

## DRAFT CLAUSES ON EXEMPLARY DAMAGES AND COSTS

1. This note explains the operation of the draft clauses in relation to damages and costs.

### Clause 1- interpretation

2. Clause 1 sets up the necessary interpretative provisions for the operation of this scheme. Of particular note are –

(a) “relevant publisher” – this definition is an initial attempt to capture the media bodies it is intended to either exclude from exemplary damages (E/Ds) altogether, or make liable to the statutory regime (according to membership or not of a regulatory scheme). This definition will need to be adapted to reflect the self-regulatory arrangements once details are settled;

(b) “relevant claim” – this lists the civil claims in relation to which the clauses operate. Leveson LJ referred to “media torts” without providing a full list. These are the claims that we consider would be potentially relevant.

### Clause 2 – awards of E/Ds

3. This provision establishes when, and against whom, E/Ds may be awarded under the new arrangements. E/Ds will still be available at common law in the usual way.

4. By clause 2(2), a defendant who was a member of an approved regulator at the relevant time is entirely excluded from liability to E/Ds. This is in relation both to E/Ds at common law and under this statutory scheme.

5. For non-regulated defendant publishers, clause 2 prevents E/Ds being awarded in respect of relevant claims under the common law – they may only be awarded under the statutory scheme. The touchstone of liability is in clause 2(5) – E/Ds require:

(a) conduct showing a deliberate or reckless disregard of an outrageous nature for the claimant’s rights;

(b) which is of an order meriting punishment (i.e. some response beyond mere compensation of the victim);

(c) and other remedies are insufficient to punish (e.g. the size of the compensation is not sufficient punishment in itself on the facts of the case).

6. The court will look at all the circumstances. The decision to award E/Ds, and the amount of those E/Ds, may only be made by a judge – jury involvement is excluded.

### Clause 3 – relevant considerations

7. The court is given quite detailed guidance about particular factors to take into account in deciding whether to award E/Ds.

8. The court should not usually award E/Ds if there has already been punishment of the defendant in relation to the same conduct by a criminal conviction. Equally, the court should take account of whether the defendant could have joined a regulatory scheme (and if he/she did not, why that is). The court should also consider whether, irrespective of regulatory scheme membership, the defendant had good internal compliance procedures in place, or not. These latter two considerations were specifically raised in Leveson LJ's recommendations. The court may have regard to the need for deterrence – both of the defendant and others.

#### Clause 4 – amount of E/Ds

9. When determining the amount, the court must have regard to the need for the award to be no more than is necessary to exact punishment, and must ensure that the award is proportionate to the seriousness of the conduct. The court is also required to take account of the nature and extent of loss or harm caused (or intended to be caused) by the defendant's conduct, set against the benefit the defendant derived, or hoped to derive, from that conduct. This is a reflection of the common law test, which aims to ensure that defendants do not weigh up what compensation wrongful conduct is likely to result in as against profits or other benefits that they would derive from it, and conclude that wrongdoing "pays".

#### Clause 5 – multiple claimants

10. This clause aims to eliminate a particular problem with E/Ds at common law. Where there are multiple potential claimants, courts have been wary of awarding E/Ds against a defendant because unless all claimants are before the court in one action, there is an unfair risk of the defendant facing yet more E/D claims later. Therefore, courts have sometimes declined to award E/Ds in cases which merited it and defendants have gone unpunished for conduct that in fact merited punishment.

11. This clause controls this problem by preventing any later claims for E/Ds where an earlier award of E/Ds has been made. The defendant does not therefore remain at risk and the court is able to punish where it is merited. Although the claimant(s) first in time to successfully obtain E/Ds get the benefit and later claimants do not, it should be remembered that E/Ds are not compensation, only punishment – later claimants will still get compensation in the usual way.

#### Clause 6 – multiple defendants

12. A further difficulty at common law is that in some cases the liability for E/Ds is "joint", meaning that all defendants are together liable for the same E/Ds, as opposed to "several" where each defendant is liable only for the E/Ds specifically attributable to his conduct. The result has been that in some cases, the courts did not feel able to reflect the full extent of wrongdoing by the "worst" defendant, because that would punish the least poorly behaved defendant excessively. Therefore awards were more limited than they might have been and the worst behaved defendants escaped the full extent of punishment merited.

13. This clause addresses this issue by indicating that in relation to E/Ds, liability will always be “several” so that the court can look at each defendant individually and punish that defendant according to the actual extent of their wrongdoing.

Clause 7 – awards of aggravated damages

14. This clause addresses a Leveson recommendation to make clear that “aggravated damages” are distinct from E/Ds. The two have sometimes been treated in a confused manner by the courts.

15. Aggravated damages relate to mental distress caused by the defendant’s wrongdoing which goes over and above the sort of mental distress that the basic award of compensation addresses. However, they are essentially still compensatory not punitive, unlike E/DS. This clause makes that clear.

Clause 8 – awards of costs

16. This clause relates to cases where the relevant publisher is a defendant to a relevant claim. In such cases, when making a decision about the costs of the case, the court will apply the usual costs rules. However, this clause specifically provides that the court may additionally take into account whether the defendant was able to join a regulatory scheme (thus making the possibility of arbitration under that scheme available to himself and the claimant, rather than court proceedings). If he/she was such a member, the court is to consider whether either defendant or claimant refused to make use of the arbitration route under the scheme, which can then be reflected in the costs decision as appropriate to the facts.