EARLY RESOLUTION

Submission to Press Recognition Panel

on consultation proposals

1. **Early Resolution CIC**

Early Resolution CIC (ER) is an independent, not-for-profit company set up by Sir Charles Gray, the retired High Court libel judge and Alastair Brett, former Legal Manager of The Times and Sunday Times, to help litigants locked in expensive libel disputes to resolve their differences quickly, fairly and cost effectively. Robert Clinton, former Senior Partner of Farrer & Co, is the third director. All three directors have extensive experience of libel and privacy actions. Alastair Brett, who is Managing Director, pioneered 'Fast Track Arbitration' as a way of resolving CFA-driven libel actions, while at Times Newspapers Ltd between 2002 and 2010.

2. **ER Contact details**

ER can be contacted by telephone on 020 7736 0071 or by email at alastair@bretts.org.uk or by post at 18 Edenhurst Avenue, London, SW6 3PB. The company is happy for its submission to the PRP to be published.

3. **Introduction**

ER specialises in the resolution of 'publication proceedings'- i.e. actions for libel, slander, breach of confidence, misuse of private information, malicious falsehood and harassment.

4. **Arbitration schemes, consistency and fairness**

ER submits that any arbitration scheme for media disputes must comply with 'best practice' across the industry. As Lord Justice Leveson recommended at Recommendation 22 of his Report, the regulator should provide 'an arbitral service in relation to civil legal claims against subscribers, drawing on independent legal experts of high reputation and ability on a costs only basis to the subscribing member'. Any 'free' entry arbitration scheme, where a claimant does not need ATE insurance, should clearly prohibit the recovery of an unnecessary insurance policy premium and limit, if not ban altogether, the recovery of any success fees, since the respondent newspaper would from the outset be agreeing to pay for the determination of the key issues in the dispute - usually the meaning of the words and whether they are seriously harmful.

Further, any arbitral process will have to make appropriate and sensible provisions where one party makes an early offer 'without prejudice save as to costs' or a Part 36 offer which the claimant rejects but the amount of the award is less than the respondent publication had already offered. In all these cases there needs to be consistency as to the level of damages and the amount of any costs awards, as well as where and how any report of any arbitral ruling might appear in a respondent newspaper.

For all the above reasons ER believes that there should be a single industry-wide Arbitration Scheme which would enable the law to be applied quickly, fairly and cost-effectively. It should not be open to the publisher to decide which arbitration scheme to select. In short there should be one specifically tailor-made Arbitration Scheme for this complex area of the law, just as there is a statutory adjudication procedure in the field of construction.

5. **Why a standard arbitration scheme in defamation cases is desirable.**

ER submits that there should be a standard form of procedure in all publication proceedings. The reasons are as follows:

(i) the need for speedy redress is of paramount importance in this area of the law. The limitation period is one year. This means that the technical definition as to when an action is commenced is of vital importance if a claim is not to become statute-barred.

(ii) the law in this field is complex: for instance, the claimant may be unaware that the occasion of the publication complained of may be protected by qualified privilege.

(iii) it follows that any arbitral scheme in this field must be 'inquisitorial' rather than adversarial as in the High Court litigation. The arbitrator must be an independent legal expert with specialist knowledge of this area of the law.

(iv) because the meaning conveyed to the ordinary reader by the words complained of is often of crucial importance, it follows that any arbitral process must have at its heart a method by which the meaning of the words can be determined at the earliest practicable opportunity. Until the defendant knows what meaning is conveyed to the ordinary reader by the words complained of, the defendant will often not know what to apologise for.

(v) it is essential that there is uniformity and consistency in the exercise of the power of an arbitrator to direct the publication of a correction and/or an apology.

(vi) any number of Regulators, from national to hyperlocal, may be approved which will have the effect of triggering the Crime and Courts Act 2013 and the consequent impact on costs awards.

6. **The recommendation of Lord Justice Leveson as to the appropriate order for costs in cases where an arbitral system is available.**

At paragraph 73 of his Report, Leveson LJ indicated that the Civil Procedure Rules should be amended to take into account the availability of an arbitral system recognised by law. His purpose was to encourage all publishers to join the new system and to encourage claimants to use it as a speedy and comparatively inexpensive method of resolving disputes.

In the absence of an approved mechanism for dispute resolution, together with an adjustment to the CPR to require or permit the court to take into account the availability of one way cost shifting, Leveson LJ suggested that one way cost shifting should be introduced.

7. **Judicial approval of any arbitration scheme put forward by an applicant**

ER has consistently advocated the adoption of a single industry-wide Arbitration Scheme and that it should adopt 'best practice'. Taking in turn the 'proposed indicators' suggested by the PRP, we comment as follows:

(a**) that the Arbitration Scheme complies with the Arbitration Act:**

the Scheme run by any applicant regulator should be checked by the PRP to ensure that it makes clear what is mandatory under the Arbitration Act and consequently cannot be varied by agreement between the parties ;

(b) **that the arbitral process operates 'fairly, quickly and inquisitorially'**:

these requirements need to be looked at by a practitioner in this field who is fully conversant with practice and procedure. The requirement that the process operates 'inquisitorially' indicates that the arbitrator will play a major part in the examination of witnesses. The meaning of the words complained of is often the key issue. Once that has been determined, the parties will generally be able to arrive at a settlement;

(c) **that claims can be struck out for legitimate reason:**

the concern is to prevent the Scheme being misused for personal advantage but at the same time to ensure that the arbitration process remains 'free' ;

(d) **that appropriate pre-publication matters may be referred to the courts:**

some, albeit not all, pre-publication issues may be unsuitable for arbitration. If so, such issues will need to be determined by the courts;

(e) **that the arbitration process is 'free' for complainants:**

in this context 'free' cannot mean that a complainant will never have to pay at least some of the costs. 'Free' must mean free within the realities of Part 36 offers. In those comparatively rare cases where it can be clearly established that a claimant is greedy or misguided, costs may be awarded against that claimant;

(f) **that provision be made for costs and any caps on costs:**

see the High Court Rules on costs, in particular CPR Part 44.14.

(g) that the Scheme is overall inexpensive for all parties:

the often exorbitant costs of litigation in the High Court must be avoided and it is confidently anticipated that arbitrators, as well as practitioners and their clients, will ensure that the costs of arbitration fall well short of what traditionally has been the exorbitant cost of High Court litigation.

8. Different Regulators

Finally ER notes that at paragraph 16 of the PRP Consultation Paper reference is made to "applications from a range of Regulators covering different types of publisher including, for example, 'hyperlocal' online news or content services that serve small, geographically defined communities".

ER acknowledges that the application of certain of the Leveson criteria may differ according to the particular types of publisher concerned. One obvious example is the localised online news service pertaining to a small community such as a village. ER readily accepts that a degree of latitude is necessary in relation to such publishers over, for example, appointment to their Boards, their financing and governance.

ER submits, however, that many of the other criteria, including the post-publication arbitral procedures, should be in standard form and not vary from publisher to publisher.