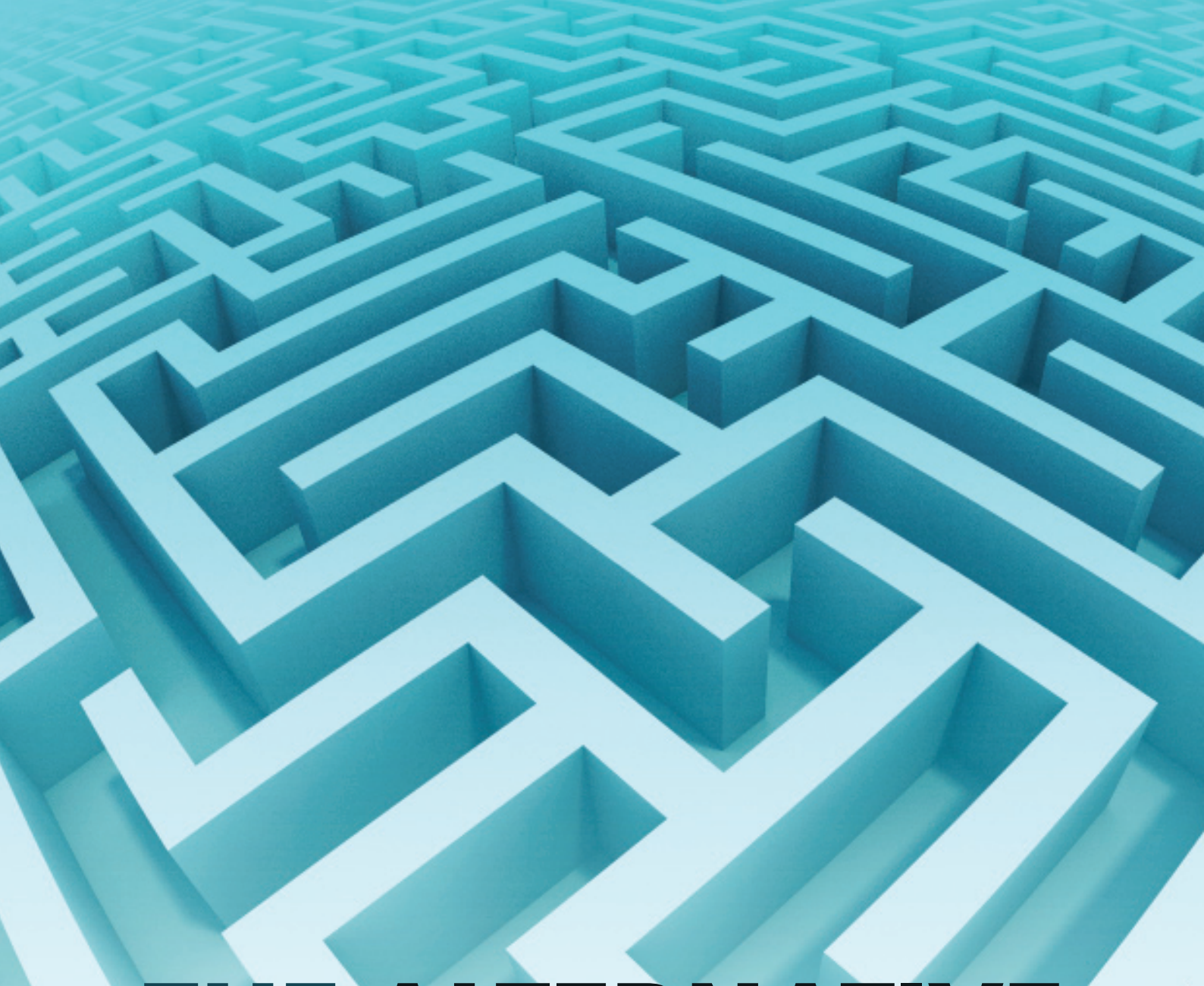

THE ALTERNATIVE LIBEL PROJECT

A PRELIMINARY REPORT ON THE PROBLEMS CREATED BY CURRENT DEFAMATION PROCEDURE AND RECOMMENDATIONS FOR CHANGE

OCTOBER 2011

INDEX ON CENSORSHIP

ENGLISH PEN

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EXECUTIVE SUMMARY

Libel is a complex, costly and highly emotive area of law. It deals with people's identity, their self-esteem and their capacity to express themselves freely. This report shows how both the complexity and costs of libel can be reduced by giving greater respect to the human feelings of libel litigants.

Our recommendations are based on research into the needs of both claimants and defendants in libel actions and consideration of a wide range of forms of alternative dispute resolution. We believe that the balance between freedom of expression and reputation should not be affected by the relative resources of litigants but by the strength of their claims, which should be assessed as early as possible, through either mediation or early neutral evaluation by a specialist High Court judge.

Research shows that mediation has a success rate of 96 per cent in libel actions. Mediation does not mean compromise – quite the opposite. Mediation enables parties to establish the merits of their case in an efficient and effective manner. It is a fast track to justice.

Early neutral evaluation allows judges to assess the merits of a case on the basis of a short and straightforward hearing. Like mediation, it allows both parties to argue their case. It has a high success rate in family law and in the Technology and Construction Court.

For this reason we recommend:

- All libel cases should be mediated; and
- If either party refuses mediation their case must go before a judge for early neutral evaluation.

Alongside this we recommend:

- The removal of the presumption of a jury in libel trials;
- The introduction of a simple procedure to determine meaning;
- Judges should be given a mandate to apply strict case management rules; and
- The costs regime should redress any inequality of arms between the parties.

These changes in isolation will not resolve the current failings of English libel law. They must be accompanied by meaningful reforms to the substantive law, as proposed by the Libel Reform Campaign, and to the costs regime, including limits on lawyers' hourly rates.

This triple-track approach to the reform of procedure, substantive law and costs has the potential to create a more level playing field in future, in which both freedom of expression and reputation can be protected, where appropriate.

This is a preliminary report, and we look forward to hearing from anyone who has a view on the merits of this approach.

INTRODUCTION

In 2009, English PEN and Index on Censorship published 'Free Speech Is Not For Sale', a report that concluded that English libel law has a negative impact on freedom of expression, both in the UK and around the world, and called for reform. Two of the findings of the report are that the potential cost of defending a libel action chilled free speech in this country, and that there are few alternative ways to resolve defamation claims other than the High Court process.

Since then, Index on Censorship and English PEN have joined with Sense About Science to lead the Libel Reform Campaign, which is supported by numerous individuals and organisations from the fields of human rights, science, medicine, literature and journalism. Concern about libel law has also been expressed by the UN Human Rights Committee and the House of Commons Culture, Media and Sport select committee. All three main political parties made a commitment to libel reform in their general election manifestos.

The government pledged to carry out a review of libel laws in its coalition agreement and has now published a Draft Defamation Bill. The Libel Reform Campaign is seeking to ensure that this Bill deters unjustifiably damaging free speech and protects freedom of expression.

Alongside this work, English PEN and Index on Censorship have received a grant from the Nuffield Foundation to carry out research on whether alternative methods of dispute resolution can be used in defamation cases, and to identify if there is a better alternative to the current High Court process.

This report is the result of our research so far. The questions of legal procedure which it addresses are important: the way in which we enforce our rights determines whether we have those rights in theory or in practice. We are therefore extremely grateful to the Nuffield Foundation for their support for this project.

Our thanks also go to the many lawyers, journalists, alternative dispute resolution specialists and others who have given us their time and the benefit of their expertise in the course of this project. The names of those who have so generously given us their time appear at Appendix A.

We would like to say a particular thank you to the members of our advisory committee and to Sir Stephen Sedley, the chair. The advice our committee members have given us is invaluable and we have listened to and been guided by their expert opinions throughout the course of this project. The views expressed within this report are, however, those of English PEN and Index on Censorship and not all of these are necessarily shared by those who have advised and supported us.

We believe that to make free speech in this country a reality, there needs to be reform of both the substantive law of defamation, and of the process by which a claim for defamation can be made or defended. These changes must be made in parallel with each other: a perfectly fair and balanced substantive law will not result in fairness if it costs hundreds of thousands of pounds to establish a person's legal rights; likewise a perfect procedure cannot lead to justice if the law applied by the courts is itself unjust.

Our project is continuing into early 2012, and we welcome comments on the report and suggestions for improvement of the procedures contained within it. We would be grateful to receive any such feedback before 18 November, and aim to publish a further report in the New Year.

This report contains some of the papers prepared in the course of this project at Appendix C. Further papers are available on request.

Any comments or queries about this report should be directed to:

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Most people in this country would view the prospect of becoming involved in a defamation claim with dread. The uncertainty, duration and cost of proceedings mean that potential claimants are not pursuing cases where they have legitimate grievances, and potential defendants are choosing not to publish despite believing that it would be in the public interest to do so. Cases settle because of factors such as cost rather than agreement on their merit. This undermines freedom of expression, compromises reputational rights and harms the image of the English and Welsh justice system.

Case study

Two longstanding foster parents were accused of terrorism in a national newspaper. The accusations were without foundation, but although their employer accepted the allegations were untrue, there was concern about the press attention and the couple lost their role as foster carers and with it their income. They sought initial advice from a defamation lawyer and were advised they had a very strong case. Despite this, and the advice that a CFA and ATE insurance would be available, they were still traumatised by the effect of the publication, worried about the litigation process and afraid of losing their life savings and home, and decided not to sue. The allegations therefore remain unchallenged.

> **'It simply was not worth putting the newspaper through the struggle or argument or difficulties that it might subsequently face'**

The fear of being drawn into defamation proceedings prompts people to avoid publishing material without any consideration of whether the claim would have merit. Website hosts and internet service providers are removing sites and content when they receive a letter threatening a libel action, and book publishers err on the side of caution when editing material submitted for publication. In a House of Lords debate, the historian Lord Bew gave a striking example with reference to a newspaper article he had written: '*In the past two or three weeks, the Bloody Sunday report of the noble and learned Lord, Lord Saville, put a number of contentious matters beyond all reasonable doubt. I left out several paragraphs of those articles because there was still so much space for possible libel action, even though I was confident that what I wanted to say was definitely true. It simply was not worth putting the newspaper through the struggle or argument or difficulties that it might subsequently face, even in a context in which so much has been clarified beyond doubt.*'[1]

[1] House of Lords Hansard, 9 July 2010 : Column 456

THE PROBLEM

Why are people so afraid of becoming involved in a defamation claim? Firstly, it is a question of expense.

Headlines such as 'BBC to pay £1m over Mohamed Taranissi libel battle'[2] in the *Daily Telegraph* bring the high costs of defamation claims to the attention of the public. Mohamed Taranissi is a doctor specialising in IVF treatment who made a defamation claim against the BBC. The *Telegraph* reported: '*Both parties have agreed to settle and not to continue forward and consider the matter now closed. A source close to the case said the BBC was not paying any damages to Mr Taranissi, but would cover his legal costs, believed to be around £900,000. The Corporation's own costs have not been revealed but they are likely to be a six-figure sum*.'

The problem is exacerbated when one party has resources and the other does not. As an example of this, journalist Hardeep Singh incurred costs of more than £90,000 as a defendant before the High Court ruled that it could not hear the case. [3] Despite winning his case, Singh has been unable to recover his costs. He has said, '*It seems [the claimant] hoped I would be forced to back out of the case as the costs mounted, which begs the question: should freedom of speech in this country only be available to the rich who have means to defend themselves in court?*' [4]

The main reasons for the high costs of defamation cases are:

- the use of conditional fee agreements (CFAs), which can more than double one party's basic costs, and on which the government is legislating;
- lawyers' fees;
- the defendant is required to prove allegations are true when pleading a defence of justification (truth), rather than the claimant being required to show they are false; and
- the process takes too long, entailing too much unnecessary work, as well as avoidable and protracted interim applications.

We recognise that litigation costs money: it takes time and expertise, and lawyers charge for this. Defamation claims involve the balancing of two rights contained in the European Convention on Human Rights – the right to reputation (derived from the right to privacy) and freedom of expression. Because of the specialist nature of the defamation work, and the fact that there are few libel barristers and a small number of solicitors' firms carrying out this work, defamation lawyers can charge high rates. We do not propose to focus on this as a costs driver, as the court assesses costs which cannot be agreed between the parties, including whether barristers' fees and solicitors' hourly rates are reasonable. We believe however that the courts should not routinely allow lawyers in defamation cases to recover hourly rates that exceed the guidelines laid down by the Advisory Committee on Civil Costs.

The main focus of our research is the procedure, which is a major factor in determining how much time lawyers spend on a case, and therefore their fees. Both claimants' and defendants' base costs (i.e. costs incurred as a result of the actual work done, and not including percentage uplifts for taking the case on a no-win no-fee basis) can be staggeringly high.

'Should freedom of speech in this country only be available to the rich who have means to defend themselves in court?'

As an example, in *Peacock* v *MGN Ltd* [5] the claimant's base legal costs were approximately £155,000. Damages in this case were £15,000, a statement was read in open court, and an agreement was reached that the allegation complained of would not be repeated.

2 8 June 2009, http://www.telegraph.co.uk/health/healthnews/5477873/BBC-to-pay-1m-over-Mohamed-Taranissi-libel-battle.html
3 See "High Court halts Indian holy man's libel case against British journalist", Murray Wardrop, 18 May 2010 http://www.telegraph.co.uk/news/religion/7734383/High-Court-halts-Indian-holy-mans-libel-case-against-British-journalist.html
4 *Ibid*
5 [2010] EWHC 90174 (Costs)

One of the procedural issues that leads to high costs is the current presumption in favour of a jury, even though most trials now take place before judge alone. Whilst there is still a possibility of having a jury in a case, it can be difficult to predict the outcome, which makes it harder to reach a settlement. One of the main reasons for this is that judges will not decide the precise meaning of the words complained of if the case may go before a jury, as this is one issue that the jury should decide. This affects most areas of case preparation and may mean that the case needs to be argued on several fronts.

Even if there is not going to be a jury in a case, unless the meaning of the words complained of has been agreed or determined, parties prepare to present different arguments for different levels of meaning.

Costs can quickly mount and the issue of who should pay them becomes a bar to settling the case. Costs almost always exceed damages in reputation cases as vindication is a large part of the remedy sought. Despite recognising this, it seems self-defeating to incur more expense in arguing over costs already incurred.

Tactics adopted by the parties are also said to drive costs. Deliberate delay on the part of defendants and claimants carrying out unnecessary work are two common complaints, and may contribute to increased costs.

Furthermore, defamation litigation often involves points of principle and highly emotive issues, both of which people are willing to spend money on.

Another concern with defamation claims is that they can take too long. In 2008-2010 the average time it took between issuing a case and a judge making a decision, following a trial, was just over 17 months[6]. For people trying to restore their reputation or resolve a dispute to determine whether they will be allowed to continue to publish an article, this is a long time to wait.

Material which is online has an enduring nature and, unlike print publications, requires someone to actively remove it if it is not to remain in public view. Internet service providers (ISPs) and website hosts, unsure of their position as the law seeks to evolve to apply in a practical way to new technologies, are removing material under their control on just the threat of defamation proceedings. They are scared of being drawn into long and expensive arguments. We do not address in this report whether secondary publishers should be liable for defamation while proceedings relating to the publication are continuing: that is a matter for the substantive law. Nor do we consider the Libel Reform Campaign's proposal for a short court procedure to determine liability. However, if cases could be resolved quickly, and at a lower cost, it is much less likely that ISPs and website hosts will be intimidated into removing material in this way.

We believe that the culture of resolving defamation disputes needs to be changed. Most defamation claims that are issued in the High Court settle before they reach trial,[7] but too often this is because the costs of fighting the case are too high. The financial fear needs to be removed from defamation proceedings, so that people can make a decision based on what they believe is right and not on their individual wealth. Proceedings need to be brought to a swift conclusion, so that reputations can be restored as quickly as possible or the freedom to publish can be confirmed.

The culture of resolving defamation disputes needs to be changed

The need to reform defamation procedure has been recognised by many of the witnesses who gave evidence to Parliament's Joint Committee on the Draft Defamation Bill. In addition, at least two proposals have been made for a fast track or simplified procedure to sit alongside a High

6 From " Reframing the time it takes to get to a libel trial" Dominic Crossley, Collyer Bristow LLP, 11 November 2010 http://www.collyerbristow.com/fileserver.aspx?oID=1618&lID=0

7 Mr Justice Tugendhat, p.3, Corrected transcript of oral evidence given to the House of Lords and House of Commons joint committee on the Draft Defamation Bill, 6 July 2011

THE PROBLEM

Court procedure[8]. Furthermore, a private arbitration scheme[9] has been set up following the report of the Early Resolution Procedure Group[10], which was formed by several senior media law practitioners and chaired by Sir Charles Gray. The purpose of this scheme is to offer potential litigants in defamation proceedings a quicker and cheaper alternative to High Court proceedings, and is particularly aimed at resolving the issue of the meaning of the words in dispute.

The state must provide an efficient and effective judicial process so that parties can be assured that their right to reputation, or right to free speech, will be fairly adjudicated upon. But alongside this, a concerted effort is needed to encourage parties to resolve their differences without the need for costly and protracted court proceedings. We have therefore considered a range of procedures and fora which may be more effective than the current process for defamation claims (see Appendices B & C), and have drawn from many of these to make our recommendations.

8 "A proposal for a fast track procedure for defamation", Media Standards Trust http://mediastandardstrust.org/wp-content/uploads/downloads/2011/02/A-Fast-Track-Procedure-for-Defamation.pdf and "Reframing Libel: Taking (All) Rights Seriously and Where It Leads" Professor Alastair Mullis, University of East Anglia and Dr Andrew Scott, Law Department London School of Economics and Political Science http://www.lse.ac.uk/collections/law/wps/WPS2010-20_MullisandScott.pdf

9 Early Resolution CIC, http://www.earlyresolution.co.uk/

10 "Media Disputes and Civil Litigation Costs" Early Resolution Procedure Group, 2010, http://inforrm.files.wordpress.com/2010/12/early-resolution-procedure-report.pdf

THE PROPOSED SOLUTION

Our proposed solution is multi-faceted.

We recommend that most cases should be mediated: those cases that are not mediated should go to early neutral evaluation before a judge.

Alongside this, rule changes should encourage stricter case management by judges and a costs regime which will help redress any inequality of arms between the parties should be introduced.

Finally, a separate optional procedure ought to allow the court to determine the ordinary meaning of the disputed words in question.

MEDIATION

Mediation is being used increasingly in defamation disputes and usually results in settlement. Statistics regarding the success of mediation in defamation claims are hard to come by and should be viewed with caution,[11] but are nevertheless compelling: one defamation mediator and practitioner has acted in 86 defamation cases that have been mediated, with only three cases failing to settle – that's a 96 per cent success rate. Anecdotally, another practitioner has experience of 30 defamation cases, out of which two did not settle (a 93 per cent success rate); and a third, smaller sample of ten mediated defamation cases all settled (100 per cent success rate).

It is recognised that factors that lead to cases being mediated (e.g. the nature/motivation of the parties, particulars of the case) may make them more pre-disposed to settle in any event. Nevertheless, the fact that most cases settle at mediation makes it an attractive proposition for those looking to save costs.

Mediation has big advantages for defamation claims: it is private; it allows for any solution; it gives the personalities involved an opportunity to meet face to face; it gets parties talking; it removes guesswork by giving parties a realistic view of what the other party wants; it is focused on a solution rather than taking the procedural steps required to bring a case to court; and it can take place early, before evidence is exchanged and costs run up.

Mediation has big advantages for defamation claims

In contrast to court proceedings, mediation does not require people to stand by the strongest case possible. They do not therefore become so entrenched. The process is not focused on following formal procedure, or assessing rights according to law (although this of course forms the backdrop to the case).

Mediation concentrates on the personal, with people being treated as individuals, rather than just as parties to a case. It gives parties an opportunity to deal with emotions in tandem with the legal rights and wrongs of the case.

Individual claimants are often quoted as saying they just want to put the record straight and/or an apology. By way of an example, in evidence to the

[11] Most solicitors and mediators do not keep statistical records of whether cases settled or not. Collating information from those that do keep records risks distorting the picture: the number of defamation mediators and/or practitioners is so small, that cases may well be recorded twice.

THE PROPOSED SOLUTION

Culture, Media and Sport Select Committee, Gerry McCann talked about defamation proceedings in relation to newspaper articles published following the disappearance of his daughter. He said: *'We were interested in putting a stop to it first and foremost and looking for some redress primarily with an apology.'*[12] A similar sentiment was expressed by Sheryl Gascoigne, who had been the subject of a series of defamatory allegations in various tabloid newspapers, in the BBC's *See You in Court*[13]. Yet while the Court has the power to prevent re-publication of defamatory allegations, it cannot order a defendant to apologise. In contrast, mediation also offers an opportunity for early agreement on the issue of whether allegations should be taken down from the internet, or not republished, and for apologies to be made. The personal nature of mediation can make it cathartic for parties, particularly for claimants; a personal apology through mediation can be very important.

Case study

A story about fraud ran on pages 1 and 3 of a national newspaper: the alleged fraudster's girlfriend, a hotel receptionist who had no involvement in the dishonest scheme, was libelled in the story. The case was mediated. The claimant, her lawyer, the legal manager of the newspaper involved and a well-known libel lawyer attended the mediation. The claimant found the mediation process empowering. The defendant's representatives were visibly moved when she described the effect the report had on her life. The case settled for a substantial five-figure sum.

Mediation can work even in cases where it seems that, on the face of it, settlement is not within reach. This was recognised by the court almost a decade ago when Brooke LJ said: *'[The defendant's barrister] when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. The court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.'*[14]

We recognise that there are different approaches to mediation: some mediators have specialist knowledge of the law and use this to guide the parties, and others focus on achieving a mutually acceptable settlement rather than legal rights and wrongs. Our preliminary view is that different approaches are useful in different cases, and so the form of mediation which should be attempted should be left to practitioners to agree on, and not be prescribed. The appropriate mediator should be carefully selected to ensure that parties' expectations of the mediator's role are met.

Despite the many advantages of mediation, we recognise that there may be some cases that are unsuitable. This may include cases where the truth of the allegation is at the heart of the matter, such as Jonathan Aitken's claim against the *Guardian* in the 1990s. Unsuccessful mediation will just add to the cost of proceedings. That expense can be minimal compared to the cost of a full trial, but to force a party to incur extra costs in cases where neither party believes mediation will work seems to be contrary to the aim of reducing costs.

12 Q 213, EV 76, "Press standards, privacy and libel: Second Report of Session 2009-2010", House of Commons Culture, Media and Sport Committee, 9 February 2010 http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/362/362ii.pdf

13 "See You in Court" Episode 1, Broadcast on BBC on 29 March 2011

14 Brooke LJ at para 14, *Dunnett* v *Railtrack PLC* [2002] EWCA Civ 303

‘Parties should respond reasonably to offers to mediate or settle and... their conduct in this respect can be taken into account in awarding costs’

In cases where it seems that mediation would inevitably fail, it seems futile to force both parties to incur the costs of attending mediation. It is for this reason we do not recommend that mediation be made compulsory in defamation proceedings. In considering the question of compulsion, we have noted that judicial objections that compulsory mediation is contrary to article 6 of the European Convention on Human Rights are believed to have been withdrawn[15], and parties in other types of civil claims are increasingly being compelled to mediate, or at least attend mediation information sessions.

In a recent Court of Appeal decision, Lord Justice Rix reiterated ‘*a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs*’.[16]

Although it is by no means common, in some defamation claims Masters of the High Court are already making orders that the parties must consider ADR and, if they think it is unsuitable, file a witness statement saying why this is the case. This witness statement will then be considered when the court makes costs orders. These are known as Ungley Orders[17] and are widely used in litigation in other types of case.

Given the advantages of mediation in defamation cases, we believe that parties should mediate before they issue proceedings[18]. If proceedings are issued under Part 7 of the Civil Procedure Rules (the usual way of starting a defamation claim) and if mediation has not taken place, Ungley Orders should be made. We also believe that such an order should state that the parties themselves should attend the mediation (in the case of the corporate body, this will have to be varied to a person with authority to settle the case; serious consideration should also be given to whether the author of an article which is the subject of the claim should also be compelled to attend, if he or she is not in fact the defendant). This is to ensure that the personal benefit of the mediation process is not lost.

We also recommend that the Pre-Action Protocol be amended. In April 2009, the old Practice Direction which accompanied the Pre-Action Protocols was replaced by the Practice Direction for Pre-Action Conduct. Critically, this change resulted in the words: ‘*It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR’* being removed from the Practice Direction. Instead, the Practice Direction now says *‘Although ADR is not compulsory, the parties should consider whether some form of ADR procedure might enable them to settle the matter without starting proceedings. The court may require evidence that the parties considered some form of ADR’.*

Unfortunately, the Pre-Action Protocol for Defamation[19] has not been amended in this way. We believe that to encourage parties to use ADR, this change should be made in the Defamation Protocol.

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15 In *Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576 Dyson LJ said that the Court could not compel parties to attempt mediation. He reportedly resiled from that view in an unpublished speech to a symposium for the Chartered Institute of Arbitrators in 2010, says Tony Allen in “*Dunnett* v *Railtrack PLC* really lives: sanctioning for refusing to mediate” http://www.cedr.com/articles/?291

16 Para 41, *Rolf* v *De Guerin* [2011] EWCA Civ 78

17 An Ungley Order: “The parties shall by consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable” Para 32, *Halsey* v *Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576

18 We believe that parties in a genuine defamation dispute ought to go to mediation. We do not believe that people who receive letters threatening libel ought to rush to mediation before taking legal advice as to whether such a claim has any legal foundation.

19 At para 3.9

THE PROPOSED SOLUTION

EARLY NEUTRAL EVALUATION

Early neutral evaluation (ENE) is a process in which an independent expert considers all aspects of a case at a preliminary stage and gives an opinion on the likely outcome. Judges in the relevant court often carry out the evaluation. It is based on the understanding that once the parties have heard the opinion of a respected expert on the expected outcome of the case, they will be more likely to settle. If the case does not settle and goes to trial, a different judge will hear the case.

ENE usually takes place after disclosure of relevant documents, so that the judge can take a view of the case overall. The outcome of the ENE is an opinion rather than an order. The judge carrying out the ENE will say what is most likely to happen if the case proceeds to trial. It is open to the judge, however, to suggest alternative remedies at this stage. The parties can negotiate any remedy they choose.

The practicalities can be varied to suit the type of law and particular case. In the Technology and Construction Court (TCC), where ENE is offered, parties are given the option of an ENE. If they choose this, the judge gives directions to ensure the case is prepared for the ENE, and the evaluative process itself usually lasts for about half a day. There is no charge for ENE in the TCC at present: it is possible that the savings to the court in avoiding a full trial mean that no fee will continue to be levied.

Mr Justice Akenhead, the judge in charge of the TCC, has said that ENE almost never fails, with settlements being reached within weeks of the process taking place.

ENE has the potential to save judicial resources. Although it requires judges to consider papers before the ENE and at the evaluation itself, if the case settles it will save judges the time that they may have spent on any future interim applications and a full trial.

These factors make ENE an attractive option: it would, however, add another layer of costs for both parties and the court in the event that it fails. A further disadvantage is that for it to be effective, it needs to take place after disclosure of evidence so the judge can reach an informed opinion. It is not therefore as effective in reducing costs as, for example, mediation, which can happen before such costs have been incurred.

ENE almost never fails

Part of the difficulty in analysing ENE lies in the fact that, outside of family proceedings, it is still largely untested. In the TCC only about ten cases a year opt for ENE.

Despite this, where it has been used, ENE has been shown to be successful and we therefore believe that it has potential to be very useful in defamation proceedings. We think that it would be particularly appropriate in cases where parties have refused to mediate. We believe that parties are most likely to refuse to mediate because either they are so convinced in their position that they are not willing to concede anything; or the other party is so unreasonable that mediation will never result in a settlement. Cases which turn on 'truth' may fall into either or both of these categories. An early judicial opinion would provide a reality check in both of these scenarios, revealing any weaknesses or confirming the strengths of the case in the first example, and exposing any unreasonable positions in the second.

We envisage that ENE would take place following the government's proposed early resolution hearing.[20] Whether or not it could happen immediately following this – on the same day, for example – would depend on when the proposed early resolution hearing is to take place and whether enough evidence has been produced to enable a judge to carry out an ENE.

[20] p. 47 and following, "Draft Defamation Bill Consultation" CP3/11, Ministry of Justice, March 2011

STRICTER CASE MANAGEMENT

Strict case management could be the key to reducing costs in defamation proceedings. Adrienne Page QC and Desmond Browne QC, in evidence to the Select Committee on the Draft Defamation Bill, were of the view that 'traditionally judges are not interventionist'.[21] It is our firm view that to control costs in defamation proceedings, judges need to intervene.

We believe judges should consider a case shortly after it is issued and make directions for its conduct.

Lawyers try to run arguments and produce evidence to cover every possible angle in a case. Whilst lawyers are acting in the best interests of their clients, this approach can mean a case is not dealt with 'in ways which are proportionate',[22] which forms part of the court's overriding objective to deal with cases justly. Whilst the Civil Procedure Rules do give judges the power to limit the evidence and argument produced in a case, this is used sparingly in defamation claims.

Judges need to intervene

We believe judges would be assisted if given a specific mandate to use tighter case management tools, rather than just the potential to do so. This mandate has recently been given to the judge in the renewed Patents County Court, Judge Birss, who applies a cost-benefit analysis test to each application he receives, and with apparent success. In a recent example, an application was made to amend statements of case in a Patents County Court case.[23] Though such an application would usually routinely be approved in the High Court Patents Court, it was refused. Applying the cost-benefit test in this case, HHJ Birss considered '*issues of proportionality, whether the amendment is a "killer blow" and costs. The judge also held that the reasons why an amendment was not made earlier will be considered in the appropriate circumstances. Applying this to the instant case, HHJ Birss QC refused the amendment on the grounds that the incremental increase in the chance of winning was outweighed by the increased cost and complexity of allowing the amendment*'.[24]

21 Pages 13 & 14, Corrected transcript of oral evidence given to the House of Lords and House of Commons joint committee on the Draft Defamation Bill, 22nd June 2011
22 Part 1.1(2) Civil Procedure Rules
23 See for example, *Temple Island* v *New English Teas* ([2011] EWPCC 019)
24 "London Image Case Gives Direction On PCC Pleading Amendments" Hogarth Chambers Latest News 24 June 2011, http://www.hogarthchambers.com/Asp/uploadedFiles/File/NEWS/Clarification/on/when/amendments/of/pleading/are/allowable/in/the/PCC/PDF/(2).pdf
25 Grade A, London 1 "Solicitors' Guideline Hourly Rates 2010" http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guideline-hourly-rates-2010-v2.pdf
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THE PROPOSED SOLUTION

CHANGES TO COSTS RULES

We have already set out our view that stricter costs sanctions should be introduced if a party's refusal to mediate is unreasonable. Stricter sanctions for non-compliance with the Pre-Action Protocol for Defamation would also help ensure best practice. These sanctions should include a winning party not recovering all the costs they would usually expect, and a losing party having to pay costs at a higher – or indemnity – rate.

In addition, we believe that the guideline hourly rates published by the Advisory Committee on Civil Costs should not routinely be exceeded in defamation cases. In 2010 the highest guideline rate was £409 per hour[25] yet seven firms charged more than this – the highest being £650 per hour.[26] Practitioners have told us that the court, which has discretion as to the hourly rates allowed, often allows rates higher than the guidelines.

These relatively simple measures may make a big difference to the costs and attitudes of parties in certain cases. We believe, however, that more radical changes should be made to the costs rules in defamation proceedings to help redress any inequalities of arms between the parties. Once again, we draw on the experience of the Patents County Court where there is a cap on the amount of costs that one party will have to pay to the other, precisely to ensure that a wealthy party cannot use their financial might to try to dictate legal proceedings and run up costs that their opponent cannot afford. We consider the costs options below.

Until 1 October 2009, the usual rule of civil litigation applied to defamation claims: the winner could recover their reasonable costs. On that date, a costs budgeting pilot was introduced. This pilot continues to run, and has been extended until the end of September 2012. Costs budgeting allows for judicial approval of spending, and can give each party a better idea of the likely costs liability once a case has commenced.

No data have been published regarding the pilot and there are mixed reports as to its success. Lord Justice Jackson, in his report to the Civil Procedure Rules Committee, believes it is working well,[27] but there is anecdotal evidence that the hearings designed to approve future budgets are in fact being used to assess the level of past costs, which is difficult to do in a continuing case. It is, for example, difficult to justify having carried out preliminary work with a potential witness who has not been called to give evidence, without showing why that work was done.

Radical changes should be made to the costs rules in defamation proceedings to help redress any inequalities of arms between the parties

Irrespective of the outcome of the pilot, costs budgeting does not produce any certainty, nor necessarily reduce costs. We believe that a more dramatic change in the costs regime should be introduced. We have set out below a range of costs options, from the traditional English and Welsh model that winner takes all, to a no costs shifting regime. We believe that costs caps, fixed recoverable costs, protective costs orders or qualified one-way costs shifting are all measures which would allow more access to the courts. There is precedent in the English and Welsh courts system for all of these forms of costs orders, save for qualified one-way costs shifting. None of them offer a perfect solution, but in our view they would help redress the inequality of arms between parties.

Fixed costs caps mean some parties may not be able to recover all their costs, and the costs cap will have to be set at a level which will be unaffordable to many. But parties are not recovering all their

[27] "Rupert Jackson's note to the Rule Committee re the Defamation Costs Management Pilot" CPR (11)14, Ministry of Justice, 6 June 2011

costs at the moment, and a cap will mean that more people will be able to afford access to the courts. Caps may also mean parties are more likely to exercise control over their lawyers.

Individual costs caps can prevent a party from being exposed to a financial risk he or she can ill afford. Applying for such an order can itself be a time consuming and therefore costly process, but the fact that these orders can be considered on a case by case basis does allow individual consideration of parties' resources.

Fixing the amount of recoverable costs may also mean that parties may not recover all of their costs. Fixed recoverable costs can also cause conflict of interests between lawyers and their clients: the less work lawyers do, the more profit they will make, which may conflict with their clients' interests. Fixed recoverable costs do, however, bring certainty, and eliminate arguments over the amount of costs to be paid.

Protective costs orders and qualified one-way costs shifting would allow a person with limited resources to take a claim without fear of being exposed to the risk of paying the other side's costs.

Exceptions could be made in all of the above cases, where the cap or fixed rate could be removed in the event of unreasonable behaviour in the course of the litigation by the party who benefits.

COSTS OPTIONS

1. **Winner takes all**
   The winning party recovers all costs from the other party.
2. **Winner recovers reasonable costs**
   The winning party recovers all the costs which are assessed by the court (or agreed) as reasonable, from the other party.
3. **Costs budgeting**
   Throughout the claim, each party must predict how much work they intend to do and how much this will cost, and have this budget approved by the court. The party that wins at trial will then recover reasonable costs, which will be assessed with reference to the approved budget, from the other party.
4. **Costs cap(s)**
   Fixed: The winning party recovers all the costs which are assessed by the court (or agreed) as reasonable, from the other party up to a maximum set amount laid down in the rules (a costs cap). A costs cap can also be applied to each stage, e.g. £5,000 cap for issuing proceedings and drafting Particulars of Claim.

   Individual: A person can apply for their costs liability to be capped, either for the entire case, or just in relation to a particular application.
5. **Fixed recoverable costs**
   The winning party recovers a set amount of costs depending on the stage at which the case was settled or decided, irrespective of their actual costs.
6. **One-way costs shifting**
   A party can make an application for the court to order that one party does not have to pay the other party's costs even if that first party loses (a protective costs order).

   Alternatively, a one-way costs shifting regime under which one party is routinely protected from paying costs if the claim is unsuccessful may be introduced.
7. **No costs shifting**
   Each party pays their own costs irrespective of the outcome of the case.

THE PROPOSED SOLUTION

A HEARING TO DETERMINE MEANING

A party to a defamation dispute ought to be able to make an application to the court to determine the ordinary meaning of the alleged defamatory statement and decide whether it is opinion or fact. In the majority of cases (i.e. all cases except where an 'innuendo' meaning is alleged), these are both determinations that can be made on consideration of the publication itself: no other evidence is needed. Submissions could be limited in length, and the parties could only recover fixed costs. In order to allow such applications, the presumption that there will be a jury in defamation proceedings must first be removed.

> **'The principal obstacle to early resolution in defamation cases is the lack of a procedure for determining the actual meaning of the material complained of before service of a defence.'**

We are proposing this as an option so that it can be used in cases where deciding the issue of meaning may lead to a settlement.

In current defamation law, the alleged defamatory statement is taken to have a single meaning. This may be artificial as a statement may be open to more than one interpretation. Nevertheless, there are no proposals from government to change the single meaning rule, not least because it is practical and proportionate.

Since the case of *Lucas Box v News Group Newspapers Ltd*[28] a defendant must set out in their statement of case the defamatory meaning he/she seeks to prove to be essentially or substantially true. In 2003, the Court of Appeal delivered its judgment in the case of *Chase v News Group Newspapers Ltd*[29] which led to three levels of 'meaning' being referred to:[30]

Level 1: guilt or serious grounds to suspect
Level 2: reasonable grounds to suspect
Level 3: grounds to investigate.

In many cases, the parties cannot agree the ordinary meaning of the statement in question. The claimant must set out the highest defamatory meaning they allege the publication bears (as the court can find that there is a lesser defamatory meaning, but not a higher one); the defendant must respond and almost invariably seeks to assert a different level of meaning. This not only results in time and therefore money being spent on arguing the meaning, it results in cases being prepared and pleaded in the alternative.

When parties are able to settle the issue of meaning, it often leads to resolution of the case. This is because parties are able to take a view on whether they have the evidence to justify their position, the cost of establishing their position, and what remedies might result.

The Early Resolution Procedure Group said: '*The principal obstacle to early resolution in defamation cases is the lack of a procedure for determining the actual meaning of the material complained of before service of a defence.*'[31] The government has recognised this and has proposed an early resolution hearing to deal with this and other issues once a defamation case is issued.[32]

The court will not currently decide the ordinary meaning of allegations while there is still a possibility of a jury trial: the jury, after all, is supposed to represent the view of the 'ordinary person'. If defamation claims are removed from the scope of s.69 of the Senior Courts Act 1981 (which prescribes that defamation claims will be heard by jury unless the court determines otherwise) as

28 [1986] 1 WLR 147
29 [2002] EWCA Civ 1772
30 Brooke LJ at Paragraph 45, *ibid*
31 *Ibid*. 8, at para 1.4
32 *Ibid* 20
33 *Ibid*. p36

the government proposes,[33] this will allow for hearings on meaning to be heard by judges when a defamation claim has been issued.

Issuing a claim, however, involves (at least in theory) Pre-Action Protocol compliance, and usually requires full statements of case to be set out before the court gives directions and decides whether to hold an early hearing. This process can easily cost each party £5,000.

We believe that meaning can and should be resolved early. The meaning of an article can often be decided on considering the publication alone; there is no need for any evidence to be adduced. Whether a statement is opinion or alleging fact can also be decided by consideration of the publication alone.

A hearing that considers only the publication could be suitable for an application under Part 8 of the Civil Procedure Rules. This part of the CPR allows parties to ask the court to decide an issue, using an abbreviated procedure, if there is no substantial dispute of fact. Part 8 also sets down certain types of application that have to use the procedure set out in that section. Essentially this procedure is designed to be used when a person wants a court decision on a discrete issue that does not require substantial evidence.

We believe that Part 8 could be utilised for a consideration of the publication alone, to deal with meaning, and possibly a decision on whether the statement is an opinion. This procedure could be used in cases where the parties require a binding decision on meaning where this issue seems to be the major hurdle to resolving the dispute.

To make this process easily accessible, we believe that an application to consider the meaning of statement, and whether this is opinion or fact, should be one of specified circumstances in Part 8 where this process should be used. To ensure this does not become another layer of litigation leading to endless argument, attempts at production of evidence, and more cost, this hearing should:

1) Be limited to consideration of the publication, with no other evidence to be adduced;
2) Allow limited argument, e.g. each party should only be allowed to make submissions of no more than two sides of A4 paper;
3) Attract fixed recoverable costs e.g. the winning party should be able to recover £1,000.

The consequence of the hearing would be that a binding decision on meaning will have been made by a High Court judge. It would be possible to appeal only on the basis of misapplied law or because of a serious procedural or other irregularity in the proceedings in the lower court.

The decision would stand on its own: it is not part of a larger claim, where parties have opened themselves up to the possibility of cost liabilities mounting to tens of thousands of pounds.

The court fee would be £465 (currently) – which is the fee for a non-money claim in the High Court. If it was agreed between the parties the claim could be issued in the County Court for £175 (we note that this is unlikely, unless a judge who has experience as a defamation practitioner happens to sit in the relevant County Court).

The application could be decided very quickly. It may even be suitable for determination on paper. Otherwise, a one-hour hearing would usually be sufficient. A half-day hearing – which should be more than sufficient – could be listed at the Royal Courts of Justice very quickly. A hearing would usually be held within a month of the application.[34]

[34] Clerks in the listing office of the Queen's Bench Division of the High Court interviewed on 11 August 2011

THE PROPOSED SOLUTION

The disadvantage of this approach would be that if parties are unable to settle the case following the decision on meaning, proceedings would have to be issued under Part 7 of the CPR, which means paying a new court fee. It would also mean preparing different statements of case, and although this might involve a small amount of repetition regarding scene-setting, it is unlikely to recount arguments made in the decision on meaning: the application would simply say that the meaning has been decided.

The advantages are that either party can apply to the court for a decision to be made on meaning at any time, irrespective of the status of other elements of the case. The maximum length of submissions and fixed recoverable costs mean there is certainty as to the cost of proceedings (and there won't be arguments over costs themselves). A ruling on meaning could also be useful where a defendant is seeking to make an offer of amends under section 2 of the Defamation Act 1996. Often, the parties may agree the terms of settlement, but are not willing to accept the other's interpretation of meaning. A court's decision on meaning would remove this obstacle to settlement.

This is a small but significant departure from the government's proposed early resolution hearing.[35] The key differences are that this application could be made without full proceedings having been issued and that it would not deal with matters that may require evidence, such as whether the claimant has suffered significant harm.

[35] *Ibid* 23, p.48

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APPENDIX A: PEOPLE WHO HAVE ASSISTED IN THE COURSE OF THE PROJECT

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APPENDIX B: THE PROJECT

In order to reduce impediments to justice and to clarify the relationship in English law between Articles 6, 8 and 10 of the European Convention of Human Rights the right to a fair trial, privacy, including reputation, and freedom of speech, we are investigating the feasibility of a procedure for resolving libel claims which would offer litigants an alternative to the current High Court based process.

In the course of the project so far, we have considered the full landscape of dispute resolution mechanisms currently in use across England and Wales in different areas of law, as well as considering current schemes or proposals for defamation claims. We also analysed the factors believed to drive costs, reflected on the aims of defamation litigation and considered what the parties to such cases want from the process.

We considered looking at procedures used in other jurisdictions: we thought about looking at common law jurisdictions as these were the most similar to the English and Welsh system, and conversely considered researching civil law systems as these may offer fundamentally different solutions. Despite these options, we concluded that given that no legal system and defamation law was directly comparable and that in the time available, looking at other jurisdictions would not add value to the report.

On recommendations from our advisory body, we carried out more detailed research into five fora which, at first glance, looked like potentially attractive options for defamation procedure, and produced models based on these. On consideration of these options, some of the features of the models were attractive, and we have drawn on these in our recommendations, but none were thought in themselves alone to be appropriate for defamation actions. We have reproduced these models, with notes on their perceived advantages and disadvantages, as appendices.

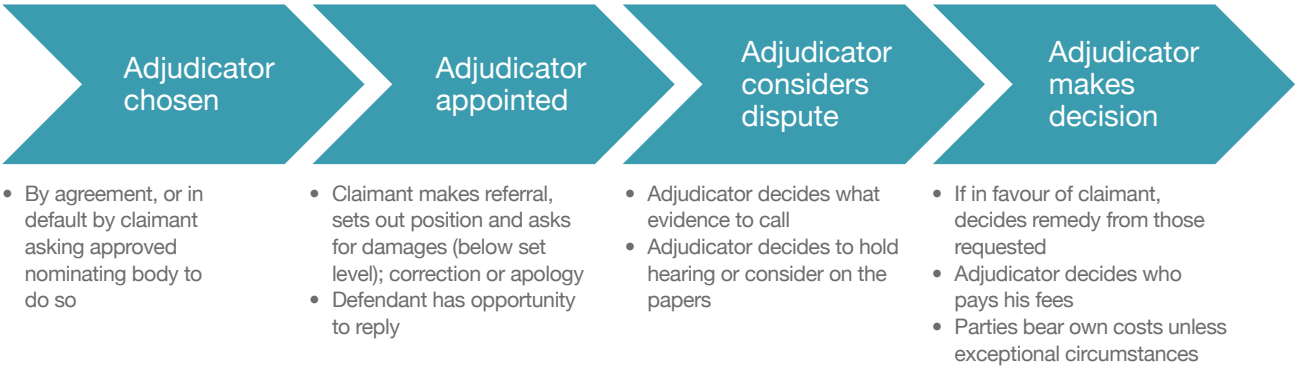
Our research is being carried out in the wake of Lord Justice Jackson's report on Civil Costs and Funding. Although we believe that reducing costs is a fundamental part of improving defamation procedure, we are not seeking to address the same funding and costs issues as Lord Justice Jackson considered. Indeed, in his report, Lord Justice Jackson refers to the issue of early resolution and jury trials, but says *'it is not the function of this Costs Review to become involved in the procedures for defamation litigation at that level of detail'*[36]. In contrast, it is the function of this project to consider procedure in such detail to see if any alternatives can be found.

Finally, there has been much discussion in the course of the libel reform debate about a 'take down' procedure to help clarify when liability for intermediaries (such as website hosts and internet service providers) arises. The Libel Reform Campaign has proposed a court-based procedure to deal with this. We have not addressed the details of this procedure in this report because of time constraints but it may be appropriate to do so in our final report, which we aim to publish early in 2012.

[36] Para 5.2, Chapter 32, Jackson LJ "Review of Civil Litigation Costs: Final Report" December 2009 http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

APPENDIX C: ANALYSIS OF POTENTIAL MODELS FOR DEFAMATION ACTIONS

MODEL A: DEFAMATION ADJUDICATION



Adjudication is intended to be a quick and low cost process. An expert in the relevant field is appointed as an adjudicator. The referrer asks the adjudicator to decide whether the other party should apologise, publish a correction or pay damages.

The adjudicator decides what facts need to be established and calls evidence as appropriate. The adjudicator can make a decision on the papers or hold a hearing.

The adjudicator's decision is binding unless and until the parties agree or a court decides otherwise. An unchallenged adjudicator's decision can therefore be enforced through the courts.

The process is privately funded, with the adjudicator deciding which party should pay his or her fee. The parties usually bear their own costs if they choose to be represented.

To compel defamation litigants to adjudicate, having an adjudicator's decision would have to be made a pre-requisite to starting a court claim.

This model is based on adjudication used in the construction industry.

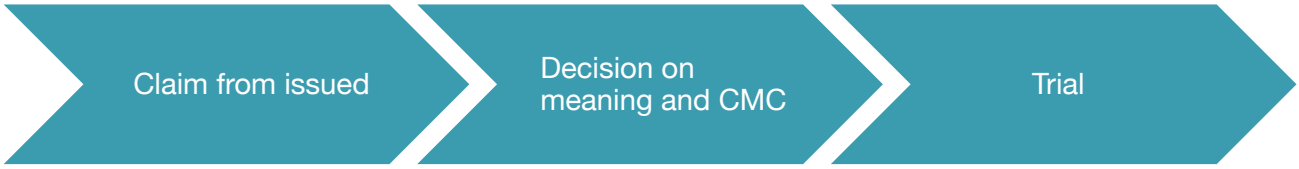
ANALYSIS

Parties wishing to adjudicate defamation proceedings would have to overcome an additional hurdle to, for example, the construction industry, because there is no contract to assist with choosing the adjudicator and determining the process to be followed. All of this would have to be agreed before the adjudication began. The evidence required to make a determination in a defamation dispute may be more expensive to obtain than in a contractual dispute about, for example, non-payment of monies due. In addition, the fact the adjudicator's decision is not binding is likely just to defer the dispute, with court proceedings being started by the unhappy party after a decision has been made.

The big advantage of adjudication is the potential for speed. This is also an advantage of arbitration, which is a similar model to adjudication, but the parties agree to be bound by the outcome (by entering in to an agreement under the Arbitration Act 1996). Neither involve a public body, thus have the advantage from a government (and taxpayer) perspective of not relying on the public purse. Arbitration is probably the ADR model which comes closest to being a private court. One national newspaper often used arbitration to resolve defamation disputes: the scheme used has now been formalised and is available for any party involved in defamation disputes to use.

Adjudication has too many disadvantages to be thought to be a suitable model for defamation proceedings; arbitration is undoubtedly useful in some cases, but is available on a private basis and because of the binding nature of the decision, the Court could not compel people to use this.

MODEL B: DEFAMATION COURT



- Court fee paid
- Parties make detailed statements of case

- Before circuit judge
- Decides meaning
- Judge identifies issues and makes directions

- No more than two days
- Cost cap - for each stage and overall

A specialist defamation court is established with similar status to the Mercantile Court. It is part of the High Court but junior to it. Its administration is carried out by High Court staff. The judge(s) are senior circuit judges who specialise in defamation law. It is a self funding court, paid for from the fees levied when a claim is made. The exception to this is if a party qualifies for fee exemption, when the government covers the cost of the fee.

The judge may award the same remedies as a High Court judge – damages, injunction preventing republication of the same or similar allegations, a statement read in open court, or an order that the court's judgment be published.

The judge manages the case very robustly after reading detailed statements of case, and applies a cost-benefit analysis in considering what evidence to allow. The trial is limited in time perhaps to two days. A costs cap on each stage of the process, as well as an overall cap, is applied.

If a case is too complex for the Defamation Court it would be transferred to the specialist judges in the High Court.

The model that has been used for this court is the Patents County Court.

ANALYSIS

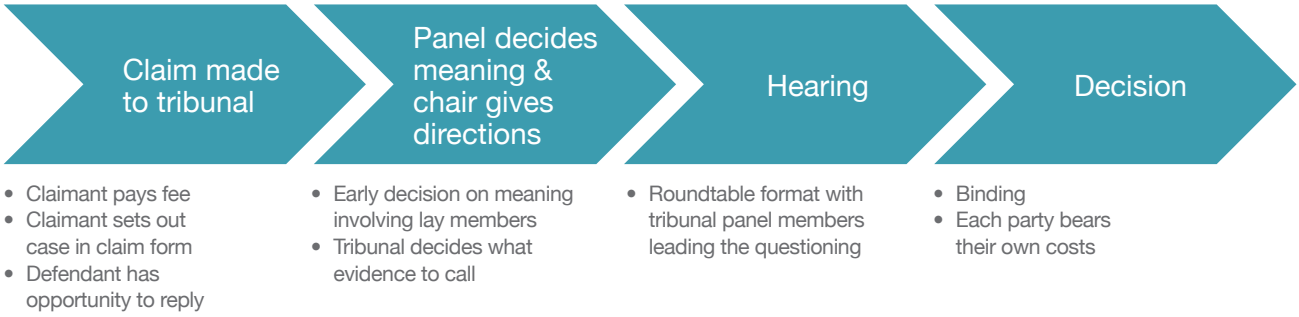
The Patents County Court offers an attractive model on which to base a defamation court. The name of the Patents County Court is somewhat misleading: though its status is technically that of a County Court, it is in reality one court based in central London that sits with a specialist senior circuit judge.

The Patents County Court is more cost effective than the Patents Court because of the specialist judge, the strict case management and the costs cap. A defamation court based on this model (but as part of the High Court as opposed to with a County Court jurisdiction, similar to the Mercantile Court) is an attractive proposition. Strict case management is needed in defamation claims, so this is an advantage of the proposed defamation court. A costs cap offers certainty for the parties, but at £50,000, for example, would be still be unaffordable for most people and at this level would often mean that the winning party would frequently be out of pocket. Finally, a new court could be set up within the High Court with relatively little expense.

There are already specialist judges in defamation claims, however, and strict case management rules could be introduced in to the current procedure. Costs caps too could be introduced to High Court defamation claims (and in fact are available on application on case by case basis). A defamation court is not therefore significantly different from the current forum to warrant setting up a new court, but its features offer benefits to defamation cases.

APPENDIX C

MODEL C: DEFAMATION TRIBUNAL



New legislation would establish a defamation tribunal which would sit within the existing General Regulatory Chamber of the First Tier Tribunal. It would be self funding, through fees levied when a claim is made. The exception to this is that the government will pay the fee where the claimant has a low income and few assets (through the existing fee exemption scheme).

Parties would state their case in initial paperwork. A panel consisting of the chair and two lay people would give a decision on meaning and the Tribunal Chair (a lawyer) would give directions as necessary, including specifying the evidence which is required. The panel would hear the case, in round-table format, and with the panel members making inquiries.

The tribunal could be given the power to award the same remedies as the High Court currently does.

Any decision the tribunal reaches would be binding. Appeals to the Upper Tribunal would be allowed on certain points, subject to permission being granted.

If the substantive law were to change to require some judicial action before secondary publishers become liable in defamation, the tribunal could handle these cases.

This is a hybrid model based on features of a number of tribunals.

ANALYSIS

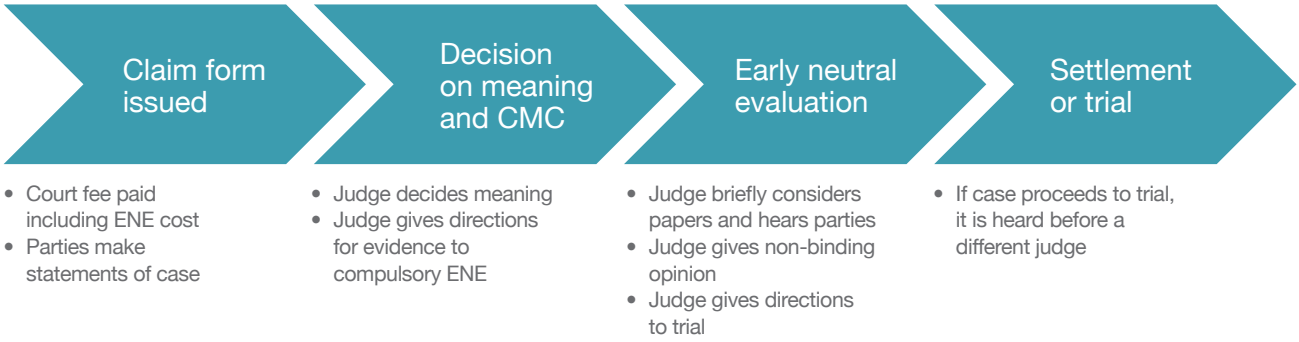
An advantage of a defamation tribunal would be the involvement of lay assessors. This would help retain the element of a case being decided by lay people (as happens with a jury) as opposed to by a judge alone.

Where would such lay assessors be drawn from? Traditionally a tribunal panel is made up from a chairman (a lawyer) and one assessor who represents one relevant interest group, and one assessor who represents the other (i.e. an Employment Tribunal would sit with one assessor from an employer's association and one assessor from a trade union) and such interest groups do not really exist in defamation because the parties can be so different in nature.

The main disadvantage of setting up a tribunal is that, with the exception of lay assessors, it would not offer anything significantly different from a court. It would also be expensive to set up.

Furthermore, the tribunal costs model, where parties bear their own costs, is disapplied if a case is taken to the Court of Appeal, meaning that once a party is involved in a tribunal claim, if the other side escalates this to the Court of Appeal, he or she might suddenly find themselves exposed to the risk of having to pay the other side's costs for the whole of the case.

MODEL D: EARLY NEUTRAL EVALUATION IN DEFAMATION



High Court judges could give an opinion on the likely outcome of a case once the parties had outlined their case and evidence. They could give an indication on both whether they think the claim would succeed and the likely damages. ENE would be compulsory.

The idea behind it is that once the parties have heard the opinion of a respected expert on the likely outcome of the case, they will be more likely to want to settle. If the case does not settle and goes to trial, a different judge will hear the case.

The court would be funded as it is now, through the levy of Court fees, with a potential additional payment for the ENE, and with exemptions available. An ENE would work best in a case without a jury, so if the presumption against a jury was introduced (as opposed to current presumption in favour of a jury), ENE would be more effective. An ENE would also be more effective if a decision had been made in respect of meaning.

The models considered are ENE in the Technology and Construction Court (TCC) and the Financial Dispute Resolution (FDR) hearing in family cases.

ANALYSIS

The success rate of Early Neutral Evaluation in the TCC is impressive: Mr Justice Akenhead has said that he believes that every case in which he has carried out an early neutral evaluation has settled as a result of that. Despite this faultless success rate, there is not a lot of take up of this option of ADR in the TCC with ten or so cases every year opting for this process.

ENE also takes place in family financial disputes, and many cases settle as a result of this, with few going to a final hearing.

ENE is certainly useful as it acts as a reality check: people rightly treat judges' opinions as having gravitas, and even when they have perhaps had the same advice on a likely outcome from their legal advisor, hearing a judge's view on the case can frequently encourage settlement. Some people, of course, would readily take such advice from their barrister or solicitor, but there is no doubt that others need to hear a judge's view before they accept the likely outcome of a case, particularly if it is contrary to their sense of justice. It would be a particularly good form of ADR if a party is unrepresented.

Yet for an effective early neutral evaluation to take place, evidence must have been disclosed, so some costs have already been built up. It cannot therefore take place as early as mediation can, for example. The advantage of ENE over mediation though, is that apart from the usual steps that a party would take in litigation (disclosure etc) it does not require the active participation of the parties to be successful. All ENE requires in order to be successful is that the parties hear the judge's opinion.

A successful ENE could result in a case settling earlier than it would have without the evaluation having taken place; an unsuccessful ENE could add to the costs of the case.

APPENDIX C

MODEL E: JUDICIAL MEDIATION IN DEFAMATION

- Court fee paid
- Parties make statements of case

- Mediation fee paid
- Judge qualified to hear trial acts as a mediator for no more than one day

- If no settlement, case goes before judge
- Decision on meaning
- Directions

- If case proceeds to trial, it is heard before a different judge

High Court judges could mediate cases that come before them. This could be voluntary or compulsory. Mediation could take place as soon as the defence has been served. Even if the mediation doesn't settle the case, it may narrow the issues.

The judge would not be able to give an opinion, but could guide the parties through all the issues in dispute, clearing barriers to settlement.

The court would be funded as it is now, through the levy of Court fees, with an additional payment for the mediation, and with exemptions available. An important question to ask is whether the mediation would be compulsory.

The model we have used is judicial mediation in Employment Tribunals.

ANALYSIS

Mediation is well suited to defamation claims. It takes the heat out of litigation and focuses on settlement, not presentation of the strongest possible case. It is being used increasingly in defamation litigation, with a lot of success. If judges were to carry out mediation, they would have to be trained: mediation requires different skills to managing and deciding the outcome of a case.

The respect the parties have for judges may in some cases be beneficial in assisting mediation, but the court environment the mediation would take place in, and the fact that proceedings would already have to be issued to access this service, negate that potential benefit. Part of the benefit of mediation – that it is about the personal circumstances of the case and not the parties' rights in law – may be lost if mediation is carried out by judges.

Mediation which takes place outside the court process can take place early, before parties have set down their strongest arguments in statements of case and incurred perhaps £5,000 in the process.

Compelling parties to mediate has the potential to ensure parties who have taken an entrenched view of proceedings to consider other possibilities. With the assistance of the mediator as a skilled third party, mediation may lead to settlements in cases which were thought to be incapable of settling.

It is important that parties themselves attend mediation, not just their lawyers.

The costs of attempting a failed mediation will however add to the overall cost of proceedings, which is contrary to the aim of an alternative procedure. Furthermore it is impossible to compel parties to engage constructively in mediation even if they are compelled to attend.

Parties who choose not to mediate should be made to give a reason for their choice, and costs sanctions for failing to mediate without good reason should be imposed.

APPENDIX C

COMPARISON TABLE

	Model A Adjudication	Model B Defamation Court	Model C Defamation Tribunal	Model D Early Neutral Evaluation	Model E Judicial Mediation
Public body	No	Yes	Yes	Yes	Yes
Forum	N/A	Specialist part of High Court	First Tier Tribunal	High Court	High Court
Personnel	Private adjudicator	Senior Circuit Judge	Panel of one judge and two lay members	High Court Judge	High Court Judge
Compulsory	Yes	Yes but cases can be transferred to High Court	Yes	Yes	No
Remedies	Damages, correction, apology	Damages, injunction, statement in open court, publication of judgment	Damages, injunction, statement in open court, publication of judgment	Any	Any
Who pays the fees?	Adjudicator decides who pays	Claimant but Court decides if recoverable	Claimant but Court decides if recoverable	Claimant but Court decides if recoverable	Both parties but recoverable by negotiation
Who pays the costs?	Parties bear their own costs	Court decides who pays costs up to cap	Parties bear their own costs	Negotiated	Negotiated
Length of process*	5 weeks	6 months	6 months	4 months	1 month
Nature of decision	Binding unless challenged in court	Binding	Binding	Not binding	Not binding
Other key features	Low cost	Strict case management	Inquisitorial	Early judicial opinion on likely outcome of case Gets all parties	talking early

*This is reflective of the time the process should take from complaint until conclusion of the case (in the case of the non-binding processes assuming this happens shortly after the process is complete) and necessarily involves a degree of guess work as well as relying on information obtained from existing courts and procedures that these models are based on. It is also noted that the length of time a process will take will depend on the resources available.

APPENDIX D: NOTES TO EDITORS

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Jonathan Heawood (Director, English PEN), John Kampfner (CEO, Index on Censorship), Jo Glanville (Editor, Index on Censorship) and Rob Sharp (Campaigns Manager, English PEN) form the steering group for the Alternative Libel Project.

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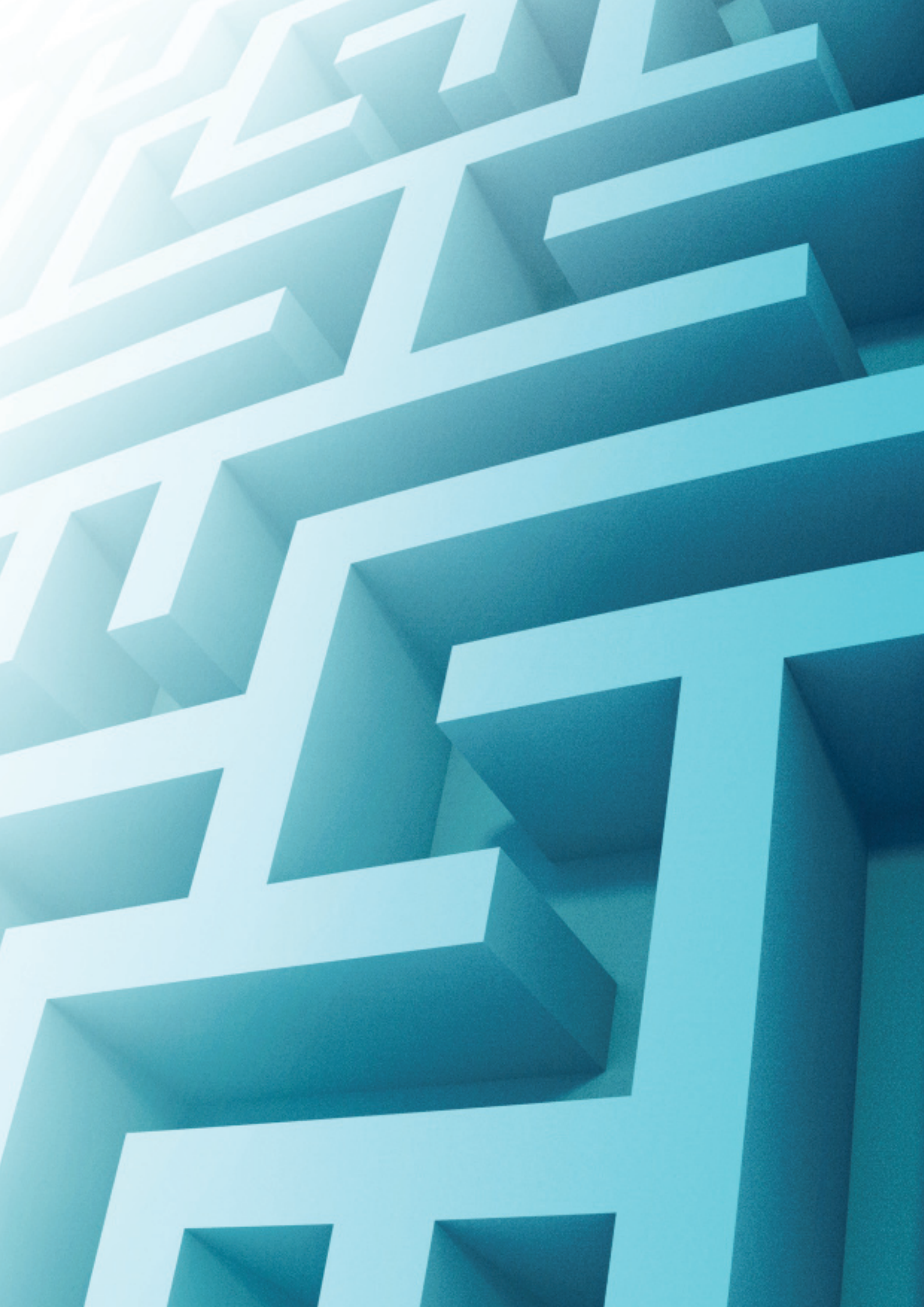

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