claimants still make claims in future, defendants are more likely to challenge them given the reduced defendant cost exposure. This increase in challenges may lead to a rise in case volumes. If this risk materialises it is unclear whether there would be an overall change in case volumes.
- 1.57 Under Option 1b it is assumed that defendants affected by the reforms will challenge more claims, leading to an increase in case volumes. This is because defendants secure more costs protection than under the base case. As a consequence, claimants are more financially exposed when they bring a case. There is a risk that as a result claimants may make fewer claims in future, reducing case volumes. If this risk materialises it is unclear whether there would be an overall change in case volumes.

Overall impact of implementing both Option 1a and Option 1b

- 1.58 In summary the above analysis of costs and benefits suggests the following combined effect of implementing both Option 1a and Option 1b:
- Claimants may pursue a reduced volume of weaker cases, may be more liable to pay their own legal costs in cases they lose, and may be less able to recover their costs from defendants in cases defendants lose.
 - Defendants may challenge an increased volume of weaker cases, may be more able to recover their costs from claimants in cases claimants lose, and may be less liable to pay the claimant's costs in cases the claimant wins.

- The impact on court case volumes is ambiguous as any reduction in the volume of cases pursued by claimants may be offset by any increase in the volume of cases challenged by defendants. HMCTS operates on a cost recovery basis in the longer term. As such, changes in overall court costs should be comparable to changes in overall court fee income. If there was a net reduction in court case volumes the court resources freed up may be used to reduce court case waiting times and case durations including in other areas.
- There are no direct impacts on legal services providers. If there was a net change in the volume of cases there may be an increase or a reduction in levels of business for legal services providers. If there was a reduction this would free up their resources for other profitable activities.

One in Two Out Assessment

- 1.59 The impacts on non-compliant bodies are not included in the One In Two Out assessment. In relation to the proposals in this Impact Assessment, non-compliant bodies would be defendants who lose their case. Indirect impacts are also not included in the One In Two Out assessment. This would include the impacts on legal services providers.
- 1.60 The gross and net impacts on business will depend upon the extent to which businesses are claimants and the extent to which they are defendants (as well as factors such as legal costs, settlement levels, success rates, and the financial means of claimants and defendants). These are being explored further over the consultation period.
- 1.61 Under Option 1a claimants would be worse off and defendants would gain, as a result of reduced claimant costs protection. These reforms affect cases where claimants lose. Claimants affected by the proposals would be worse off from covering more defendant costs than they do now, and defendants affected would gain to the same extent.
- 1.62 Under Option 1b claimants would also be worse off and defendants would gain, but as a result of increased defendant costs protection. These reforms affect cases where defendants lose. Claimants affected would be worse off from covering more of their own legal costs. The equivalent gain to defendants affected would not be captured in the One In Two Out assessment as they are non-compliant.
- 1.63 In addition the net impact on business would depend upon whether the reforms lead to changes in case volumes. It is ambiguous whether the overall volume of defamation cases will change, and this is being explored further over the consultation period. It is possible that case volumes may fall under Option 1a, i.e. that claimants would bring a reduced number of weaker claims, and that case volumes may increase under Option 1b, i.e. that defendants may challenge a higher number of weaker claims. Even if the overall number of cases remains broadly the same, there might be a difference in the mix of cases within this total, and this might have implications for the impacts on business.
- 1.64 Given the above analysis, the reforms have provisionally been assessed as an IN with zero net cost.

Small and micro business assessment

- 1.65 The costs and benefits of these reforms on business have been outlined above. Whilst it is unclear to what extent small (up to 49 employees) and micro businesses (up to 10 employees) might be affected within the category of all businesses, the reforms should preserve cost protection for claimants with more limited financial means, and introduce cost protection for defendants with more limited financial means. To the extent that small and micro businesses might qualify as having more limited financial means, the reforms would be beneficial for them in the ways outlined in the costs and benefits section of this Impact Assessment.
- 1.66 This assessment would change for small and micro businesses which pursue claims unsuccessfully, which qualify as having higher financial means, and which therefore receive less claimant cost protection in future than they do under the base case. These small and micro businesses would be worse off in the future as they would need to cover the costs of winning defendants. It is unclear to what extent this applies. Furthermore the winning defendants might also

be small and micro businesses. If so there would be no net impact on small and micro businesses. Instead there would be a financial transfer from losing (claimant) small and micro businesses to winning (defendant) small and micro businesses.

- 1.67 This assessment would also change for small and micro businesses which pursue claims successfully against other small and micro businesses, in cases where the latter have low or modest financial means and secure full or partial costs protection in future. In such cases, however, the costs to claimant small and micro businesses would match the gains to defendant small and micro businesses and there would be no net impact on small and micro businesses. Instead, compared to the base case, there would be a financial transfer from winning (claimant) small and micro business to losing (defendant) small and micro business.
- 1.68 Small and micro businesses that are legal services providers may see a decrease in business from more wealthy claimants who pursue a smaller number of weaker claims in future, but may see an increase in business from defendants with low or with modest financial means who contest a higher number of weaker claims in future.
- 1.69 The consultation seeks evidence on the impact to small and micro business from these proposals.