**A Response**

**on behalf of the CIVIL JUSTICE COUNCIL**

**to the DRAFT DEFAMATION BILL Consultation**

**June 2011**

**A. The Civil Justice Council**

1. The Civil Justice Council is an advisory body established under section 6 of the Civil Procedure Act 1997. Its functions include keeping the civil justice system under review, considering how to make the civil justice system more accessible, fair and efficient, and advising the Lord Chancellor and the judiciary on the development of the civil justice system. Its members are appointed by the Lord Chief Justice or the Lord Chancellor.
2. Where this paper engages with matters of substantive law it does so in order to contribute from the particular perspective of considering how defamation litigation could be made more accessible, fair and efficient. For the avoidance of doubt, this paper does not purport to represent the views of the United Kingdom government or the judiciary of England & Wales (or of any other part of the United Kingdom).

**B. The Working Party**

1. The Working Party invited by the Council to prepare this response combined practitioner experience (barrister, solicitor, claimant, and defendant), academic expertise, media experience, judicial experience and consumer expertise.
2. The members of the Working Party were:

Gideon Benaim (of Schillings, solicitors, and of the Law Society Reference Group)

Desmond Browne QC (a former Chairman of the Bar)

Sir Charles Gray (a former High Court Judge)

Robin Knowles CBE, QC (member of the Civil Justice Council)

David Marshall (Senior In-house Lawyer at Which?; member of the management committee of the Media Lawyers Association)

Professor Rachael Mulheron (Queen Mary University of London; member of the Civil Justice Council)

Lucy Moorman (formerly of Doughty Street Chambers, now of Simons Muirhead& Burton)

Joshua Rozenberg (journalist and author)

1. Some members of the Working Party (or organisations they represent) have submitted individual responses to the Consultation Paper, and/or given evidence to the Joint Committee, which do not necessarily reflect the views expressed in this paper. Nothing in this paper, which has been prepared collaboratively and in an effort to make a single combined contribution for the Civil Justice Council, should be taken as affecting the individual responses submitted or evidence given.
2. The Working Party was chaired by Robin Knowles CBE, QC.  It was assisted by Alex Clark, Secretary to the Civil & Family Justice Councils, Chris Morris-Perry, Assistant Secretary to the Civil Justice Council and Mizan Abdulrouf, legal assistant.

**C. Objectives of the reform of Defamation Law**

1. The Ministerial Foreword to the Consultation Paper identifies the “core aim” that is sought to be achieved. This is:

“... to ensure that the balance [between protection of freedom of speech on the one hand and protection of reputation on the other] is achieved, so that people who have been defamed are able to take action to protect their reputation where appropriate, but so that free speech and freedom of expression are not unjustifiably impeded by actual or threatened libel proceedings.”

The Foreword goes on to identify as a particular concern the need “to ensure that the threat of libel proceedings is not used to frustrate robust scientific and academic debate, or to impede responsible investigative journalism and the valuable work undertaken by non-governmental organisations.”

1. In this area of law, where the aim is balance, and where the balance includes balance between what is important to claimants and what is important to defendants, many views will be forcefully expressed by lobbies from one area of interest or another. This is not to doubt the sincerity of the views expressed, but it is to recognise that in striking a balance most points made will attract a counterpoint. However in one key area above all there is a common interest, and that is in reducing the scope for parties to incur disproportionate and excessive costs, because high costs distort the position for claimants and defendants alike. Thus the reduction of cost can be a (but of course not the only) valuable objective when a proposal is made for a substantive provision and the question is whether the proposal strikes the right balance.
2. If the stated core aim is to be achieved, it will be important throughout to consider not just what happens in cases that do commence or are decided, but also the impact of potential cost and of uncertainty on behaviour in the many, many more situations that do not in the event reach the courts.
3. The same is true when assessing whether it is necessary to introduce a substantive provision, especially where one effect of doing so may be to increase the scale of argument and therefore cost. An example is the proposal to introduce Clause 2 (responsible publication on a matter of public interest). The Consultation Paper acknowledges that a common law defence has been developed in this area (the *Reynolds* defence, extended to non-media publications by *Seaga v Harper*) but refers to uncertainty over how the defence applies outside the context of mainstream journalism. Here, as elsewhere, it is important not just to look at the contested cases that proceed to trial or other hearing. Indeed it is appreciated that that is the point being made by those who say that small organisations are caused to hesitate before making a decision in favour of publication. That is one side of the balance, and the experience across the Working Party recognised it. However the Working Party also recognised that claimants repeatedly have been advised and accepted advice, including in areas outside mainstream journalism, not to bring proceedings because those proceedings will be met by a *Reynolds* defence. That is the other side of the balance. The overall view was that Clause 2 as drafted would not move things on. It could increase rather than reduce litigation cost, and in that light whilst it is relevant to consider points favouring statute as the place for a robust defence of public interest, the majority considered it is relevant also to consider the fact that the common law is able to develop the law if in practice that is needed. Further, if the *Reynolds* common law defence is retained alongside a proposed statutory defence there is potential for confusion and additional cost.
4. An appreciation of the importance of cost is apparent from the Ministerial Foreword. The Foreword states that it is the objective of “help[ing] reduce the length of proceedings and the substantial costs that can arise” that lies behind “reforms to simplify and clarify the law and procedures”. The Foreword acknowledges that “the draft Bill does not directly deal with issues relating to costs in defamation proceedings”. This in part recognises that the separate reform of funding and costs in civil litigation contemplated following Lord Justice Jackson’s proposals, and the promotion of alternative dispute resolution, will have an effect.
5. However, where the concern is to reduce and not to increase the potential for excessive cost, it is important to recognise that defamation law is an area in which the introduction of new law can as easily introduce uncertainty (and therefore cost) as reduce it. For this reason it is suggested that, generally speaking, the case for each proposed piece of new law needs to be very strong. At the same time, as emphasised in this paper, the risk of increased cost is also addressed by procedural reform.
6. It is perhaps useful to set out, albeit in summary, some of the main effects of high costs. To do so helps a close appreciation of the point that their impact is fundamental, and intrudes into the balance that the substantive law seeks to strike. In summary:
7. They prevent all but the wealthiest claimants being able to vindicate their rights or reputations, whilst in practice most potential claimants are not well off.
8. They put defendants under real pressure to settle even where there is a real prospect that the defence will succeed, but particularly under the present regime where the claimant is represented on a Conditional Fee Agreement.
9. They give rise to the problem of “inequality of arms” (it is relevant to note that in any particular case it can be the defendant or the claimant that has the major superiority of arms).
10. They prevent the resolution of disputes in a manner which (to use the language of the Ministerial Foreword) achieves “the right balance – between protection of freedom of speech on the one hand and protection of reputation on the other.”

To give a single illustration of why this is an area in which different interests can share a united approach, it is unfair to those whose reputation is wrongly damaged that it can become too expensive to obtain a remedy from a newspaper, just as it is unfair to the newspaper if it is too expensive to justify the truth.

**D. TwelveMain Conclusions**

1. Taking the Consultation Paper as a whole, and examining the area of defamation law as a whole, the following 12main conclusions were identified and agreed by the Working Party:
2. The major problem with defamation law, from all perspectives, is the potential cost of proceedings (contemplated, threatened or instituted). Save for its proposal to limit jury trial, the Draft Bill does not focus on reducing costs. Indeed some of the proposed provisions in the Draft Bill will increase costs.
3. The single most important means of controlling and reducing costs, and behaviour that can increase costs, is judicial case management, and that can and should be enhanced. This does not require legislation.
4. Judicial costs management is also important, but is not the same as and is not, in any degree, as important as case management.
5. The current use of juries reduces the scope and opportunity for bringing cases to an early conclusion prompted by judicial decision on one or more key issues, in particular on the meaning of the words used. In recent years few defamation cases have been tried with juries. Views do and will perhaps always differ on whether jury trial should be retained, but if jury trial is confined to cases where a specialist judge is persuaded it is necessary, costs will be reduced – to the benefit of claimants and defendants alike. Consideration could be given to specifying the classes of case where use of a jury might be considered or the factors that would be for consideration in deciding whether a jury trial was or was not necessary. For example, should it be retained for cases involving the police or government agencies, as Tugendhat J recently indicated in *Mark Lewis v Metropolitan Police*?
6. The importance of judicial case management, and the related opportunity for bringing cases to an early conclusion by judicial decision, argue strongly in favour of defamation law being an area in which, wherever possible, the case management is undertaken at the level of High Court Judge with specialist experience in the field. This is the model used successfully in the Commercial Court. It is particularly desirable that there be a means of enabling the issue of what defamatory meaning(s), if any, are borne by the publication complained of, to be decided at the earliest possible stage.
7. When it comes to a choice between the common law and statute law as the source of substantive defamation law, whilst it is recognised that the range of views in this area include the view that statute can provide clarity and certainty, one of the most important considerations that can be relevant to cost, fairness and efficiency’s the consideration that the common law allows adaptability and refinement as circumstances change or as unforeseen fact patterns emerge, while statute law does not.
8. The Draft Bill is entitled a Bill to amend the law of defamation. However as drafted Clauses 1, 2, 3 and 4 of the Draft Bill are not proposed with the aim of altering the common law significantly, if at all. It is recognised that the range of views in this area include views that favour the subject matter of these Clauses being brought into statute(see for example the evidence of Which? to the Joint Committee).On the other hand (and in fact the majority of the Working Party) consider that)the use of statute simply or principally to codify the common law does carry real risks of inviting fresh argument over previously established points, thus increasing potential costs, and of reducing flexibility available at common law.
9. Where it is proposed to use the Draft Bill not simply to state the common law but to reform the common law in various respects, this approach may give rise to argument as to the correctness of previous decisions, thus creating uncertainty and increasing potential costs.
10. The value of an extension of qualified privilege in relation to discussion of medical and scientific issues is apparent but, not least in the interests of reducing uncertainty and therefore cost, care needs to be taken to ensure that the extension is as clear as possible and addressed to genuine scientific and medical research.
11. The armoury of remedies is of importance. Declarations of falsity deserve an important place within that range. .
12. “Libel tourism” is an imagined problem, not a real one. Adequate tools to prevent forum shopping already exist in the form of the rules concerning service out of the jurisdiction and “forum conveniens”.
13. Taken overall, the Draft Bill in its current form will not significantly improve defamation law in England and Wales. In that sense the Draft Bill does not do “what it says on the tin”. Indeed, by providing more room for expensive argument and uncertainty, in some respects the Draft Bill may make things worse. In other respects it does not address the target that really matters. However the current attention given to defamation law offers the opportunity for significant improvement through judicial case management.

**E. Judicial Case Management**

1. Main Conclusion (2) is that the single most important means of controlling and reducing costs is judicial case management, and that can and should be enhanced.
2. As noted, judicial case management does not require legislation. In this area it is more important than legislation, if the objectives identified in the Ministerial Foreword are to be achieved.
3. The Consultation Paper rightly addresses the subjects of jury trial, summary procedure, and early determination of meaning. Annex D to the Consultation Paper canvasses a new procedure for defamation cases. Attention in these areas is welcome, but the Working Party would urge that they be seen not as individual pieces but as part of a whole that is judicial case management. Annex D is a procedural tool, but has the weakness of appearing to make some points mandatory for preliminary determination and others discretionary. The ideal is a wide discretion to the Judge so that the Judge can manage flexibly but firmly the particular case, including by deciding what points should be decided at what stage, all in light of the circumstances of that case and all having regard to the overriding objective, including in relation to cost.
4. In this spirit, the Working Party highlights Main Conclusion (5), that the judicial case management is undertaken at the judicial level of a specialist High Court Judge; the model used successfully in the Commercial Court (and note also the Patents County Court, where again a trial judge deals with judicial case management, albeit in the case of that court not at High Court Judge level).
5. Undertaking judicial case management at this judicial level allows:
6. The introduction of the maximum available judicial authority from the beginning.
7. The earliest possible decision on whether the case be tried by a Judge and not a jury.
8. The case to be shaped by a tribunal that has the most experience of trying cases.
9. Early identification of issues that could be decisive; especially the issue of meaning (which can be decided with certainty at an early stage as soon as it is decided that a jury will not try the case as a whole: see (1) above).
10. It is fully accepted that this suggestion will require careful discussion with the High Court Judges who handle defamation cases. That discussion might perhaps involve some of the Judges of the Commercial Court so that their experience can be shared, and the discussion can embrace discussion of practical arrangements.
11. One question that properly arises is whether increased judicial case management by High Court Judges will require more judicial resources. This will need to be examined carefully in discussion with the Judges. It will be very important not to overload the system. However there is reason to believe that the answer may be that additional judicial resources will not be required because (a) judicial time will be saved with the reduction of trials that involve juries and (b) the early identification and decision of issues that could be decisive can be expected to reduce the (albeit limited) number of full trials, and the length of those which do fight.

**F. Scientific research and opinion**

1. Main Conclusion (9) is that it is important that there is a careful extension of qualified privilege in relation to genuine scientific and medical research and opinion. The Ministerial Foreword is right to identify a particular concern “to ensure that the threat of libel proceedings is not used to frustrate robust scientific and academic debate”. In addition this is an area where a careful extension can reduce uncertainty and therefore cost.
2. The Consultation Paper proposes to extend Schedule 1 to the Defamation Act 1996 (which deals with qualified privilege) so as to include:

“A fair and accurate –

(a) report of proceedings of a scientific or academic conference, or

(b) copy of, extract from or summary of matter published by such a conference.”

1. In the view of the Working Party, the use of the term “conference” gives rise to the risk that privilege may be extended to cover proceedings which lack real scientific or academic validity. The Consultation Paper itself recognises the challenge of defining “conference”, and inclines not to do so. What amounts to a conference, and does that really provide a sure guide between what is and is not genuine scientific research and opinion, or “robust scientific and academic debate”? What of articles of the highest quality that are not published by a conference, but have been peer-reviewed or subject to editorial board control? What is and is not “scientific” and “academic”?
2. There is no perfect answer, and here as elsewhere there is a balance. However a better approach might be along the following lines:

“A fair and accurate report of scientific, medical or academic discussion, or an article or commentary of a scientific, medical or academic nature, where the report, article or commentary has, before publication, undergone a recognisable peer-review process, a process of editorial board scrutiny, or a broadly equivalent process of objective scrutiny and correction.”

1. In the area of scientific and medical research and opinion, as in all other areas of defamation law, the particular reform here under discussion is only part of the answer. More important still are the points of general application we have made about cost.

**G. Remedies**

1. Main Conclusion (10) is that the armoury of remedies is of importance.
2. Generally speaking, the target for a claimant is, at least primarily, vindication rather than money. It is a widely shared experience that with an apology and something published by way of correction many claimants or prospective claimants would be satisfied. The wider the range of remedies the wider the opportunity for a claimant with merit to focus on the most appropriate form of vindication, and the greater the opportunity for an early outcome with which both claimant and defendant (or prospective parties) can live.
3. A statutory “notice and takedown” procedure, as canvassed in the Consultation Paper and by Lord Lester, would likely be a positive step, including in the area of internet-based publication (see further Section H below). But as identified in Main Conclusion (10), declarations of falsity also deserve an important place within that armoury. And whilst there are different views about ordering a defendant to publish a judgment it is to be noted that it would be consistent with the Press Complaints Commission Code and the practice of continental courts (and was directed by the Court in *Mahfouz v Brisard*in the absence of a voluntary apology),and the majority of the Working Party recognised that ordering publication of a summary of or extract from the judgment in a suitably prominent place has valuable potential.

**H. Internet-based publication**

1. The Consultation Paper is right to invite views on this issue. It is obviously a difficult area, and to recognise that is to recognise that (where the Draft Bill contains no relevant provisions at the moment) there will need to be thorough discussion in the interval between receipt of responses to the Consultation Paper and the formulation of any proposed legislation.
2. The Working Party offers the following contribution of views at this stage:
3. The key question for ISPs, hosting organisations and website publishers is whether to pre-monitor (broadly, nothing appears without their approval), post-monitor (broadly, they review after posting and this can result in content being removed)or not to monitor (broadly, anything can be posted, but with the possibility of removal on request to them; and sometimes with the option of their disabling the facility to post altogether for a period or in particular circumstances).
4. A reasonable element of any eventual requirements should be the requirement that ISPs, hosting organisations and website publishers publish clearly their own contact details or those of the moderator or webmaster of the platform on which the words complained of appear.
5. Any requirements have to face facts including the speed with which material will spread across sites, and how reasonable it is to expect monitoring will depend on the nature of the site or whether on-line dialogue rather than simple posts is involved.
6. This is obviously a developing area and it is possible that, suitably encouraged, websites, hosts and ISPs may see vigilance on their part, and a readiness to correct error or note that certain matters are denied or disputed, as a route to higher reputation within their particular market .
7. There is much to be said for a “notice and takedown procedure”. Lord Lester’s Clause 9 is a valuable draft. The Working Party offers two particular suggestions for improvement below.
8. An approach well worth considering is that of affording a reasonably generous defence to those websites, hosts and ISPs who choose to make arrangements to provide details of the author of the alleged defamatory material, within a short, defined period of time, and a less generous defence to those who take the view that it is inappropriate to make those arrangements. This would not be to criticise either approach by a website, host or ISP. The focus would simply be on ensuring the availability of a remedy by identifying the author or the website, host or ISP as the viable defendant. In addition, the use of ‘Loutchansky’ type notices should be encouraged so that the reader of the words complained of knows that they are contested, denied or the subject of legal proceedings.

# I. Responses to Individual Questions asked in the Consultation Paper

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| 1. Do you agree with the inclusion of a substantial harm test in the Bill?
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| Comments: Please see Main Conclusions (6)to (8) above. The majority of the Working Party does not agree that the inclusion of a substantial harm test in the Bill is desirable. |

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| 1. Do you have any views on the substance of the clause?
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| Comments: NA but if enacted the drafting would need to make clear that it applied to actual or threatened publication. |

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| 1. Do you agree that the Slander of Women Act 1891 and the common law rule referred to in paragraph 6 should be included among the measures for repeal in the Repeals Bill?
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| Comments: Yes, if a substantial harm test is introduced into statute.  |

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| 1. Do you agree with the inclusion of a new public interest defence in the Bill? Do you consider that this is an improvement on the existing common law defence?
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| Comments: Please see Main Conclusions (6) to (8) above. The majority of the Working Party does not agree that the inclusion of a new public interest defence in the Bill is desirable or an improvement on the existing common law defence.  |

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| 1. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that it would not be appropriate to attempt to define “public interest”? If not, what definition would you suggest |
| Comments: Please see generally paragraph 10 above.As to a) Yes. |
| b) do you consider that the non-exhaustive list of circumstances included in subsection (2) of the clause should include reference to the extent to which the defendant has complied with any relevant code of conduct or guidelines? |
| Comments:N/A. |
| c) do you consider that the nature of the publication and its context should be given greater weight than the other circumstances in the list? |
| Comments:N/A. |
| d) do you agree that the defence should apply to inferences and opinions as well as statements of fact, but that specific reference to this is not required? If so, are any difficulties likely to arise as a result of the overlap between this defence and the new honest opinion defence? |
| Comments:N/A. |
| e) do you agree with the approach taken on the issue of “reportage”? |
| Comments: No. The defence of neutral reportage is vital for the reporting of current news (properly so called). However the drafting proposed is very wide and that is a particular shortcoming here. It is also desirable that any legislation make it quite clear in that context to what extent, if at all, the repetition rule is of application. |

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| 1. Do you agree that it is appropriate to legislate to replace the existing common law defence of justification with a new statutory defence of truth?
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| Comments: Please see Main Conclusions (6) to (8) above. The majority of the Working Party does not agree that it is appropriate to legislate to replace the existing common law defence with a new statutory defence. The use of the term “truth” in place of the term “justification” could be accomplished judicially without legislation. |

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| 1. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?
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| Comments: No. (Abolition of the common law defence will likely prompt expensive argument that the existing case law is not relevant.) In the case of Clause 3 in particular there is room for the argument that as framed it does alter the existing law in relation to substantial justification.  |

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| 1. Do you have any views on the substance of the draft clause?
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| Comments: N/A. The Working Party did however note that in substance Clause 3(3) was of value. |

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| 1. Do you consider that the current law is producing unfair results where there is a single defamatory imputation with different shades of meaning? If so, how could this best be addressed?
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| Comments: Not necessarily. In any event this could be addressed through the common law. Further, leaving decisions on meaning to the Judge will likely help advances in this area in due course. |

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| 1. Do you agree that it is appropriate to legislate to replace the existing common law defence with a new statutory defence, and that this should be called a defence of honest opinion?
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| Comments: Please see Main Conclusions (6) to (8) above. The majority of the Working Party do not agree that it is appropriate to legislate to replace the existing common law defence with a new statutory defence. The Court of Appeal in the *Singh*case has already re-named the common law defence “honest opinion”  |

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| 1. Do you agree that the common law defence should be abolished, so that existing case law will be helpful but not binding for the courts in reaching decisions in relation to the new statutory defence? If not, what alternative approach would be appropriate?
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| Comments: As a drafting approach, abolition of the common law defence will likely prompt expensive argument that the existing case law is not relevant. |

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| 1. Do you have any views on the substance of the draft clause? In particular:

a) do you agree that condition 1 adequately reflects the current law that the statement must be recognisable as comment? |
| Comments: N/A. |
| b) do you consider that the requirement in condition 2 that the matter in respect of which the opinion is expressed must be a matter of public interest should be retained? |
| Comments: N/A. |
| c) do you agree with the approach taken in relation to condition 3 that the opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or an earlier privileged statement? |
| Comments: N/A. |
| d) do you consider that the defendant should be allowed to rely on the honest opinion defence where they have made a statement which they honestly believed to have a factual basis, but where the facts in question prove to be wrong? |
| Comments: N/A. |
| e) do you agree that the new defence should not apply to statements to which the public interest defence in clause 2 of the Bill applies? |
| Comments: N/A. |
| f) do you agree that an objective test of whether an honest person could have held the opinion should apply? If not, would a subjective test of whether the defendant believed that his or her opinion was justified be appropriate? |
| Comments: Reform on the lines identified by Lord Phillips in *Spiller* is appropriate, in particular, broad identification of the subject matter of the comment. A careful and limited reform so as to focus on the defendant’s subjective belief is not a reform that should increase costs. |

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| 1. Do you have any views on the changes made to the scope of absolute and qualified privilege in clause 5? In particular:

a) Do you agree that absolute privilege should be extended to fair and accurate reports of proceedings before international courts and tribunals as proposed? If not, what extension (if any) would be appropriate? |
| Comments: The Consultation Paper does not appear to explain the rationale for Clause 5(8), and it is important given its apparent nature and breadth that the rationale is clearly stated and tested in discussion. As to Question 13a),Yes, but only to specified courts and tribunals, which would be those recognisable as genuine courts and tribunals. A list might be used, extendable from time to time by statutory instrument or like measure. Qualified privilege might be more suitable for other courts and tribunals, although the need to be able to report openly and robustly on what is going on in courts and tribunals in jurisdictions where there is no or no sufficient rule of law is fully recognised. Further, privilege should not afford protection to a document simply because a document is filed with a court or tribunal: the focus of the privilege should be on what was said, read or went on in open court. |
| b) Would it be helpful to define the term “contemporaneous” in relation to absolute privilege for reports of court proceedings? If so, how should this be defined? |
| Comments: No. |
| c) Alternatively, should the distinction between absolute and qualified privilege in relation to contemporaneous and non-contemporaneous reports be removed? If so, which form of privilege should apply? |
| Comments: No. |
| d) Do you agree that Part 2 qualified privilege should be extended to summaries of material? If so, do you have any views on the approach taken? |
| Comments: Yes. |
| e) Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of scientific and academic conferences? If so, should definitions of these terms be included in the Bill, and how should any definitions be framed |
| Comments: Yes, subject to Section F above. It is important to include medical research and opinion too (in light of experience such as the *Drummond Jackson* case).  |
| f) Do you agree that Part 2 qualified privilege should be extended to cover proceedings in other countries? If so, do you have any views on the approach taken? |
| Comments: Broadly speaking, yes. The Consultation Paper states that “a number of amendments in Clause 5 make this change”. Some of those seem too wide and merit further discussion and consideration. For example Clause 5(3) would extend to matter issued for the information of the public by or on behalf of what is described simply as “an international organisation” or “an international conference”. Another example might be Clause 5(4) which would extend qualified privilege to “public meetings” “anywhere in the world”.  |
| g) Do you agree that Part 2 qualified privilege should be extended to fair and accurate reports of proceedings at general meetings and documents circulated by public companies anywhere in the world? If so, do you have any views on the approach taken? |
| Comments: Broadly speaking, yes. However the drafting seems too wide and merits further discussion and consideration. For example Clause 5(6) would extend even to an extract from a document circulated not by a public company or even by its members in exercise of a statutory right but by anyone to members of a quoted company which made allegations about the appointment of a director. |
| h) Do you agree that no action is needed to include a specific reference to press conferences? If not, please give reasons and indicate what problems are caused by the absence of such a provision |
| Comments: It is not clear that the analysis at paragraph 67 of the Consultation Paper, and on which this question is based, is entirely correct. This area merits further discussion and consideration in conjunction with any decision reached in relation to “public meetings” (see f) above).  |
| i) Do you consider that qualified privilege should extend to fair and accurate copies of, extracts from, or summaries of the material in an archive, where the limitation period for an action against the original publisher of the material under the new single publication rule has expired? If so, how should an archive be defined for these purposes to reflect the core focus of the qualified privilege defence? |
| Comments: No, especially where the compass of the provision would be driven by the width of the word “archive”, which could be read to include on-line archives. The position of bodies compelled to maintain an archive may require separate consideration from other situations.  |

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| 1. Do you consider that any further rationalisation and clarification of the provisions in schedule 1 to the 1996 Act is needed? If so, please indicate any particular aspects which you think require attention.
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| Comments: No. However, if changes are made, a single fresh schedule could be prepared. |

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| 1. Does the specific issue raised by the National Archives affect any other forms of archive, and have problems arisen in practice? If so, would it be right to create a new form of qualified privilege in this situation?
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| Comments: The issue raised by the National Archives is (according to paragraph 69 of the Consultation Paper) about protection of an archive from liability. It is not clear that the National Archives needs protection in the form of qualified privilege. As to other “archives”, the word itself is too broad to admit of a general approach. More generally, in relation to archives the proposed single publication rule is valuable. The Working Party could also see value in archives being encouraged to qualify what they held where they knew of a dispute (to take an example, the archives might attach a note saying that material X was the subject of proceedings in which Y denied Z.) |

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| 1. Do you agree with the inclusion of a clause in the Bill providing for a single publication rule?
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| Comments: Yes. However a rule that prevents a claimant from taking action after a year is capable of presenting real challenges (in particular, encouraging individuals to sue on initially limited publications where they might not otherwise have done so), with the result that particularly careful attention to the drafting of the rule, and to the situations in which it could engage, is needed.  |

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| 1. Do you have any views on the substance of the draft clause? In particular,

a) do you consider that the provision for the rule to apply to publications to the public (including a section of the public) would lead to any problems arising because of particular situations falling outside its scope? |
| Comments: Clause 6 is, in substance, of value, but please see the answer to Q16. |
| b) do you agree that the single publication rule should not apply where the manner of the subsequent publication of the material is materially different from the manner of the first publication? If not, what other test would be appropriate? |
| Comments: Yes. |

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| 1. Do you consider that any specific provision is needed in addition to the court’s discretion under section 32A of the Limitation Act 1980 to allow a claim to proceed outside the limitation period of one year from the date of the first publication?
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| Comments: No. |

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| 1. Do you agree that the proposed provisions on libel tourism should be included in the draft Bill?
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| Comments: No. Please see Main Conclusion (11) above. |

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| 1. Do you have any views on the substance of the draft clause?
 |
| Comments: N/A. |

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| 1. Do you agree that the presumption in favour of jury trial in defamation proceedings should be removed?
 |
| Comments: Please see Main Conclusion (4) above, and see further Section E above. |

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| 1. Do you have any views on the substance of the draft clause? In particular:

a) do you consider that guidelines on the circumstances governing the courts’ exercise of its discretion to order jury trial should be included on the face of the Bill? If so, what factors or criteria do you consider would be appropriate? Please provide examples. |
| Comments: Please see Main Conclusion (4) above. |
| b) would it be appropriate for any provisions to be included in the Bill to clarify which issues should be for the judge to decide and which for the jury (where there is one)? If so, do you consider that any changes are needed to the role of the jury on any particular issue (in particular in relation to determining meaning)? |
| Comments: N/A. Please see Main Conclusions(4) and (5) above. |

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| 1. Do you consider that it would be appropriate to change the law to provide greater protection against liability to internet service providers and other secondary publishers?
 |
| Comments: Yes, but as part of an overall statutory regime that offered an overall balance: please see Section H above. |

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| 1. If so, would any of the approaches discussed above provide a suitable alternative? If so, how would the interests of people who are defamed on the internet be protected? Do you have any alternative suggestions?
 |
| Comments: None of the approaches itemised in paragraph 114 is satisfactory. For the Working Party’s suggestions at this stage, please see Section H above.  |

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| 1. Have any practical problems been experienced because of difficulties in interpreting how the existing law in section 1 of the 1996 Act and the E-Commerce Directive applies in relation to internet publications?
 |
| Comments: The problems canvassed at paragraph 117 of the Consultation Paper should not deter an effort to establish an overall approach (as to which please see Section H above) and are not insurmountable. |

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| 1. Do you consider that clause 9 of Lord Lester’s Bill (at Annex C) is helpful in clarifying the law in this area? If so, are there any aspects in which an alternative approach or terminology would be preferable, and if so, what?
 |
| Comments: Yes, please see generally Section H above. Please see the answer to Question 29, and there is much to be said for including a further provision in Clause 9(2) identifying that the defendant’s failure would be either not to remove the words complained of (as at (c)) or not to publish a reasonable statement. |

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| 1. If Lord Lester’s approach is not suitable, what alternative provisions would be appropriate, and how could these avoid the difficulties identified above?
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| Comments: Please see generally Section H above. |

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| 1. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.
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| Comments: There has been experience of secondary publishers removing content merely because it is defamatory without considering whether it is defensible as true or honest opinion. It is also important to look at the time frame within which the arrangements will take place. |

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| 1. Would a statutory notice and takedown procedure be beneficial? If so, what are the key issues which would need to be addressed? In particular, what information should the claimant be required to provide and what notice period would be appropriate?
 |
| Comments: Yes, but again as part of a coherent overall scheme (please see Section H above). The notice period in Lord Lester’s clause 9 is (at 14 days) too long in the context of this area. It is appreciated that there are matters to be looked into (including the question of truth), but regard has to be had to the damage (and onward dissemination) that can occur in as much as 14 days.  |

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| 1. Do you consider that a new court procedure to resolve key preliminary issues at an early stage would be helpful?
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| Comments: Yes, but as part of a new emphasis on judicial case management and early decision making, facilitated by the removal of jury trial save where necessary. Please see Main Conclusions(2), (4) and (5) above and Section E above. |

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| 1. If so, do you agree that the procedure should be automatic in cases where the question of whether the substantial harm test is satisfied; the meaning of the words complained of; and/or whether the words complained of are matters of fact or opinion are in dispute?
 |
| Comments: Yes. Please see Section E above. |

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| 1. Do you consider that the issues identified in paragraph 127 above should also be determined (where relevant) under the new procedure? Please give your reasons.
 |
| Comments: Yes. Please see Main Conclusions(2) and (4) above, and Section E above. |

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| 1. Are there any other issues that could usefully be determined under the new procedure? Please give your reasons.
 |
| Comments: Yes. Please see Main Conclusion (2) above, the answer to Q30 above, and Section E above. |

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| 1. Do you have any comments on the procedural issues raised in the note at Annex D and on how the new procedure could best operate in practice?
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| Comments: The note at Annex D is useful but should not be seen as comprehensive (and thus as limiting the full ambit of judicial case management and early decision making). Please see Section E above. |

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| 1. Do you consider that the summary disposal procedure under sections 8 and 9 of the 1996 Act should be retained?
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| Comments: Yes but it is not much used and so should not be seen in any way as a comprehensive statement of the situations where summary disposal or a declaration of falsity should be possible. Please see Section E above. |

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| 1. If so, do you consider that any amendments could be made to the procedure to make it more useful in practice, and if so, what? In particular, should the Lord Chancellor exercise his power to amend the level of damages which can be ordered under the summary procedure? If so, what level should be set?
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| Comments: Please see answer to Q35 above. Please see Section E above. |

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| 1. Do you consider that the power of the court to order publication of its judgment should be made available in defamation proceedings more generally?
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| Comments: Yes. Please see Section G above. |

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| 1. Do you consider that any further provisions in addition to those indicated above would be helpful to address situations where an inequality of arms exists between the parties (either in cases brought by corporations or more generally)? If so, what provisions would be appropriate?
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| Comments: Please see the 12 Main Conclusions above.  |

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| 1. Do you agree that it would not be appropriate to legislate to place the *Derbyshire* principle in statute? If not, please give reasons and provide evidence of any difficulties that have arisen in practice in this area.
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| Comments: Please see the 12 Main Conclusions above.  |

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| 1. Do you agree that it would not be appropriate to legislate to extend the *Derbyshire* principle to restrict the ability of public authorities or individuals more generally to bring a defamation action? If not, please give reasons and indicate how any such provisions should be defined.
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| Comments: Please see the 12 Main Conclusions above. |

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| 1. Do you have any comments on the costs and benefits analysis as set out in the Impact Assessment?
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| Comments: Please consider the 12 Main Conclusions above. |

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| 1. Do you have any information that you believe would be useful in assisting us in developing a more detailed Impact Assessment?
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| Comments: Please consider the 12 Main Conclusions above. |

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| 1. Do you consider that any of the proposals could have impacts upon the following equality groups?
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| Comments: Please consider the 12 Main Conclusions above. |