Written evidence for the Joint Committee on the Draft Defamation Bill.
From Tim Crook, Senior Lecturer, Media Law & Ethics, Department of Media & Communications, Goldsmiths, University of London, author of 'Comparative Media Law & Ethics' published by Routledge in 2009 and its companion web-site http://www.ma-radio.gold.ac.uk/cmle, a journalist of 36 years at the time of submission, and a background in teaching media law and ethics professionally and in higher education since 1982.

I apologise to the committee for the lateness of this submission and acknowledge that you have received excellent and more authoritative evidence from professors, editors and members of the legal profession and judiciary who are far more senior and distinguished than myself.

I commend the brilliant work of Lord Lester QC of Herne Hill, Heather Rogers QC, and Sir Brian Neill, along with that of the Ministry of Justice and Parliamentary legal advisors whose consultation document is a model of clarity.

I wish to briefly support all of the proposals for reform as representing progress in dealing with the social, political and cultural problems of current English and Welsh defamation law in restricting freedom of expression in the democratic context. I wish to put forward some arguments and ideas for radical reform that arise from my interest in media law and ethics from a comparative perspective.

1. Since the publication of my book in 2009 and submission to the House of Commons Select Committee of Culture, Media & Sport enquiry into press standards, privacy and libel, I have been advancing a more constitutional settlement of the role of media law and ethics in the United Kingdom through low cost restorative justice processes and methods that channel all legal disputes, litigation and indeed criminal issues through an all encompassing independent structure of media regulation based on apology, case conferencing, media harm evaluation, and victim face-to-face resolution, mediation, alternative dispute resolution, arbitration and compensation scheme joint funded by the industry and state prior to last resort specialist media high court proceedings. These are set out at http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/memo/press/m13002.htm and I only wish to direct your committee to new proposals and detail in respect of defamation and how these could be developed in the light of the announcement of Lord Justice Leveson's enquiry into media ethics and regulation. [set out in more detail at 4.]

2. The key struggle facing the United Kingdom judiciary and Parliament at Westminster is the resetting of the constitutional imperative of freedom of expression in relation to liberty and democracy. I believe it is under threat on three levels:

a) The diminishing value and operation of prior restraint in relation to libel, privacy, administration of justice and national security. Neither Parliament nor the judiciary have appreciated that court injunction in any context must be a true exception and that freedom of expression descends into an authoritarian context through court orders restricting publication of truth and falsity that are binding on third parties, *contra mundum*, retrospective and prohibitive of information suppressive orders themselves. I believe that I did warn

Parliament in 2009 that censoring information that the public regards as being in the 'public interest' will undermine the authority of the courts and I fear recent manifestations of civil disobedience of such court orders through new media, and the reality of communication in the global context indicate that my apprehension was not unfounded. I strongly believe the communication of harm must be remedied by damages and not by prior restraint in secret hearings. The *ratio decidendi* in Bonnard v Perryman 1891 needs reaffirming, strengthening and statutory authority.

b) Since 2000, the judiciary has taken the wrong route in developing a common law *stare decisis* of respect for the right of privacy through prior restraint and damages on media publication by giving effect to ECHR jurisprudence and applying an intense focus of a balancing exercise between Articles 8 and 10. Parliament, in my opinion, directed through statutory reference that there was a UK margin of appreciation giving freedom of expression priority and paradigmatic importance. The Human Rights Act specifically directed the courts to give particular regard to Article 10. I regret to say the courts have not been doing this and it is of great concern to me that they have changed the British Constitution without proper deferral and reference to Parliament. The collapse or reading of 'right to reputation' in the light of Article 8 was not a matter for the courts through ECHR case law originating from continental jurisdictions. Prior restraint on the publication of truth on the basis that zones of private interaction relate to infidelity and participation in the sex industries as a consumer went far beyond the remit of judicial discretion and had not been given the green light in the Human Rights Act. In my opinion the establishment of the tort of defamation as a right to reputation in Article 8, the establishment of a tort of privacy through human rights jurisprudence have to be matters for Parliament since they affect the bedrock of British constitutional rights and the balance of power.

c) Conversely Parliament has failed to recognise and respect the judiciary's exhortation to preserve the constitutional principles of open justice that defendants and the wider public must know the evidence being adduced to prosecute and convict crime. This open justice principle is also fundamental to civil litigation in the pursuit of remedies by claimants. It was wrong of Parliament not to follow the jurisprudential principles decided by the House of Lords in R v Davis 2008. [Davis, R v [2008] UKHL 36 (18 June 2008)] The conclusion of the Justice report of 2009 calling for an end to the use of secret evidence is acutely relevant and correct: 'Secret evidence is unreliable, unfair, undemocratic, unnecessary and damaging to both national security and the integrity of Britain's courts.' I fully endorse the recent ruling of the Supreme Court in Al Rawi v Security Service [Al Rawi & Ors v The Security Service & Ors [2011] UKSC 34 (13 July 2011)] and strongly urge Parliament to retrieve our national dignity and libertarian authority on this issue. In addition public dissemination of the identity of defendants and legal parties to any form of litigation is also a matter that cannot be compromised except in only the most exceptional of circumstances Guardian v Ahmed [Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors [2010] UKSC 1 (27 January 2010)] and I do think this requires statutory enactment or authoritative declaration in a written constitution.

3. Draft Defamation Bill proposals.
I support the clause 1 definition of defamation as a "substantial harm" test. I would support the insertion of the word 'serious' in the test. I believe that this should sluice-gate out trivial actions and begin a process of recognising that damage to reputation needs to be proved in materialist rather than emotional terms. I would go further and require the assessment of damages to be based on provable evidence rather than a presumption of damage to feelings. It is logical that if defamation were based on provable materialist damage rather than a presumption of harm to feelings, freedom of expression would be promoted on many levels. This would help to distinguish the English and Welsh common law emphasis of libel and slander relating to economic and social status rather than the continental civil law principle of emotional sensibility based on honour and dignity.

I regard clause 2 and the drafting of the defence of responsible publication in the public interest as progress and this should overcome the concerns associated with the existing Reynolds defence. I would clarify the meaning of "public interest" to recognise the plurality of the media market place and not to determine any hierarchy of public interest communication. I am in favour of the public interest threshold of libel defence developed by the United States Supreme Court set at the level of 'reckless disregard for the truth' and 'actuated by malice' that has been adopted by India, Argentina and other legal jurisdictions. I also think there is merit in developing a distinction between public interest and private claimants.

In relation to clause 3 and truth I regard the proposed changes to the defence of justification as progress, but I would go further to reverse the burden of proof in relation to all claimants and bring our position in line with our common law cousin, the U.S.A.

I am in favour of the proposed changes to the existing defence of honest comment set out in clause 4. I think its relationship to the responsible publication defence is clear and appropriate.

I support the proposals in clause 5 to extend the defences of absolute and qualified privilege. I would simply extend the reporting privilege in relation to Parliament to an absolute level to give media publication the equivalence of the privilege relating to Parliamentarians. I strongly disagree with the current Lord Chief Justice that there can be any construction of contempt on the part of media reporting of anything said in Parliamentary proceedings on the basis of 'bad faith.' The purpose of section 9 of the Bill of Rights of 1689 was to give Parliament constitutional authority over the judiciary in respect of freedom of expression. This has to be extended to all areas of media reporting in the early 21st century and there should be no doubt at all that accurate and fair reporting of anything said in Parliament, whether malicious or in defiance of any kind of judicial injunction, is protected and privileged.

I think the distinction drawn between absolute and qualified privilege should only remain in respect of qualified privilege being subject to contradiction or explanation with the media publisher being given a reasonable time to publish any such response whether sought or not.

The issue of contemporaneous reporting does not appear to have any practical bearing on the publication and reporting in a multi-media age.

I regard the extension of qualified privilege to protection given to copies of and extracts from material and scientific and academic conferences as representing excellent reform and progress. I would extend the academic qualified privilege to peer-reviewed academic journals. I support extending qualified privilege to reports relating to public companies elsewhere in the world. I support extending qualified privilege 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. I would also support the request from the National Archives for a specific privilege relating to previously unpublished documents that are in the public interest.

In my opinion there would be merit in the Defamation Bill clarifying that media conferences that are accessible by members of the public fall under the definition of 'public meetings' and that the qualified privilege subject to explanation or contradiction also applies to press releases published in relation to such conferences. Whilst the House of Lords ruling in Turkington v The Times in 2000 [Turkington and Others v. Times Newspapers Limited (Northern Ireland) [2000] UKHL 57 (2nd November, 2000)] provided a common law extension of the qualified privilege defence, I would urge the committee to consider introducing a recognition that media interviews recorded or conducted by the media conference participants within 24 hours of the conference retained the same privilege provided they represented a fair and accurate expression of the matters communicated at the press conference.

I would also urge the committee to introduce a qualified privilege for reporting news agency material in order to protect subscriber news organisations from any inadvertent republication of defamation contained in news agency distribution. Such a defence to defamation is available in a number of U.S. state jurisdictions.

I fully support the proposals set out in clause 6; in respect of the single publication rule. The "materially different" test is well thought out and constructed and I am confident that the proposals adequately protect persons who are (allegedly) defamed by material that remains accessible to the public after the one-year limitation period has expired.

I fully support the proposals set out in clause 7 in respect of jurisdiction – "Libel tourism." The draft bill offers an excellent solution in the context of the UK's obligations to European Union law. Clause 7 effectively changes the law so that a court does not have jurisdiction to hear and determine a claim to which the clause applies unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate jurisdiction in which to bring an action in respect of the statement.

I oppose any move to abolish the existing presumption in favour of trial by jury. I believe Parliament and the Judiciary underestimate the constitutional importance of jury participation in matters of fact concerning freedom of speech. A verdict on whether damages should be awarded in respect of communication is as important as that relating to unlawful imprisonment by the police or any other public authority. It is

fundamental to civil liberty and democratic accountability, and the jury's role is both practical and symbolic in expressing an understanding of ordinary and natural meaning in the social, political and cultural context. The jury remains one of the last bulwarks against abuse of power by executive, legislature, and judiciary. The right to trial by jury should be given the same constitutional status as it receives in the USA.

4. Consultation issues

In the light of recent events concerning the conduct of the press in obtaining information for the purposes of publication and the public disobedience of court orders relating to privacy, I would suggest the committee takes a radical approach to drafting legislation so that all defamation proceedings have to revert to a Media Law and Ethics Restorative Justice Commission that combines the purposes of Ofcom, BBC Trust and Press Complaints Commission regulation. I would suggest the funding of such a commission were based on a partnership between media industry and the state with public funding matching pound for pound contributions from media companies and organisations.

The Commission would be independent of government and Parliament, but have investigatory, pro-active and compensatory powers with damages capped at £10,000 and the publication of the commission's adjudications. Each side would be obliged to pay their own costs.

Anyone complaining of defamation (a false publication causing serious and substantial harm to reputation) would be obliged to elect a process of mediation or alternative dispute resolution, with the former process having the option of case conferencing. In ADR, the Commission would have the resources to provide advice and representation where a litigant in person could not afford specialist legal advice. The defamation law applied by the Commission's mediation and ADR processes would be that set out in the proposed Defamation Bill as well as existing and relevant English and Welsh common law.

I would propose that those disputes in defamation that could not be resolved by the Commission's mediation/ADR process, or as an appeal against the Commission's ADR could then proceed to the specialist Media High Court where the damages would still be capped at £10,000, with each side obliged to pay their own costs whatever the outcome, and there being the US constitutional public interest defence standard of 'reckless disregard for the truth' and 'actuated by malice' standard applying to public interest claimants.

As my submission is close to the last day for public consultation, I realise the committee is unlikely to require or need any oral evidence on this submission, but I remain willing and available should it be required.

These views are personal to me and do not represent any policy position or view taken by any organisation that employs me or hires me in any context.