



JUDICIARY OF
ENGLAND AND WALES

Media & Communications List Consultation Report

June 2017

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Introduction

The Media and Communications List was created in March 2017. It was intended to give new focus to this important specialism within the Queen's Bench Division and to modernise the listing arrangements. Mr Justice Warby was the obvious choice to be the Judge in charge of the List.

In May 2017, in order to identify the issues that might affect the work of the List, this consultation exercise was undertaken; it was particularly addressed to those who work within this field of law and other interested parties. I am delighted to introduce the short report which has resulted.

As I have emphasised on many occasions, the media play and have always played a vital role in our democracy. Media communication is also very powerful. Holding the balance between freedom of speech and other competing rights and interests has long been a delicate task. Today, the proliferation of different forms of media communication and the ever-increasing role these play in public and private life make that task all the more pressing and important.

Reading the report that Mr Justice Warby has prepared, it is good to see that the response rate to this swift consultation has been both comprehensive and detailed. It is also heartening to note that some clear and practical recommendations seem to be emerging. I look forward to hearing more about the progress of this initiative.

The Rt Hon Sir Brian Leveson
President, Queen's Bench Division

Background

The consultation which has led to this report represents a first, relatively small, step for the new Media and Communications List. The creation of that list and the initiation of this consultation deserve to be put in some historical context.

For most of the 20th century media litigation mainly consisted of claims for defamation, principally libel. Most cases were tried by jury, which was the default mode of trial prescribed by section 69 of the Senior Courts Act 1981. The jury list was managed by a Judge in Charge of the Jury List who, by tradition, was the most senior Queen's Bench Judge with an interest in taking on the role.

Much has changed since the 1990s, and in particular since the coming into force of the Human Rights Act 1998 at the turn of the century (the Act came into force on 2 October 2000).

- A Committee report of 1993 led in 1996 to the first Defamation Act for over 40 years. This was a combination of consolidation, updating, and innovation. Many of its provisions sought to address the major procedural problems of the era. Some of those problems flowed from the mode of trial which Parliament had prescribed as the norm, and the expense and uncertainty to which this was thought to lead. Thus, the 1996 Act made provision for defendants to make offers of amends, by which they could bring a defamation claim to a swift end, resulting – as the case law established – a ‘healthy discount’ when it came to damages. In an era when defamation claims fell outside the summary judgment regime contained in Order 14 of the Rules of the Supreme Court, the Act allowed for the first time a form of summary judgment, called “summary disposal”.
- The civil procedure reforms of the late 1990s made some of these changes redundant, or reduced their importance. The Civil Procedure Rules, introduced in 1997, made summary judgment available in defamation claims as in other litigation. At around the same time there were more major changes: the Protection from Harassment Act 1997, the Human Rights Act 1998 and the Data Protection Act 1998
- Since those years, judicial decisions have explored and determined the parameters of the new causes of action which this raft of legislation enacted, or ushered in. Misuse of private information has become at least as significant a cause of action as defamation for the media, and others who make or have to defend claims in respect of publication or communication. Defamation law has altered also, as a result of the HRA and further legislation in the form of the Defamation Act 2013.
- One of many important changes made by that Act was the abolition of the presumption in favour of jury trial. Defamation claims now stand on an equal footing with other kinds of claim, so far as the principles affecting mode of trial are concerned.

The decision of the President of the Queen's Bench Division in April 2017 to authorise the creation of a Media and Communications List reflected this shift in the nature of the work. The President recognised that the work of the Jury List had largely fallen away. The time had come to modernise, and create a post with responsibility for oversight of the wider range of causes of action that feature in modern media litigation.

One of the first tasks for the newly appointed Judge in Charge of the Media and Communications List was to find out what users of this aspect of the court service see as the major areas for procedural reform or updating.

The Consultation

Timing, aims, and scope

The consultation was announced on 3 May 2017. The announcement, which appears in full at Appendix A, explained the intention was to raise “a small number of procedural questions” including whether practitioners would find it helpful to form a Court Users’ Committee or hold a Court Users meeting. The intention was to embark on engagement with Court users in a modest, limited, but achievable way.

The consultation period was a mere 28 days. This was short, but deliberately so. The hope was that responses could be received, analysed and reported upon before the end of term on 31 July 2017. It is pleasing to be able to publish this report ahead of that deadline, and indeed before the end of June.

It was also a deliberate choice to keep the consultation questions narrow in scope. This was necessary if the self-imposed deadline was to be met, with the available resources. It was appropriate given that this has not been a consultation on concrete proposals, nor a wide ranging examination of all the procedural issues that arise in this kind of litigation. It has been, rather, an exercise in eliciting some broad views on a range of key questions, as a prelude to some deeper consideration of what changes are desirable and can be made to the way the court manages this category of litigation.

Another important aspect of the exercise was to discover whether there was any appetite amongst the professionals and others who regularly use the Media and Communications List to engage with the Court in a joint effort to bring about enhancements of the regime.

Consultation topics

There were 3 main consultation topics:

- The adequacy or otherwise of the relevant CPR and Practice Directions, and areas for improvement
- The adequacy of the regime for collecting statistics on media injunctions and means of improvement
- Whether respondents supported a meeting for users of the List and/or a Users’ Committee

The second topic was raised as a result of media reports suggesting that the existing regime pursuant to PD40F was not working in a satisfactory way.

The consultation response document appears in full at Appendix B

Mechanics

The consultation was announced via the Judiciary website and Twitter. It was reported on the Infromm media law blog, the 5RB website and other online portals.

Responses

Respondents

A total of 22 response forms was received, representing the views of the following:

- 6 solicitors' firms and, additionally
- 5 individual solicitors
- 3 newspaper publishing groups
- 2 barristers' chambers
- 1 individual barrister
- 1 court reporter
- 1 law reporter and 2 academics on behalf of an NGO
- The regulator, IPSO
- 1 litigant in person

A full list of consultation respondents appears in Appendix C to this report.

One individual emailed in response to the consultation announcement, stating that they would submit a form but none was received in the event. The information in the email has not been included in this report, as it was outside the scope of the consultation.

The questions and answers

Do you consider that the CPR and PDs adequately cater for the needs of those who litigate in this area?

YES	2
NO	18

What do you see as the single most important case management issue to be considered in this context?

Costs budgeting	13
Delay	5
Other	1

It has been suggested that the statistics on injunctions restraining freedom of expression are incomplete. What is your response to the following propositions?

The collection of statistics is worthwhile?

Agree	21
Disagree	0

The system of data collection is adequate?

Agree	2
Disagree	17

If you do not consider the system of data collection is adequate, what is your response to the proposition that the legal representatives should

(a) Complete and submit the data form

Agree	8
Disagree	10

(b) Prompt the Judge to complete the form

Agree	11
Disagree	7

Would you find it helpful to have a meeting for users of the Media and Communications List?

Yes	20
No	1

Would you support the creation of a Media and Communications List Users Committee?

Yes	20
No	1

Analysis

Main messages

The main messages of this consultation are clear:

- The overwhelming majority of respondents (about 81%) consider that the current CPR and PDs do not adequately cater for the needs of court users.
- Asked to identify the single most important case management issue, more than two thirds of respondents (some 68%) identify costs budgeting. Delay was picked out by a substantial minority, just below 25%. Only one other topic was identified, which is incorporated in the details below.
- Of those who expressed a view 100% considered the collection of statistics on injunctions was worthwhile, and 89% considered the system inadequate.
- Over 90% of respondents were in favour of a Court Users' meeting and the same percentage support the creation of a Court Users' Group.

In more detail

The CPR and PDs, etc.

The topics identified for change or attention covered a wide range, the main points being:

- Pre-action Protocols
 - Defamation protocol: claimant should be obliged to specify meaning and precise monetary relief claimed; replace reference to Press Complaints Commission)
 - A PAP for misuse and data protection claims should be introduced
- Allocation, 7APD 2.5. 2.9 and CPR 30.5(4) (mandate the starting of claims in the Media and Communications List, not the Chancery Division)
- Docketing to specialist judges (CPR 1 and 29)
- Early judicial assessment of claims, especially by litigants in person
- Statements of Case, CPR 15.8 (a Reply to be served in 28 days and before directions)
- CPR 22.1 (statement of truth) to apply to letters of claim
- Dealing with applications on paper (CPR 23.8) (greater readiness to do this, of own initiative)
- Guidance on when preliminary issues are appropriate
- CPR 29.7 (list PTR before trial judge unless impracticable)
- Costs: various changes were proposed to
 - CPR 3.15 & 3.19 & PD 3E, PD3F (more costs capping, early costs management, rules specific to defamation)
 - PD 48 2.1 and 3.2 (recovery of additional liabilities, etc)
- PD53, which was said to be "out of date" and in need of being "overhauled" especially in the light of the Defamation Act 2013. Aspects of the PD which attracted comment or criticism included paras 2.7, 4, and 6. One respondent suggested an entire PD is required for publication claims.
- CPR 65.28(1) (start claims for harassment under Part 7 not Part 8)
- Queen's Bench Guide 19.2 to be updated.

One respondent proposed that statistics should be provided on all areas of the courts.

Costs budgeting

The responses do not disclose in detail what aspects of this procedural regime are considered to be unsatisfactory. Respondents were not asked for this information. This is a matter for further exploration, as is the perennial problem of delay.

The injunction statistics scheme

The responses are unequivocal and overwhelming in their views on the importance of the scheme and its current inadequacy. Responses became more divergent when it came to the two proposals for improvement on which views were invited.

- Only 36% of respondents favoured the suggestion that the legal profession should take on the task of completing and submitting the data collection form. 45% were opposed to that proposal.
- Respondents were a bit more open to the notion that professionals might prompt the judge, with 50% approving that proposal, and only one third in disagreement with it.

There may of course be other means of improving the system which would merit consideration. The Transparency Project submitted a detailed discussion of this topic.

User engagement

The only person who answered no to the questions about a users' meeting and user group was a litigant in person who may be assumed to have no interest in that aspect of the matter. For practical purposes, therefore, respondents were unanimously in favour of both propositions.

Conclusions and next steps

This consultation has been a valuable and informative exercise. I am very grateful to all those who have responded. It is clear that users of this List have a keen appetite for engagement with the Court on procedural issues. A wide range of detailed and specific proposals has been put forward for changes to the procedural regime affecting cases of the kinds dealt with in the Media and Communications List. Respondents have taken a thoughtful and considered approach to their responses.

As stated when this consultation was announced, any changes to the Civil Procedure Rules or Practice Directions will need to be put to the Civil Procedure Rule Committee to consider whether, and if so how, they are to be taken forward. It is too early in this process to formulate any firm proposals for submission to the CPRC. The next step must be to convene a meeting of users of the Media and Communications List.

A meeting will therefore be convened at the Royal Courts of Justice on a date to be announced during the Michaelmas Term of 2018. An Agenda will be drawn up and circulated in advance. It will include as one item for discussion the formation of a Users Group Committee, favoured by so many respondents. In the meantime I shall, as indicated at the time of the Consultation announcement, be consulting judges with experience in this work. Input from the profession is also invited on two topics

- Any proposed Agenda items beyond those identified in this report
- How to ensure a fair spread of representation on any Users Group Committee

To ensure appropriate space is reserved, those interested in attending the meeting should please notify my clerk at the following address, which should also be used for any communication on the two topics just mentioned: Emma.Lownsborough@hmcts.gsi.gov.uk Emails should carry the subject heading "MCL Users Meeting".

Mark Warby

Hon Mr Justice Warby
Judge in Charge of the Media and Communications List
Royal Courts of Justice
Strand
London WC2A 2LL

APPENDIX A: Consultation Announcement

MEDIA AND COMMUNICATIONS LIST

Consultation

Mr Justice Warby is consulting practitioners and other court users in the media and communications field on a small number of procedural questions. These include enquiring whether practitioners would find it helpful to form a Court Users' Committee or hold a Court Users meeting.

The consultation questions are below. Responses should be sent by email, using the subject line Media List Consultation, to Emma.Lownsborough@hmcts.gsi.gov.uk

The closing date is 31st May 2017. The intention is to publish the results of the consultation and to consider whether any action is required in the light of the responses and any other relevant considerations.

If any changes to the Civil Procedure Rules or Practice Directions are proposed, it will be for the Civil Procedure Rule Committee to consider whether, and if so how, they are to be taken forward.

3 May 2017

APPENDIX B: Consultation Response Form

CONSULTATION RESPONSE FORM

Consultation Questions									
1	Do you consider that the Civil Procedure Rules and Practice Directions adequately cater for the needs of those who litigate in this area? <input type="checkbox"/> Yes <input type="checkbox"/> No [Go to 2]								
2	If you answered No to Q1 - What two changes to the CPR or PD would you most like to see implemented? <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <thead> <tr style="background-color: #cccccc;"> <th style="width: 30%; padding: 5px;">Rule or PD:</th> <th style="padding: 5px;">Change</th> </tr> </thead> <tbody> <tr> <td style="height: 20px;"></td> <td></td> </tr> <tr> <td style="height: 20px;"></td> <td></td> </tr> </tbody> </table>	Rule or PD:	Change						
Rule or PD:	Change								
3	What do you see as the single most important case management issue to be considered in this context? <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tbody> <tr> <td style="width: 50%; padding: 5px;">(a) Costs budgeting</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/></td> </tr> <tr> <td style="padding: 5px;">(b) Delay</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/></td> </tr> <tr> <td style="padding: 5px;">(c) Other (please specify below)</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/></td> </tr> <tr> <td style="height: 20px;"></td> <td></td> </tr> </tbody> </table>	(a) Costs budgeting	<input type="checkbox"/>	(b) Delay	<input type="checkbox"/>	(c) Other (please specify below)	<input type="checkbox"/>		
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(b) Delay	<input type="checkbox"/>								
(c) Other (please specify below)	<input type="checkbox"/>								
4	It has been suggested that the statistics on injunctions restraining freedom of expression are incomplete. What is your response to the following propositions? <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tbody> <tr> <td style="width: 45%; padding: 5px;">(a) The collection of statistics is worthwhile</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Agree</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Disagree</td> </tr> <tr> <td style="padding: 5px;">(b) The system of data collection is adequate</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Agree</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Disagree</td> </tr> </tbody> </table> <p style="text-align: right; margin-top: 5px;">[Go to 5]</p>	(a) The collection of statistics is worthwhile	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree	(b) The system of data collection is adequate	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree		
(a) The collection of statistics is worthwhile	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree							
(b) The system of data collection is adequate	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree							
5	If you do not consider the system of data collection is adequate, what is your response to the proposition that the legal representatives should <table border="1" style="width: 100%; border-collapse: collapse; margin-top: 5px;"> <tbody> <tr> <td style="width: 45%; padding: 5px;">(a) complete and submit the data form</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Agree</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Disagree</td> </tr> <tr> <td style="padding: 5px;">(b) prompt the Judge to complete the form</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Agree</td> <td style="text-align: center; padding: 5px;"><input type="checkbox"/> Disagree</td> </tr> </tbody> </table>	(a) complete and submit the data form	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree	(b) prompt the Judge to complete the form	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree		
(a) complete and submit the data form	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree							
(b) prompt the Judge to complete the form	<input type="checkbox"/> Agree	<input type="checkbox"/> Disagree							
6	Would you find it helpful to have a meeting for users of the Media & Communications List? <input type="checkbox"/> Yes <input type="checkbox"/> No								
7	Would you support the creation of a Media & Communications List Users' Committee? <input type="checkbox"/> Yes <input type="checkbox"/> No								

APPENDIX C: List of Respondents

(Alphabetical)

Addleshaw Goddard LLP (David Engel, Sara Sayeed)

Nicola Cain, RPC LLP

Carter-Ruck (Alasdair Pepper)

Rupert Cowper-Coles, RPC LLP

Foot Anstey LLP (Tony Jaffa)

Guardian News and Media Ltd (Gill Phillips)

Harbottle and Lewis LLP

The Independent Press Standards Organisation (Matt Tee)

Lee Johnson

Kingsley Napley LLP (Gerard Cukier, Charlotte Harris, Michael Tyler)

Tristian Kirk, Courts reporter, London Evening Standard

Sara Mansoori (Barrister)

Keith Mathieson, RPC LLP

News Group Newspapers Ltd

The Transparency Project (Paul Magrath, Dr Julie Doughty & Dr Judith Townend)

Trainee solicitor, RPC LLP

Trinity Mirror PLC (Marcus Partington)

Louise Turner, RPC LLP

Wiggin LLP (Caroline Kean)

1 Brick Court

5RB