Consultation on s.40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry

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WIGGIN

A Submission by Wiggin LLP

Wiggin LLP is an independent, award winning law firm established in 2003 that acts exclusively for media, technology and IP-owning companies. We act across the whole of the media: our clients include publishers of national and regional newspapers, magazines, books and online as well as those concerned in film and television companies, sports companies, music businesses, betting and gaming companies and the platforms that distribute media. Our clients range from independent individual publishers to global media companies. We have very considerable experience, dating back to the 1980s, of the sort of disputes to which the consultation relates; namely libel & slander, malicious falsehood, breach of confidence, misuse of private information, data privacy and harassment, and also of complaints that have not amounted to a legal wrong but have given grounds for complaint under the Editors' Code or otherwise. We believe, therefore, that we have relevant information to assist the government in this consultation. For the sake of transparency, we would make it plain that while we do act for national newspapers, in the year to date the fee income received from those clients is less than 1.3% of our total fee income. The opinions expressed below are based on our own experience. We have not been asked by any client to make a submission to the consultation.

Consultation on section 40

Question 1: Which of the following statements do you agree with:

	Government should not commence any of s.40 now, but keep it under review and on the statute book.
	Government should fully commence s.40 now.
✓	Government should ask Parliament to repeal all of s.40 now.
1.	If Government does not fully commence s.40 now, Government should partially commence s.40, and keep under review those elements that apply to publishers outside a recognised regulator.
	If Government does not fully commence s.40 now, Government should partially commence s.40, and ask Parliament to repeal those elements that apply to publishers outside a recognised regulator.

Question 2: Do you have evidence in support of your view, particularly in terms of the impacts on the press industry and claimants?

✓	Yes
	No

Please provide the evidence which supports your view (We are particularly interested in hearing from legal professionals (using their experience of litigation) in respect of the financial impacts on publishers outside a recognised self-regulator should Government fully commence s.40, and specifically on (a) the likely change in volume of cases brought; and (b) the extent of average legal costs associated with bringing or defending individual cases).

We have given very careful consideration to the drafting of s.40 (and s.41 and Schedule 15). We believe it should be repealed. Many other commentators have made submissions on the effect of s40 on investigative journalism and free speech. We believe that those submissions have considerable force, but given the desirability of keeping these submissions relatively succinct, we do not elaborate here on what has already been said.

As lawyers with many years of experience of litigation we believe that if the government commences s.40 there will be a very considerable increase in the number of cases brought, not just in relation to 'relevant claims' but also in relation to the meaning and interpretation of the sections. The sections of the Act relevant to this enquiry are so poorly drafted that commencement of those sections will inevitably result in very costly satellite litigation as their meaning and proper interpretation is argued before the courts. One only needs to look at the cases that have been brought following the implementation of the Defamation Act 2013, arguing over the proper interpretation of 'substantial harm', for evidence that this will happen. The financial impact on print publishers will be devastating. The legal costs associated with 'relevant claims',

already out of proportion to the likely damages awards, will rise considerably since there will be no 'brake' on claimants. Furthermore, the Act is already out of date. The carve outs in schedule 15, particularly in favour of online publishers, online platforms and publishers without a professional editor, do not reflect the reality of the current media landscape, the development of the law so far as platforms (such as Google) are concerned, or the public interest in protecting the public from misleading information from unaccountable publishers. The Act will not protect individuals or provide a low cost solution in relation to the majority of 'relevant claims', which happen on line. In fact, it is notable that, according to its report of media cases in 2016, media website Inforrm reported that out of 58 cases, judgment was handed down in only 4 'relevant claims' involving a 'relevant publisher'. S.40 appears to be a blatant attempt to punish large circulation print publishers, rather than any considered measure designed to enable individuals to obtain cost effective redress in relation to 'relevant claims' in the situations where they most often rise. It is illogical, unjust and damaging to the public interest.

We expand on these statements below.

CFAs remain

Much has been said by those who seek the commencement of s40 that it is 'implementing Leveson'. This is far too simplistic, and is not correct.

Sir Brian made it clear in his report that he was acting on the assumption that sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, amending s58 and s58A of the Courts and Legal Services Act 1990 (which had then been enacted) would abolish the recoverability of success fees and ATE premiums, including in relation to media related claims (J/3/2.16). His recommendations were made on that basis. However, after much lobbying, this never came to pass: even now claimants in libel/ privacy cases have the benefit of conditional fees.

Sir Brian had noted that the power of CFAs had *"changed the landscape entirely"*. Specifically, he noted that the regime negatively affected the freedom of the press and had been abused: *"proceedings could be threatened and then commenced on a CFA and the risk to the defendant was enormous. However modest any damages might be, the potential costs bill if the claimant succeeded, increased by 100% for the success fee and then further increased by the cost of the ATE insurance premium, was potentially prohibitive. The press felt driven to settle not only because the editor was prepared to accept that a mistake had been made or did not feel confident about the story that had been written but because, even if he or she did feel confident, the cost of losing was entirely out of proportion to the issue at stake"* (J/3/3.5).

Sir Brian believed that the conditional fee regime needed to be abolished, as: -

- The European Court of Human Rights in *MGN v United Kingdom* had expressed concern that the recovery of success fees under Conditional Fee Agreements at the level sought by claimant lawyers in privacy and defamation cases represented a significant violation of the right to freedom of expression (J/3/2.12 & 2.17) and
- Lord Justice Jackson, who had conducted an inquiry into costs in civil proceedings, had recommended that success fees and ATE Premiums should cease to be recoverable and should be replaced by Qualified One Way Costs Shifting (J/3/2.12).

In the event, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 No. 77 excluded media related claims and therefore the context in which Sir Brian considered a costs-shifting regime might be appropriate has never arisen.

The position therefore remains as Sir Brian described and even without the commencement of s.40 is still weighted heavily in the favour of a claimant. We have a very great deal of experience of (and still see) the chilling effect of CFAs on journalism: the vast majority of claims against our publisher clients are settled quickly even where there may be a good defence to a libel claim of truth or honest opinion, or where there are public interest defences to privacy claims, precisely because the risks that the business faces in running a claim to trial are too great to countenance. Even after the Defamation Act 2013, the burden of proof in a libel claim is effectively all on the defendant, and the law of libel and the relevant procedural rules are so complex that defending a claim, even where the publisher is confident the story is true, cannot be undertaken lightly. Publishers are mindful of the fact that even when successful it is rare to be awarded anything approaching 100% of costs; if a claim runs all the way to trial such costs will typically be well in excess of £400,000 and the irrecoverable costs of a successful action (perhaps £100,000 or more) can sink a publisher. We are aware of editors who are faced with the stark choice of either incurring the cost of defending a story they believe to be true and risking having to lose a journalist to pay for it, or settling. Usually they settle.

This is as true of a title owned as part of a portfolio by a substantial national or regional publisher as it is of a title owned by an individual. Modern business practice requires that each title is individually accountable.

Further, it is misleading of those who campaign for the commencement of s.40 to claim that it is necessary in order that 'ordinary people who would not be able to afford it can take on newspapers in court'. Given the continuing availability of CFAs in 'relevant claims' an 'ordinary person' with a meritorious claim continues readily to be able to obtain representation at effectively no risk to themselves.

Carte blanche for claims with no merit or that are poorly run

Currently, the rules on costs recovery (set out in Part 44 of the Civil Procedure Rules) are that the court has discretion as to whether costs are payable by one party to another. If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order. The court will have regard to all the circumstances and Part 44 sets out the sort of conduct which will be taken into consideration when the court exercises its discretion.

The wording of s.40 says that, in the case of a publisher regulated by a non-approved regulator, the court *"must"* award costs against the defendant unless it is just and equitable in all the circumstances to make a different award. The section is clearly intended to displace the existing rules on costs recovery and the usual way in which a judge is to decide the just and equitable position but it does not explain how. "Must" would appear to mean that the court is required to ignore the factors that the court would normally take into consideration, and will continue to take into consideration in every other non-media case (even involving a party traditionally subject to regulation, such as a solicitor), namely conduct before, as well as during, the proceedings and including the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended its case or a particular allegation or issue; and whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

On the face of it, s.40 means that a claimant can bring proceedings against a non-IMPRESS publisher in relation to a story he knows to be true or in the public interest, make no attempt to settle the claim using ADR or using the conciliation services of the non-regulated regulator, plead it badly, run it to trial with no attempt to settle it, lose all interim applications on the way and lose at trial, yet have its costs paid.

It is not an answer that the court will filter out unmeritorious claims through case management or early application to strike out or for summary judgment. We have considerable experience of such claims being brought against clients, not just in relation to 'relevant claims' but where, for example, an individual claims that a successful film or television programme has been based on their idea. The court is so poorly resourced that it has never been possible for there to be active case management by the judiciary or court staff, of the sort envisaged by Lord Woolf when he introduced reforms to civil justice procedure in 1996. Case management is at the expense of the defendant. Claims for summary determination or early rulings on meaning or similar commonly cost a minimum of £25,000 and costs of up to £100,000 are not unusual.

We give as an example two claims issued in 2015 via Money Claims Online for libel by an individual who claimed he had been defamed by a report that he had been convicted for fraud (an allegation which was demonstrably true). Up to the point of issue, the Claimant had been represented by non-specialist lawyers but at the time of issue was a litigant in person (presumably they decided the claims had no merit). The publisher contacted MCOL to alert them to the fact that the claims should not have been issued in the County Court as it had no jurisdiction (there was no agreement under s. 18 of the County Courts Act 1984). The claims should have been struck out, but instead the publisher was asked to apply for directions. One of the claims was nevertheless then transferred out to a county court. The other was transferred up, without jurisdiction, to the High Court. The publisher applied successfully to strike out both and obtained costs orders against the claimant of £26k which the claimant could not pay. Despite the fact that the allegations were easily proven to be true, the Claimant appealed the strike out of both claims twice, with both appeals being dismissed by the High Court and Court of Appeal.

By far the majority of the 'relevant claims' on which we are asked to advise (i.e. those that our clients have not already dealt with through their own internal process) are resolved without any proceedings at all, through correspondence or negotiated settlements. In addition to claims that are resolved on their merits, we see on average 10-20 complaints a year from claimants with legal representation or reputation advisers, where aggressive letters are sent but then the claim is not pursued further when a robust response is given pointing out the deficiencies in the case. With no costs disincentive to a claimant we anticipate that the majority of those complaints would, if s.40 is commenced, be made as claims to the court. We anticipate the number of such claims would increase significantly as a result of marketing by claimant lawyers.

No evidence that arbitration will be cheaper

Sir Brian Leveson noted in his report that media claims could not readily be brought without legal representation owing to their complexity (J/3/2.4) and the usual venue for low value straightforward claims (the small claims track in the County Court) was unsuitable for media claims which were likely to be complex (J/3/2.4).

There is no evidential basis whatsoever for the claim that has been made that the IMPRESS arbitration scheme would provide a satisfactory regime for resolving 'relevant claims'. There have been independent arbitration schemes available in the past, such as Early Resolution, initiated by Sir Charles Gray and Alastair Brett, which claimants, presumably on advice, chose not to take advantage of. We are deeply concerned that the IMPRESS scheme is wholly one sided and completely unsuitable as a forum for trying or resolving complex and nuanced legal claims. We attach a schedule comparing the IPSO and IMPRESS schemes. It would simply be impossible for any arbitrator to deal justly with a defended defamation claim for a fee of £3500. There is no right of appeal from an arbitration finding. The IMPRESS scheme might be cheap, but it would be highly unlikely to provide justice.

Question 3: To what extent will full commencement incentivise publishers to join a recognised self-regulator? Please supply evidence.

We do not believe that full commencement would incentivise publishers to join IMPRESS. Some may feel coerced into joining: we anticipate that the majority will refuse, and instead will prepare to take issue with the Act when they have the opportunity. We note that the recognition of IMPRESS is itself already subject to an application for judicial review.

Part 2 of the Leveson Inquiry

Question 4: Do you believe that the terms of reference of Part 2 of the Leveson Inquiry have already been covered by Part 1 and the criminal investigations? If not which terms do you think still require further investigation?

Question 5: Do you have evidence in support of your view? If so, please provide your evidence.

We believe that the government should terminate the Inquiry. Many of the elements of the terms of reference have already been covered. No further lessons would be learned. The victims of phone hacking have been compensated. The police service and press have undergone significant changes. The media landscape has changed considerably not just since the enquiry, but even more since the events that gave rise to the need for the inquiry. To continue the Inquiry would require very considerable sums of public money being spent that would be better spent elsewhere.

Question 6: Which of the two options set out below best represents your views?

	Continue the Inquiry with either the original or amended terms of reference
✓	Terminate the Inquiry

If you think the government should take another course of action to those set out in the question above, please set out your views.

We have noted that those campaigning for the continuance of the Inquiry refer to certain specific matters that have yet to be decided. It appears to us that going ahead with holding Part 2 of the Inquiry in the hope that as part of that exercise those matters would be determined is 'using a sledgehammer to crack a nut' and a very disproportionate use of public funds. We cannot judge whether the individual causes that are relied upon by Hacked Off and its supporters are appropriate for a public Inquiry, but if they are, we suggest the appropriate course of action would be for those particular matters to be identified and appropriate terms of reference agreed limited to the investigation of those matters.

Schedule 1 – A comparison of IMPRESS's and IPSO's arbitration schemes

	IPSO	IMPRESS
Participation	A pilot scheme IPSO is trialling for 12 months from July 2016. Members have the *option* of participating in the scheme at any point. Even if they opt into the scheme, participating members are not compelled to use the scheme in relation to any particular claim.	Scheme *requires* members to engage in arbitration if the claimant choses to do so.
Arbitrator	CEDR - a private commercial company	CIArb - a registered charity
Costs	Fees - Publisher pays Preliminary Ruling fee; Parties split Final Ruling fee and Oral Hearing fee (if applicable). No caps or amounts mentioned. Costs – Either party can be liable for costs, capped at • £5000 if documents only • £10,000 if oral hearing • At arbitrator's discretion if damages cap has been removed, but no more than £20,000 Publisher *must* pay claimant's "reasonable and proportionate" costs if the claim is "successful" (i.e., claimant succeeds *and* does better than any offer made by publisher). Publisher *may* have to pay claimant's costs where fair and reasonable to do so. *Unsuitable claim* - Neither party can be required to pay fees and costs of the other party where arbitrator determines claim is unsuitable for arbitration. *Strike out* – Claimant must pay the publisher's fees. Arbitrator may require claimant to pay publisher's reasonable and proportionate costs.	Fees - The fees of the arbitrator are to be paid by the publisher and capped at £3500. Costs - No award of costs can be made against the Claimant. Where a claimant is successful, the costs award against the publisher is capped at £3000 and the claimant lawyer's hourly rate capped at £300. The scheme provides no cap on damages awards. Nothing stated with regards to when claims are dismissed for being unsuitable or claims that are struck out – simply that "No award for cost shall be made against the Claimant under any circumstances."
Damages	Capped at £50,000 and can only be removed by consent of both parties. Arbitrator does not have the power to award exemplary or aggravated damages.	No cap.
Hearings	If there is an oral hearing it will be conducted in private.	Whether or not the hearing is in public or private is at the discretion of the arbitrator.

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