REVIEW OF
CIVIL LITIGATION COSTS

RESPONSE OF THE JUDICIAL STEERING GROUP TO MINISTRY OF JUSTICE CONSULTATION PAPER CP3/11

1. This is the Response of the Judicial Steering Group (the Master of the Rolls, Maurice Kay, Moore-Bick and Jackson LJJ) to those parts of the consultation paper which relate to the Costs Review Final Report ("FR"). This Response has been written by Jackson LJ and adopted by other members of the Judicial Steering Group.

2. Questions 20 and 21. We support the proposal to remove the presumption in favour of juries. Despite the existence of that presumption, jury trials are already a rarity. Furthermore, when a jury is empanelled the trial costs generally increase by about 20-30%: see FR chapter 32, section 6.

3. In our view the wording of clause 8 of the draft Bill is satisfactory. There is no need to set out guidelines on how the court should exercise its discretion whether to order a jury trial. We say this for two reasons. First, there is already judicial guidance on when juries may or may not be appropriate in libel trials. This matter is better dealt with by case law rather than by statutory provisions, which cannot readily be amended. Secondly, clause 8 (1) of the Bill, if enacted, would leave s. 69 (3) of the Senior Courts Act 1981 as it now stands, namely without statutory guidelines concerning the exercise of the discretion for which it provides.

4. It should, however, be understood by the legislature that if clause 8 of the draft Bill is enacted, in practice jury trials are likely to occur in very few, if any, libel cases. Section 69 (3) of the Senior Courts Act 1981 is never in practice used to direct jury trials in cases not falling within s. 69 (1) (although it could be so used).

5. Question 30. We support the proposal for the early resolution of meaning as a preliminary issue. In many cases a decision on meaning will lead to early settlement and substantial saving of costs: see FR chapter 32, paragraph 5.2. If the presumption in favour of juries is removed, the practical problem identified in that paragraph will vanish.

6. We do not believe that trial of a preliminary issue on meaning should be automatic in every case where meaning is in dispute. This must be a case management decision within the discretion of the court. In some circumstances the trial of a preliminary issue can substantially *increase*, rather than reduce, costs: e.g. where the parties end up having two trials and possibly two appeals as well. The judge is best placed to decide in any individual case whether the trial of a preliminary issue or preliminary issues is appropriate.

7. The Early Resolution Procedure Group ("ERPG") in its report dated 14th December 2010 has suggested some rule changes which would enable the court to determine meaning as a preliminary issue. We support those proposals. The separate statutory amendments which the ERPG proposed will no longer be necessary if the presumption in favour of juries is removed.

8. Question 32. Re the last bullet point of paragraph 127 of the Consultation Paper, the defamation costs management pilot has been extended for a further six months, namely until 30th September 2011. We shall discuss the outcome of that pilot with the Queen's Bench libel judges before making our recommendations (if any) to the MoJ in that regard.

9th June 2011