SUBMISSION TO THE LEVESON INQUIRY

on behalf of

EARLY RESOLUTION CIC

1. Early Resolution ("ER") and its objectives

1.1 ER was set up in 2011 as a not-for-profit company for the specific purpose of helping those embarking on or already locked into expensive and complex libel or privacy litigation. The directors include Sir Charles Gray (former High Court Judge), Alastair Brett (solicitor and former Legal Manager with Times Newspapers), Robert Clinton (solicitor and former senior partner of Farrer & Co.) and Julian Peel Yates OBE (solicitor, mediator and former diplomat).

1.2 ER's objective is to bring about a fair, rapid and cost-effective resolution of disputes involving the media.

1.3 ER seeks to achieve that objective by enabling key issues in media disputes to be resolved by an expert in media law drawn from a panel of acknowledged specialists in media law – retired judges or silks – assembled by ER.

1.4 It is widely recognised that this fast track arbitration system benefits claimants and defendants alike: the procedure enables the parties to identify key issues arising between them and to have those issues determined by a media law expert assisted where appropriate by two lay assessors.

1.5 In defamation cases issues suitable for determination under the ER scheme include the meaning of the publication complained of; whether the words are statements of fact or comment and the quantum of any damages. In privacy cases issues which would be suitable for determination under the scheme include whether the defendant had infringed the claimant's right to privacy and, if so, to what extent; whether the defendant has a defence of public interest and damages.

1.6 The overriding advantages or the ER arbitration scheme are:

a) It is quick and able to produce a result in weeks;
b) it is cost effective and gives access to justice at an affordable price;
c) hearings take place in private.

2. The requirements of a regulatory regime

2.1 Regulation by the Courts has proved to be prohibitively expensive. Regulation by the Press's own governing body, the PCC, has proved ineffective. ER believes that any effective new regulatory system must be statute based with the Courts as a final port of call for it to be Article 6 compliant.

2.2 It is therefore essential that any scheme regulating the media which may come into existence after the publication of the Inquiry report should be available to the public at large. It seems clear that the arrangements which currently exist for the regulation of the media do not command the respect of the majority: that is clear not only from the evidence given to the Inquiry but also from the evidence given to the various parliamentary committees which have recently reported their findings. The problem is well-known; the solution to it is elusive.

2.3 We submit that the public are entitled to expect the media industry to be willing and able to deliver a system which strikes a fair balance between the public interest in maintaining freedom of expression and the equally important right of individuals to effective protection of their rights of privacy and of their reputations. If the media industry is perceived to be failing to deliver such a system, that will be the time for an independent regulator to intervene.

2.4 Another essential requirement of any new system is that disputes between individuals and media publishers should be capable of being resolved without either side having to incur unreasonable or disproportionate costs in order to resolve their disputes. ER believes that, despite the best efforts of the judiciary and others, the current level of costs of court proceedings is still so prohibitively high as effectively to deny access to justice to many prospective litigants.

2.5 The media industry is rightly proud of its historic record of investigative journalism, which has been a primary function of the press in a democracy. Over the past twenty years or so, however, there has been a marked decline in the amount of money which media publishers are willing and able to put into the journalistic investigation of misconduct whether on the part of corporations or corrupt individuals or officials.

2.6 We do not believe that this decline in investigative journalism can be explained by a reduction in the level of misconduct. Far from it, experience

suggests that corruption is or may be on the increase. In our judgment the reason why there has been a decline in investigative journalism is for two reasons. First, publishers are unwilling to incur the inordinate legal costs of defending defamation actions brought by those whose misconduct has been exposed. This is in spite of some newspapers still performing "vital functions as a bloodhound as well as a watchdog", as Lord Nicholls described it in *Reynolds v Times Newspapers Ltd.* Second there has been a massive decline in advertising revenue which used to buoy up the print industry.

2.7 Equally important is the countervailing need for claimants to be able to obtain access to the courts in order to maintain their entitlement to a private life and to vindicate their reputations. At one time the hope was that Conditional Fee Agreements ('CFAs') might achieve that aim. It is, we believe, widely accepted that, while enabling claimants to pursue legitimate aims, CFAs have exacerbated the problem. In some cases under the law as it stands CFA-assisted claimants are able to recover from losing media defendants an uplift of up to 100% in the already inflated costs regime of specialist law firms. The media are in most cases unwilling to countenance the risk of so large a burden being put upon them. Accordingly they will settle claims which they might otherwise have been able successfully to resist.

2.8 The Government has expressed an intention to introduce legislation to prohibit, or at least to curtail, CFAs. We believe that the Legal Aid, Sentencing and Punishment of Offenders Bill 2011 will reduce access to justice because successful claimants will no longer be able to recover ATE premiums or success fees from what may be powerful and wealthy media organisations.

3. **The solution to the problem**

3.1 Despite many recent changes in court procedures, it seems clear to us that a system of resolving media disputes outside the court system is urgently needed. An alternative system is essential if claimants are to be enabled to resolve their disputes effectively and at an affordable cost. Such a system would, we believe, be of equal benefit to a large section of media defendants including, in particular, regional newspapers whose budgets are under pressure in the current economic climate. We believe that the problem is widely recognised.

3.2 ER believes that the problems do not stem from any serious deficiency or uncertainty in the substantive law governing individuals' rights to reputation and privacy on the one hand and the media's right to freedom of expression on the other. The current Defamation Bill is, we believe, largely a codification of the old law and contains little or nothing by way of *procedural* reform. We are therefore of the opinion that articles 8 and 10 of the European Convention on Human Rights (ECHR), as interpreted in recent domestic decisions, sufficiently define the respective substantive rights of individuals and of the media. The problem lies elsewhere.

3.3 The body which currently regulates the press (both national and regional newspapers), is the Press Complaints Commission ('the PCC'), which is charged, amongst other things, with ensuring that a correct balance is struck between, on the one hand, the right of individuals to correct inaccuracies, protect their right to privacy and enforce good behaviour by the press and, on the other hand, the right of the media to exercise their right to freedom of expression and to act as a bloodhound as well as a watchdog .

3.4 Whilst the PCC has done a useful job in certain areas e.g. mediating accuracy complaints and issuing "desist notices", it has in the opinion of ER proved unable effectively to discharge key functions of an independent regulator. As the Joint Committee on Privacy and Injunctions recently stated at paragraph 159 of its 2012 report:

> "It is almost universally recognised that the system of oversight or regulation of the press needs major reform."

We agree.

3.5 The PCC is not a statutory body. Its remit is given to it by the media industry, which means in effect that the press is self-governing. The PCC has 17 members who include 7 newspaper editors. It is funded by means of an annual levy paid by the newspapers and magazines who are its members but it has been dramatically underfunded over many years now. One of the main functions of the PCC is to maintain and promote the Editors' Code of Practice ('the Code').

3.6 At paragraph 164 of its Report the Joint Committee concluded:

> "The reformed media regulator needs to play a leading role in resolving privacy complaints. For this to happen, the regulator needs to have recourse to far more effective and timely sanctions than the PCC has. It needs to be, and be seen to be, independent of the newspaper industry ....."

The Committee further found at paragraphs 170 and 171:

> "We believe that the reformed media regulator must be demonstrably independent of the industry and of government. Knowledge of the industry, however, will be essential to the good operation of the reformed regulator. We recommend that industry representatives form a substantial minority of the body that determines complaints. These representatives should have considerable experience of working in the print media but should not be a full-time employee (sic) of any news publisher or have a demonstrable conflict of interest."

3.7 A particular and ongoing problem with the PCC is that in early 2000 the Express, the Star and other newspapers controlled by Mr Richard Desmond withdrew unilaterally from the PCC on the ground that its adjudications were not independent. As a result those newspapers are not regulated by the PCC or for that matter by any other authority. Those newspapers have stopped paying their subscriptions to the PCC.

3.8 ER endorses the view of the Joint Committee, first, that the PCC needs to be replaced by a reformed independent media regulator; second, that the reformed independent media regulator should expect all newspaper and website publishers to comply with its Code of Conduct and, thirdly, that any media representatives on the Board of the new Regulatory body and/or any new Code Committee should a) form a minority and b) on the whole be confined to former editors and/or those with knowledge of the industry but without a direct commercial interest in it.

4. <u>The structure of the regulatory regime which would be able to achieve the necessary criteria</u>

4.1 The criteria required of any new regulatory body can be summarised as follows:

i. it must be independent of government, parliament and media interests

ii. It must be perceived to be effective and credible both by the public and by the media;

iii. there must be a clear statement of the ethical standards to be expected of the press which are acceptable both to the public at large and to the media industry.

4.2 ER believes that the case for replacing the PCC is overwhelming. Not only must any replacement body be and be seen to be independent of the media industry, it should also be empowered to introduce a mandatory system of dispute resolution. By 'mandatory' we mean a system of dispute resolution which is obligatory for all national media publishers.

4.3 A key question which arises is whether the mandatory system of dispute resolution which ER favours should be statute-based. If the scheme is to be obligatory for both claimants and media defendants (as ER believes it must be), it almost certainly follows that the scheme will have to make provision for a statutory adjudication system. It appears to us that it is only a mandatory statutory body which can compel both claimants and media defendants, whatever their respective financial resources, to participate in what we are confident will be a rapid and economical means of resolving their disputes.

4.4 We acknowledge that some sections of the media may on principle object to the imposition of a system which obliges them to take part in a statutory fast track adjudication scheme. It may be suggested that such a system would represent a serious erosion of the media's right to freedom of expression under Article 10 of the ECHR. A more pragmatic objection might be that obligatory participation in an "easy entry" adjudication scheme , would unfairly benefit claimants who would be spared the often intolerable burden of paying the costs of litigation through the court system. The media may voice the objection that the floodgates would be opened to spurious and vexatious claims.

4.5 ER understands these concerns on the part of the media but for two principal reasons considers them to be exaggerated. The first reason is that adjudications under the proposed scheme will take place within a very short time frame of 4-6 weeks. This necessarily means that the costs of both sides

will be a fraction of the costs of litigating through the court system. The second reason is that under the ER proposals there will be a filter system to deter vexatious or obviously unmeritorious claims: see paragraph 7.6 below.

5. The optimum solution for meeting the 'Draft Criteria for a Regulatory Solution'

5.1 ER accepts without reservation the appropriateness of the draft criteria set out in the letter from the Secretary to the Inquiry dated 24th April 2012, namely:

i. that any solution must be perceived as effective and credible both by the press and by the public;

ii. that there must be a statement of ethical standards which is recognised as reasonable by the industry and credible by the public;

iii. that the enforcement of ethical standards must be operationally independent of government and parliament and sufficiently independent of media interests in order to command public respect;

iv. that the system must provide credible remedies both in respect of aggrieved individuals and in respect of issues affecting wider groups in society;

v. that the solution must be sufficiently reliably financed to allow for reasonable operational independence but without placing a disproportionate burden on the industry, complainants or the tax payer.

5.2 It may be that a non-statutory system of press regulation would be capable of meeting criteria (i) and (ii) in paragraph 5.1. above. It is, however, doubtful in the view of ER whether any non-statutory system of dispute resolution (i.e. a system which media defendants would not be compelled to adopt) would meet the criterion that enforcement of ethical standards should be sufficiently independent of the media in order to command public respect. We say that because the PCC was not and was not perceived to be sufficiently independent in resolving disputes. Moreover many of its adjudications, particularly in privacy disputes, did not command public respect.

5.3 Moreover, experience over recent years suggests that, without a statutory system, the willingness and ability of the media industry to agree to provide credible remedies, including in particular compensation for a serious infringement of the Code of Conduct or to promote compliance is at best doubtful.

5.4 That said, ER is concerned to ensure that a statute introducing a mandatory scheme for dispute resolution and the enforcement of ethical standards should be framed in a manner which avoids imposing disproportionate burdens on the media industry or indeed on complainants or the tax payer.

6. The implementation of a statutory dispute resolution scheme

6.1 As is generally accepted, the problems with resolving media disputes through the courts include (but are not limited to) the following:

i. the excessive costs incurred or charged in court proceedings (even without a jury, as is nowadays the norm);

ii. the opportunities available to both parties to delay the resolution of disputes - for example, by ignoring the Pre-Action Protocol and/or by running up costs in prolonged and frequent interlocutory skirmishing ;

iii. the fact that both parties frequently engage in shadow boxing over the pleadings and level of meaning with the result that both parties are put to huge expense. As a result the outcome of much media litigation fails to satisfy either party;

iv. the relatively high incidence of appeals in media cases which, whatever the outcome, further increases the cost burden for the parties and postpones final resolution of the dispute.

6.2 Whilst accepting the existence of various procedural devices which may in some cases achieve an expeditious and satisfactory outcome (for example, mediation, arbitration, early neutral evaluation, offers of amends etc.), ER takes the view that the right solution is to set up a new statute- based body

whose function would be to preside over and regulate a scheme for the resolution of all disputes affecting the media including, in particular, claims against the media for defamation and invasion of privacy. Recent events - notably the phone hacking scandal involving News International - have materially reduced opposition to the introduction of a fast track statutory adjudication system like that in the construction industry .

6.3 In the view of ER, the principal argument in favour of a mandatory statutory scheme is that, unless there is a provision for compulsory participation in the scheme and for awards made pursuant to the scheme to be enforceable straightaway, the scheme as a whole will be an unnecessary waste of time and money: see *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576. Indeed, the incidence of wealthy claimants or powerful media defendants attempting to use a system of 'legal costs attrition' to wear down the other side means that too often the parties are not on an equal footing and expense is not saved.

6.4 ER accepts that there will be a limited number of claims which, for one reason or another, will exceptionally need to be dealt with through the court system. Such claims would include those where one party or the other would need to apply for and obtain a High Court injunction or take advantage of procedures which are available only through the court system (e.g. issuing letters of request, or service of subpoenas, determination of issues of public interest immunity etc). Cases in which such issues arise will be few and far between.

7. **What adaptations to the existing ER scheme are necessary in order to achieve for the future the three objectives set out in the letter from the Secretary to the Inquiry dated 24th April 2012?**

7.1 The way in which the ER scheme currently operates is set out at page 3 of ER's Submission to the Inquiry dated 2nd February 2012. In essence, the ER scheme enables parties to media disputes to obtain the determination of key issues arising in the dispute by one of the panel of experienced specialist media practitioners recruited by ER, assisted in some cases by two lay assessors. This will in most cases lead to the early resolution of the entire dispute at minimal cost and without delay.

7.2 The advantages of the existing Scheme are undeniable. They are set out at pages 3-4 of ER's earlier Submission. Essentially, if both parties to a media dispute agree, they can elect to have one or more of the key issues determined by an expert arbitrator at a fraction of the cost of litigating through the court system. Such a determination is likely in many cases to resolve the entire dispute between the parties or, failing that, to significantly limit the live issues between the parties thereby saving substantial costs. Claimants will not need to take out after-the-event insurance and losing defendants will not have to pay success fees (which are often as high as 100%).

7.3 The effect of ER's proposal, if implemented, would be that in defamation and privacy cases against the media, any action brought in the High Court which had not previously been through the statutory adjudication described above would be stayed and referred to statutory fast track adjudication.

7.4 There is a precedent for the introduction by statute of a mandatory system of adjudicating disputes. It is to be found in the Housing Grants, Construction and Regeneration Act, 1996, and in the Scheme for Construction Contracts, 1998. This follows an extensive report by Sir Michael Latham concerning the Construction Industry and disputes within it back in 1994. The way in which the Act and Scheme operate are described in more detail in paragraph 8 below.

7.5 An important feature of ER's *current* Scheme is that media defendants are encouraged to agree to pay for the cost of the arbitration (usually about £3,500) and forego the right to recover their own legal costs if successful (a form of qualified one way costs shifting). Such defendants may feel concerned that by agreeing to pay the costs of a fast track adjudication, the number of complaints brought against them may increase dramatically. Some media defendants have expressed concerns that they will end up having to pay the costs of spurious or vexatious claims being brought against them.

7.6 These concerns are understandable but are not in the view of ER a sufficient reason for the retention of a system of resolving disputes either through the courts or by means of a system for dispute resolution which is voluntary but open to "costs attrition" abuse. If it turns out that the concerns referred to at paragraph 7.5 above are justified, the solution would be to incorporate into the statutory scheme a provision that, where it is established that particular claims brought under the scheme are vexatious or frivolous or an abuse of the process, the defendant may apply to the adjudicator at any

stage for an order that the claimant provide security for costs or make an order that the defendant pay all or part of the costs of the proceedings.

7.7 The principal advantages of ER's proposed fast track statutory adjudication scheme are these:

i) disputes between claimants and media defendants will be speedily resolved at a cost which is a fraction of the costs incurred in most cases as litigated in the High Court;

ii) the key issues to be resolved (including, for example, the meaning of the words complained of or whether they constitute a statement of fact or an honest comment) will be decided at an early stage often just a few weeks after publication;

iii) claimants, who would or might be unable to use the court system (or at least unable to do so without the benefit of a CFA) will obtain access to justice.

8. The construction industry - a precedent for a mandatory statutory dispute resolution scheme for media disputes?

8.1 The system of mandatory statutory dispute resolution has been operating successfully in the construction industry for some 14 years. This is, in the submission of ER, an encouraging precedent. Much can be learnt from the Report of Sir Michael Latham entitled "Constructing the Team" in 1994.

8.2 In essence, statutory adjudication of construction disputes is mandatory in almost all cases across the board in construction cases . It was introduced by the Housing Costs, Construction and Regeneration Act, 1996, which was based on an adjudication scheme devised by Sir Michael Latham as a compulsory precursor to any litigation in the High Court. The scheme provides that any claim in the High Court to which the Act of 1996 applies which has not been through the statutory adjudication scheme beforehand will be stayed.

8.3 Mr Justice Akenhead, the Judge in charge of the Technology and Construction Court ('TCC'), confirms that the scheme works well in the construction industry. It is fast, cheap and, importantly, compliant with Article 6 of the ECHR by virtue of the provision for appeals/claims for the

enforcement of the decisions of adjudicators under the 1996 Act to be made to the TCC in appropriate cases. Jackson LJ, himself a former Judge in charge of the TCC, has suggested that, if there is general support for such a scheme, a group of well-respected libel lawyers and representatives from the media might put together a scheme for presentation to the MoJ.

9. ER's proposal for a media regulator

9.1 The scheme favoured by ER involves the establishment by statute of an independent media regulator. The regulator should be and must be seen to be independent of government and/or any other vested interests. An important part of its functions as a regulatory body would be to send out advisory "desist notices" to all publishers in order to deter actual or threatened media misconduct.

9.2 Media disputes could be referred to the regulator either for mediation – breaches of its Code of Conduct – or for fast track statutory adjudication if the dispute involves a claim for compensation. Where mediation over a breach of the Code fails, the dispute would either be referred to the regulatory body's main board for determination (like the PCC) or be sent off for fast track statutory adjudication. Adjudication cases, involving claims for compensation, are likely to involve legal representation. If a dispute requires urgent resolution, the regulator would be able to appoint an independent individual or panel to deal with it.

9.3 It is important to stress the reason for the requirement that there be enabling legislation for a new independent media regulator. The reason is that this is the only way in which *all* media defendants, whether electronic or hard copy publishers, can be compelled to correct inaccuracies if mediation fails and the matter has to go to adjudication. Equally only under such a new system can both parties i.e. claimants and media defendants be compelled to participate in the adjudication process. It is only by means of a statutory framework that participation in any new system of regulation can be made compulsory for both complainants and media publishers.

9.4 Another important feature of the scheme proposed by ER is that the regulator would carry out its functions independently of government. There is therefore no need for the media to be concerned that the existence of a statute setting up the framework or machinery of the scheme will involve the

state or government controlling or interfering with or being involved in the performance by the independent regulatory authority of its functions. The constitution of the regulator could and should stipulate that it is and will remain autonomous and independent of governmental or political influence.

9.5 We have seen the proposals by the Reuters Roundtable Press Regulation Group for a Media Standards Authority ('the MSA') for the future regulation of the media. A significant difference between the statutory regulatory authority proposed by ER and the MSA is that the MSA is dependent on media organisations being persuaded by a system of incentives to join the MSA scheme. While the adjudication system for media disputes proposed by the MSA is statute based (as also is the system proposed by ER), only those "participants" who join the MSA and submit to its jurisdiction will be in a position to stay libel actions started in the High Court and have them transferred to statutory adjudication. Further sanctions would be imposed by virtue of the terms of a 'membership contract' between the MSA and the participants.

9.7 Whilst ER is in agreement with many of the detailed proposals contained in the MSA document, we feel that voluntary participation in the MSA system of regulation would or might perpetuate what has come to be described as 'the Desmond problem' (see paragraph 3.7 above). ER is further concerned that sanctions would only be able to be imposed under the terms of a membership contract between the MSA and participants. ER has concerns about this and does not believe that 'incentivisation' is a solution to the problem of securing compliance with proper ethical standards.

9.8 The effect of ER's proposal, if implemented, would be that in defamation and privacy cases against the media, any action brought in the High Court which had not previously been through the statutory adjudication described above would be stayed and referred to fast track statutory adjudication. ER respectfully doubts if the MSA proposal would produce the quick, fair and cost-effective means of determining key issues.

9.9 It is not accepted that the system of compulsory regulation proposed by ER gives rise to serious issues of principle or practicality, any more than the regulatory systems in other independent professions. Likewise a statutory dispute resolution system like that proposed by ER has been operated for many years in the construction industry (see paragraph 8 above) and with suitable amendments could provide a practical basis for all media disputes at a

fraction of the cost of current court proceedings. We believe this could save the print and electronic publishing industry huge amounts in legal costs and also give access to justice for those currently unable to afford hugely expensive court litigation.

SIR CHARLES GRAY
for and on behalf of Early Resolution CIC

Date 7th June 2012