Implementation of Section 40 of the Crime and Courts Act 2013

Response of Early Resolution CIC to the DCMS's Consultation Paper

Executive Summary

1. Implementing s.40 in its current form will lead to the Government being a Defendant in the European Court of Human Rights (ECtHR) if Britain remains a signatory to the Convention. This will be because it cannot be right to make a newspaper, which is not part of an "approved regulator" pay a claimant's legal costs when the claimant has just lost an important libel action involving a matter of genuine public interest and concern. In such circumstances, it is more than likely that s.40 will be found to be incompatible with Article 10 of the European Convention on Human Rights (ECHR).
2. In so far as s.40 seeks to penalize newspapers with High Court costs because they have not joined an "approved regulator" but may well have an entirely acceptable and honourable Code of Conduct such as the Guardian or Financial Times, or even the thousand plus newspapers who subscribe to the Independent Press Standards Organisation (IPSO) and its Code, it is flawed and needs amending.
3. Suggesting that the punitive element in s.40 is no more than trying to "incentivise" newspapers or possible regulatory bodies to seek recognition from the Press Recognition Panel (PRP) is disingenuous and misconceived. Costs in High Court litigation should be left to the Courts and not be used by politicians to try to force newspapers to join an "approved regulator".
4. If s. 40 is meant to provide 'access to justice' to claimants who cannot currently afford High Court litigation, it again fails because the 'free' fast track arbitration scheme recommended by the Leveson Inquiry has become inextricably caught up in the complexities of Press Regulation and approval of regulators by the PRP. The PRP has little or no experience of the complexities of media law and what needs to be done to offer a really effective arbitration system for media disputes or how to keep legal costs to a minimum in this expensive area of law.
5. Section 40 therefore needs to be amended so that those commercial defendants, who refuse to offer Leveson style 'free' arbitration will remain open to exemplary or aggravated damages awards under s.34 to 39 of the Crime and Courts Act 2013 (CCA) and an award of indemnity costs if they lose a case. Any publisher or broadcaster or website owner who offers court approved Leveson style 'free' arbitration under Criteria 22 of the Royal Charter should be protected against exemplary/aggravated damages awards.

6. Further, under s.40 (4) the Secretary of State needs to make it clear that Conditional Fee Agreements under which claimant solicitors can cherry pick cases and claim a success fee and recover a notional "After the Event" (ATE) insurance premium will not be able to do so where a defendant has offered Leveson style 'free' arbitration and agreed to forego any costs recovery from an unsuccessful claimant.
7. There should be a Fast Track Arbitration Scheme, like Early Resolution's, for <u>all</u> "relevant claims", as defined in s.42 (4) of the CCA 2013. All commercial publishers, including broadcasters, website owners, book publishers etc i.e. anyone publishing or broadcasting 'with a view to profit' should therefore as a condition of selling whatever they are, have to pay for the fast track arbitration of the key issue in any media dispute. This would offer access to justice and be a quick, fair and cost effective alternative to High Court litigation. Any such arbitration scheme must be "approved" by the Civil Procedure Rules Committee (CPRC) of the High Court, not the PRP, and not be controlled by any organisation linked to newspapers (IPSO is funded by the Regulatory Funding Company (RFC)), or claimants (IMPRESS is funded by 2 Max Moseley charities and too close to Hacked Off).
8. The pilot arbitration scheme set by IPSO is not Leveson compliant and imposes too many conditions/restrictions e.g. the "cap on damages" and "cap on recoverable costs" and a claimant having to contribute to the cost of a "Final Ruling". The net result is that hardly any claimant firms of solicitors will be attracted to the IPSO pilot arbitration scheme because they will never be able to recover full legal costs or proper damages because the pilot scheme has been overly influenced by the RFC.
9. The IMPRESS arbitration scheme, set up with the help of CIArb, simply fails to cater for the complexities of what is a highly specialised area of law, where key issues – such as the "meaning" of an article complained about – are increasingly dealt with as 'preliminary issues' in the High Court. The Leveson Inquiry recommended that any arbitration scheme should have arbitrators who are "retired judges or senior lawyers with specialist knowledge of media law". The CIArb scheme is not designed for media disputes, looks like a commercial arbitration scheme and is overly protective of claimants even where the claim may be frivolous or vexatious. The PRP has regrettably approved it.
10. ER's Fast Track Arbitration Scheme for Media Disputes is drafted by an arbitration expert. It has been checked by a silk practising at the Defamation Bar and is seen as highly efficient in identifying the "key issue" in defamation proceedings and then staying the arbitration while the parties have a short period in which to try to reach agreement following determination of that key issue. The Scheme reflects what The Times offered claimants in arbitrating, at its expense, all bona fide "meaning" and other disputes while ER's current Managing Director was Legal Manager at The Times/Sunday Times. Appendix I contains a summary of the ER Scheme and the full Fast Track Arbitration Scheme Rules for Media Disputes. It is hoped that this

Leveson compliant scheme will be of some use to the DCMS in the current Consultation.

Early Resolution CIC and its board

1. Early Resolution CIC (ER) is a not-for-profit company set up in 2011 by Sir Charles Gray (CG), its Chairman and a retired High Court libel judge, and Alastair Brett (AB), its Managing Director, who was formerly Legal Manager at Times Newspapers Ltd and a pioneer of fast track arbitration. CG and AB felt that the cost of High Court litigation was so prohibitive by 2010 that it was vitally important to set up alternative dispute resolution systems so that media disputes could be resolved "quickly, fairly and cost-effectively" through arbitration or mediation. Robert Clinton, (RC), ER's third director is former senior partner at Farrer & Co and a libel practitioner of many years standing. Its board has, therefore, considerable experience when it comes to media disputes and believes that everyone should have access to justice irrespective of their financial means.

Leveson Inquiry and Jackson reforms

2. CG gave evidence to the Leveson Inquiry into the *Culture, Practices and Ethics of the Press* and the importance of arbitration as an alternative to High Court litigation in 2012. One of the key recommendations of the Leveson Inquiry was the introduction of an arbitration system for media disputes which was cost effective, quick and fair (see Criterion 22 of the Royal Charter). AB chaired a Civil Legal Aid Fund (CLAF) working group under Sir Rupert Jackson as part of his Review of Civil Litigation Costs in 2009. This looked into the possibility of there being a Legal Aid Fund for media disputes. While this was not possible under traditional 'cost shifting' principles in High Court litigation, the Working Group was of the view that in many cases it would be fair and reasonable for commercial publishers, who put ambiguous or seriously damaging material into the public domain, to pay for the determination of the "meaning" of the words complained of or if they passed the [now] "serious harm" threshold and gave rise to a libel action.

Leveson 'free' arbitration

3. An essential recommendation of the Leveson Inquiry for the voluntary self-regulation of the Press was an arbitration service for civil legal claims against publishers in order to give access to justice to victims of press intrusion and attack. Leveson also wanted arbitrations to be: a) largely 'free' with carefully designed "one-way costs shifting", b) that they should be "inquisitorial" and c) as fast as reasonably possible in a complex area of law. He felt that any arbitral scheme should have retired High Court judges or experienced legal practitioners as arbitrators. This is an important feature of the ER Fast Track Arbitration Scheme which only uses retired libel judges and silks specializing in media law (see Appendix II for ER's approved arbitrators). While Leveson was keen for the arbitration to be 'free', the Coalition Government wisely agreed that it should not be entirely 'free' and a claimant could be charged "a small administration fee" to cover the cost of assessing an application to make sure it was bona fide and not an abuse of process.

Legal Aid blackmail and sanctions against vexatious claims

4. ER is conscious of the need to prevent what in the old days was "legal aid blackmail" i.e. a claimant suing with the benefit of legal aid but making wholly unreasonable and vexatious demands on a defendant who could never expect to recover costs however successful in defending a frivolous or vexatious claim. As the Leveson inquiry pointed out in Criterion 22c), any arbitral scheme should therefore "contain transparent arrangements for claims to be struck out, for legitimate reasons (including on frivolous or vexatious grounds). ER's specially designed Fast Track Arbitration Scheme (see Appendix I) has just such a process.

The need for cost savings in media disputes

5. By 2012, costs in defamation actions were cripplingly expensive. Pleadings had become so specialized particularly in malicious falsehood claims, or where malice had to be pleaded in a qualified privilege case and/or in cases where there was an alternative plea under the Data Protection Act, that litigation was only affordable by the very rich or those able to obtain funding with the benefit of Conditional Fee Agreements (CFAs) and ATE insurance. From this situation and the Defamation Act 2013, a number of procedural issues emerged as important if any future fast track arbitration scheme was to work. They are as follows:-

A) Key Issues

First, it is vitally important that any arbitral system focuses on the "key issue" which is preventing the parties from reaching an amicable settlement and there is a binding determination of this key issue. This is usually the "meaning" of the words complained of and/or nowadays if the words have actually caused "serious harm" to the Claimant, the new "threshold test" under s. 1 of the 2013 Defamation Act (The CoA judgment in *Lauchaux v Independent Print* is still awaited). The ER Fast Track Arbitration scheme therefore concentrates on identifying the key issue which lies at the heart of the dispute which often revolves around what is known as *Chase* levels of meaning i.e. has the article accused the claimant of a) actually *being* a terrorist or murderer, or b) suggested that there are *reasonable grounds* (usually circumstantial evidence) for believing that the claimant *might* be a terrorist or murderer or c) suggested the police should rule out the possibility of the claimant possibly being involved in terrorism or murder. IPSO's pilot arbitration scheme also shares this key preliminary issue feature.

B) Traditional pleadings

Second, traditional defamation pleadings very often complicate actions and lead to hugely expensive interlocutory applications to strike out parts of a plea of truth or unnatural meanings set out in the claim form by a claimant seeking maximum damages. These interlocutory hearings can easily add tens of thousands of pounds to a complex defamation action and delay the early resolution of a dispute.

C) Keeping arbitrator's fees down

Third, it is really important to have a procedure so the arbitrator really only has to look at the papers once and once only, if possible. This keeps costs down. The moment arbitrators are instructed first to read papers, then give directions as to the procedure thereafter, and then have to read the papers again prior to a determination, costs are inevitably increased. (When AB conducted arbitrations at The Times, the arbitrator was in every case asked to read the papers – often with two lay assessors (like a mini jury in the old days) in meaning disputes – and then make a ruling on meaning or quantum or whether the words were 'fair comment' or a statement of fact. In every case handled in this way, costs were kept to a minimum and the parties invariably settled after determination of the "key" issue.)

D) Parties have opportunity to settle after initial ruling

Fourth, it is vitally important that procedures are simplified so that once the arbitrator makes a preliminary ruling on the key issue i.e. if the claim passes the 'serious harm' test under s.1 of the Defamation Act 2013 or the "meaning" of the article is determined, the defendant or claimant then has an opportunity to make an offer of amends under s.2 of the Defamation Act 1996 (where the "meaning" is higher than intended) or the Claimant has an opportunity to drop the claim if the meaning is not as high as thought. Equally there is no point in a claimant or defendant running up huge costs where by early intervention, the judge or arbitrator can facilitate an early settlement. In this process it is important for any arbitrator to act "inquisitorially" particularly if the claimant is a litigant in person and does not have the benefit of expensive legal representation.

E) Arbitrator to act inquisitorially

Fifth, if there is to be a 'level playing field' (CPR Overriding Objective) and members of the public, however indigent, are to have access to justice, any arbitral process needs to be inquisitorial with the arbitrator taking a neutral position and not allowing the adversarial process in the High Court to be taken advantage of by one side or the other.

F) ATE premiums and success fees not recoverable where arbitration "free"

As stated in 2 above, the CLAF Working Group chaired by AB in 2009/2010 was of the view that if a Defendant paid for the cost of a bona fide arbitration then the press should not be susceptible to having to pay for a claimant's ATE premium which at the best of times is a very high premium and entirely notional. Equally success fees should either not be recoverable at all or be on a scale considerably less than the 100% currently possible. By reducing these two elements in CFA litigation, the Press should be much more amenable to "free" or "one way costs shifting" as recommended by Leveson in a Fast Track Arbitration Scheme.

G) Arbitration Agreements

Even where both sides in a dispute are represented by solicitors with knowledge of defamation/privacy proceedings, it can take weeks even months to negotiate an Arbitration Agreement. It is therefore vitally important in any Fast Track

Arbitration Scheme for a claimant to be able to trigger an inquisitorial arbitration system – after complying with the Pre-Action Protocol in Defamation Actions – without having to spend weeks or months negotiating an arbitration agreement, something which is often well beyond any litigant in person. ER has therefore always believed that any "commercial" publisher or broadcaster or website owner should automatically *have to* offer fast track arbitration or face the possibility of exemplary or aggravated damages in the High Court. This mandatory arbitration system would not of course prevent any non-commercial publisher/broadcaster from taking advantage of the benefits of Fast Track Arbitration and voluntarily offering it to a claimant where appropriate. But in order to avoid the possibility of an exemplary or aggravated damages award, commercial publishers, broadcasters, website owners and others would have to offer Leveson style Fast Track Arbitration to determine the key issue. Thus a claimant could trigger it simply on payment of the 'small administration fee' in the footnote to Criterion 22, filling out the ER Claim Form and Claimant's Questionnaire (an alternative to pleadings) and it would proceed under the Early Resolution Rules as set out in Appendix I.

Media Arbitration scheme to be approved by the High Court not the PRP

6. ER believes that the Civil Procedure Rules Committee (CPRC) of the High Court with the help of specialist libel judges retired or otherwise, such as Sir David Eady, Sir Michael Tugendhat, Sir Mark Warby should be responsible for approving any Leveson style Fast Track Arbitration Scheme. There should in effect be only one "approved" arbitration Scheme for all s.42 cases. Thus any commercial publisher/broadcaster/website operator/ book publisher/film producer etc would know exactly what they would have to offer a claimant in order to avoid a possible award of exemplary or aggravated damages and indemnity costs in a tricky case. While 'Code complaints' would remain the preserve of IPSO and IMPRESS any 'alternative dispute resolution' system to the High Court would have to be approved by the CPRC. Once a Fast Track Arbitration Scheme had been approved by the CPRC – not the PRP – CIArb, CEDR or Early Resolution could then help administer it. It would obviously have to comply with Criterion 22 of the Royal Charter and be specifically geared to media disputes with the cost savings and refinements set out in 5 above. ER hopes that its own Fast Track Arbitration Scheme in Appendix I might be of assistance in this process and that the Government might think of amending s.40 along the lines suggested in a draft amended s.40 set out in Appendix III.

An industry wide arbitration scheme.

7. Bearing in mind the above and following the abolition of the PCC and setting up of the IPSO in 2014, ER in the summer of 2015, instructed Peter Aeberli, a highly experienced barrister, arbitrator and adjudicator to redraft ER's arbitration rules into a highly professional fast track arbitration scheme for ALL s.42 type media disputes. ER felt that by producing a Fast Track Arbitration Scheme which could work for virtually ALL publishers/broadcasters/website owners, the Press would not be singled out as "the

naughty boys who had to be corralled and forced into joining an approved regulator". In short, relations between Government and the Press might be eased with such an industry wide arbitration scheme. ER was therefore of the view that just as there is an ABTA scheme applying to travel agents so any commercial publisher of words/pictures (newspapers, magazines, book publishers, broadcasters, film producers, website owners and others) can and should be able to take advantage of a greatly simplified and litigant friendly fast track arbitration scheme which would be a quick, cheap and fair alternative to High Court litigation.

ER and IPSO

8. Early in 2015 ER started negotiations/communications with IPSO over the possibility of a pilot arbitration scheme for media disputes. As is well known, the Regulatory Funding Company (RFC) which funds IPSO is extremely nervous of a mandatory arbitration scheme. It and the NS/NPA fear that what are currently Code Complaints against regional newspapers will rapidly turn into claims for damages, if any arbitration scheme is "free" for claimants. This fear is understandable but if there is a proper 'strike out' system which has teeth i.e. any wholly spurious claim can be struck out with the claimant ordered to pay the costs of the arbitrator where the claim is an abuse of process, then the fears of the regional press and RFC should be illusory. ER has therefore gone out of its way to prevent claimants taking advantage of a largely 'free' arbitration scheme and any administration fee to start an arbitration being sufficiently substantive i.e. somewhere between £350 and £500, to demonstrate a claimant's commitment to the case. (It goes without saying that this is infinitely cheaper than the new High Court claim form fees for even modest claims, limiting damages to £50,000.)

Discussions with IPSO in 2015

9. ER then spent some 6-9 months in 2015 inducting IPSO into how a Fast Track Arbitration Scheme for media disputes can and should be set up under a pilot scheme and which had been used at The Times between 2002 and 2010. In the Autumn of 2015 ER sent IPSO its Fast Track Arbitration Scheme as redrafted by Peter Aeberli (see Appendix I) and tendered for the job of running a Pilot Arbitration Scheme for IPSO. It was hoped that ER's Arbitration Scheme, which had no restrictions on damages or costs and was in all respects Leveson and Criterion 22 compliant, would find favour with IPSO. However, IPSO decided to draft its own Arbitration Scheme which ER finds amateurish, (arbitrators should not be able to strike out claims under their own initiative), highly restrictive when it comes to costs and damages and so unappealing to claimant solicitors firms as in all probability never to be taken advantage of. IPSO's arbitration scheme is also contradictory in places and places too much emphasis on IPSO deciding when a case can or cannot go to arbitration. After receiving tenders from CIArb, CEDR and ER, IPSO decided to commission CEDR Services Ltd to run its pilot arbitration scheme which was launched in August last year. ER is unaware of any cases yet determined through IPSO arbitration.

ER's draft claim form and response (alternative to pleadings) not finalised

10. ER was hoping that having supplied IPSO with a highly professional Fast Track Arbitration Scheme and preliminary drafts of a Claimant Claim Form/Questionnaire, a Respondent's Defence/Questionnaire (see Appendix IV) and a list of its specialist arbitrators (see Appendix II), IPSO would help ER finalize the Claimant's and Respondent's questionnaire's which are the alternative to pleadings in High Court cases. It was also hoped that IPSO would help finance the relaunch of ER's website which had been taken down in 2015, with the Fast Track Arbitration Rules and a summary of the scheme as set out in the Appendices hereto. With IPSO deciding to restrict damages and costs in claims under its pilot scheme, make claimants pay what might be quite considerable amounts for a Final Ruling and not adopt ER's Fast Track Scheme or commission ER to run a Pilot Arbitration Scheme, ER has found it difficult to finance the completion of its industry wide Fast Track Arbitration scheme. It still believes that with appropriate funding from the Government or a Charity it would be possible to roll out an industry wide arbitration scheme which the Press would find hard to oppose as it would apply to ALL commercial publishers, broadcasters, website owners, book publishers, film producers and others.

Construction Industry Adjudications provide framework for media disputes

11. ER is also of the view that this Government could learn much from compulsory 28 day 'statutory adjudication' under the Housing Grants, Construction and Regeneration Act 1996. This has been enormously successful. ER believes it could be replicated in the media industry where the speed of any correction and apology is vitally important

An amended s.40

12. If s. 40 of the CCA 2013 is amended as suggested in Appendix III, ER believes it is important to back up any statutory ADR system with a Government commitment to free speech. If IPSO complies with virtually all the Criteria in the Royal Charter and has to comply with a Court approved Fast Track Arbitration Scheme, ER believes that relations between the Press and Government can be sorted out. To implement s.40 as it is will do nothing to heal relations between these two powerful Estates and will not help the public gain access to justice.

Submitted by the Board of Early Resolution CIC (see above) on 10th January 2017

Contact: **Alastair Brett**
Position: **Managing Director**
Address: **18 Edenhurst Avenue,**
London SW6 3PB
Telephone: **020 7736 0071**