Alternative Libel Project

Submission to the Leveson Inquiry

Index On Censorship/English PEN

The Alternative Libel Project makes a number of recommendations for an improved process for defamation claims in England and Wales. The project is a collaboration between English PEN and Index on Censorship, whose representatives have previously submitted evidence to the Leveson Inquiry.

We have been asked to explain how our proposals might fit within or alongside a new regulatory regime for the press, and how they meet the Inquiry's draft criteria for effective press regulation. In this submission, we do this in two parts.

Part 1: How the recommendations may fit within or alongside a new regulatory regime for the press

1.1 In summary, the Alternative Libel Project recommended:

- Increased use of mediation and arbitration
- The introduction of Early Neutral Evaluation
- Costs penalties for failing to use these three forms of alternative dispute resolution
- The introduction of a hearing to determine the meaning of an alleged defamatory statement, with fixed limits on evidence, argument and costs
- More robust case management
- A change in costs rules to protect a party from having to pay the other side's costs in the event of losing, and the introduction of an overall costs cap.

1.2 We believe that a new press regulator could offer a form of dispute resolution which could fit in to the court process just as mediation, arbitration and Early Neutral Evaluation do. Parties eligible to use such a service could be expected to do so before coming to court. If court proceedings are started before the regulator's dispute resolution service is used, the court should make an order urging parties to consider its use, and warning of adverse costs consequences for failing to do so. The type of dispute resolution offered by the regulator would affect what would happen to the court claim once the regulator's decision has been made.

1.3 If the new press regulator offered a voluntary arbitration service, its findings would be final and there would be no further claim.

1.4 If the regulator offered a mediation service, a successful mediation would result in

settlement on the claim. An unsuccessful mediation would mean further court proceedings, with new rules about case management and costs as proposed.

1.5 If the regulator ran an adjudication service, the adjudicator would make a decision which would be final unless challenged. If either party was not happy with the adjudicator's decision, they could issue/pursue a claim in court. To make adjudication effective in reducing costs, such further application to the court should be discouraged. This could be done in two ways: firstly, by ensuring the process seems just and fair to all; and secondly, by ensuring there is a financial disincentive to challenge the adjudicator's decision. The disincentive to challenge the decision could be a penalty in costs if a court claim is pursued, with a party agreeing with the adjudicator's decision making a formal offer to settle under part 36 of the Civil Procedure Rules in the terms of that decision, with all the punitive cost consequences that this brings.

1.6 It has been suggested (in a proposal for a "Media Standards Authority") that complying with an adjudicator's decision may become a complete defence to a defamation claim. We believe this proposal may fall foul of article 6 of the ECHR which guarantees a right to a fair trial - by in effect making the adjudicator's decision final (though as stated in 1.5, further application could be discouraged).

1.7 The question of compulsion

We support voluntary ADR as part of a self-regulatory scheme which should be incentivised by costs orders made by the courts. There are real disadvantages to compelling parties to use dispute resolution mechanisms other than the court to resolve civil claims.

1.8 To compel people to use ADR to try to resolve libel claims would involve either statutory regulation of the press, a statutory requirement to use an ADR scheme (including one offered by a press regulator), or court rules requiring parties to use such a scheme before submitting a claim.

1.9 Index and PEN oppose statutory regulation of the press. This applies even if the statute is said to be enabling, because even this will require the involvement of politicians or the state in the appointment or operation of the regulatory body. If such an enabling statute sets up

such a body without any such controls, what is the point of the statute?

1.10 Statutory compulsion to use an adjudication scheme offered by a body such as a press regulator is also problematic, if the press are incentivised to join the scheme. A claimant shouldn't be compelled to use a body that the defendant has chosen to join because of the commercial advantages it offers. This would not have the appearance of being fair.

1.11 If part of court procedure, compulsion to use such a scheme might work if it does not affect any subsequent court case, i.e. no additional defences are on offer. The problem of an unhappy party issuing court proceedings does nevertheless remain.

1.12 A voluntary system, however, which is established and offers parties a cheap, fast and fair way of resolving defamation claims, would be incredibly attractive to potential litigants who have a genuine interest in resolving their dispute. A voluntary system would seem fairer to parties and they would therefore be less likely to issue proceedings if unhappy with the adjudicator's decision. This could easily fit in to the ADR regime we have recommended, with the courts recognising an application to the press regulator's dispute resolution service as a genuine attempt to resolve the case.

1.13 We know from comments made by Lord Justice Leveson, while PEN and Index's representatives were giving oral evidence to the Inquiry, that he is acutely aware of the risk that extremely wealthy people may snub a voluntary route and go on to use expensive court proceedings. While we share this concern, so long as libel remains a justiciable tort, parties must always have the right under article 6 of the European Convention on Human Rights to ask an appropriate court or tribunal to decide the claim. This means all binding forms of ADR cannot be made compulsory, and non-binding processes may just be used by unscrupulous litigants as a way of further driving up costs with no intention to settle the case.

1.14 For this reason we strongly believe that, alongside strong judicial encouragement of ADR, there should be new rules on costs and far more consistent and robust case management by judges. Pro-active case management can stop a litigant from using applications for evidence, changes to statements of case and other tactics to drive up the other side's costs. Costs rules can also affect litigation behaviour. If a party who is not conspicuously wealthy (the term used by Jackson LJ in his report on Civil Litigation Funding) benefits from an order that the

other parties in the case will not have to bear the other party's costs, and the extremely wealthy party may have to pay the other parties' costs at a penalty rate (i.e. on an indemnity basis) because they refused ADR, it is unlikely that the wealthy party will use unsuitable litigation tactics.

Part 2: How the recommendations meet the Inquiry's draft criteria for effective press regulation

2.1 The recommendations made by the Alternative Libel Project have been made for all defamation claims, irrespective of the size of the claim or the identity of the parties involved. The project therefore has considerable overlap with the issues being considered by the Leveson Inquiry as journalists and media organisations are often parties to libel claims. There are however many areas that the Inquiry is considering that we did not address, such as privacy or breach of ethical standards. Likewise, we also considered defamation cases which will not be of interest to the Inquiry as no party had any involvement with the press, in particular the impact of our libel laws on academic publishing and bloggers. As a result of the scope of our project and the Inquiry's remit overlapping, though not being completely aligned, we have not made a direct proposal for a new model of press regulation. We have therefore set out how our recommendations meet the Inquiry's draft criteria for effective press regulation as far as we believe it is relevant to do so.

2.2 <u>Effectiveness</u>

The recommendations we have made centre on improving the existing court process for libel and supplementing it with a number of voluntary options.

2.3 It will be effective because it offers a range of low cost options for those genuinely interested in resolving their dispute, backed up by an improved court process whereby the judge has increased control over proceedings.

2.4 Reform to the wider system of libel - perhaps including but not exclusively consisting of a dispute resolution service offered by a press regulator - will benefit all litigants, whether individuals or organisations and irrespective of wealth. This is important, because an increasing number of libel cases do not involve the press: only three out of 23 cases which were finally determined by the court in 2011 involved the traditional media ("Defamation Trials, Summary Determinations and Assessments", Inforrm blog, 11.1.12).

2.5 Independence and transparency of enforcement and compliance

We believe that it is of critical importance that a press regulator is independent from government, parliament and media interests. The judicial system already fulfils these criteria. Parties who voluntarily choose to use a third party to help resolve their claim, such as an arbitrator or mediator, or if recommended by the Inquiry a press regulator's dispute resolution service, are only likely to choose a third party who they believe is independent.

2.6 Powers and remedies

For any type of civil legal claim, including defamation, mechanisms designed to resolve the dispute should offer outcomes at least as favourable, if not more favourable, than those available in the civil courts. To offer anything less would be to discourage parties from using these mechanisms. That is not to say that a regulator that could award a limited amount of damages to a complainant would not be seen as more favourable than using the civil courts: if it offered an abbreviated, and potentially less stressful process, and cost less than a court claim, then many people may choose to use this.

2.7 The potential to turn to the court to resolve a libel claim ensures that credible remedies would be available if our recommendations were implemented. In addition, mediation allows parties to explore creative solutions to their dispute, which may be more valuable to the parties involved than the remedies the court can offer. Arbitration and adjudication can also allow for more suitable remedies to be found, if the arbitrator or adjudicator is given the power to do so by the parties. A dispute resolution system offered by a press regulator could also have powers to award remedies in addition to those available in a court.

2.8 Cost

Our proposals are designed to reduce the costs of defamation claims. The system we have proposed is financed primarily by the parties involved and the state through the provision of the existing judicial system (and subject to recovering some of these costs from the parties through the levying of court fees), as is the current system. The difference is that mediation, arbitration and early neutral evaluation will cost parties considerably less than the protracted court disputes which occur at the moment.

2.9 A private mediation or arbitration can cost £2,500 plus VAT. This is compared to the £10,000 or more it might cost a party just for a court to summarily dismiss or strike out a claim (see

for example *Lait* v *Evening Standard* [2011] EWCA Civ 859 and *Robins* v *Kordowski* [2011] EWHC 1912 (QB)) and the hundreds of thousands or millions of pounds it might cost a party whose case reaches trial (see *Cambridge* v *Makin* [2011] EWHC 12 (QB, a relatively low cost trial where the defendant had to pay approximately £320,000 in costs, and research carried out in 2011 by the Publishers' Association which shows that the average cost to their members of a case that goes to trial is £1.33m).

2.9 For those cases which do proceed to court, an independent hearing on the meaning of an alleged defamatory statement, more robust case management, and new costs rules will keep costs as low as possible for parties who observe the rules.