This is JANET(UK)'s response to the Ministry of Justice consultation on a draft Defamation Bill. JANET(UK) is the operator of the UK's national research and education network, JANET, which connects all universities, colleges, research organisations and regional schools networks together, to national research and education networks in other countries, and to the Internet. We have been advised by Ofcom that JANET is considered as a private Electronic Communications Service (ECS) for the purposes of current UK and EU law. The organisations who are our customers also operate networks likely to be classed as private ECSes or ECNs: many of them also provide hosting facilities for their users (staff, students, pupils, etc.) and others. Our comments therefore relate to the impact of current and proposed defamation laws on network and hosting providers, in particular to Questions 23 to 29 in the consultation document.

Q23. 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?

Yes. We recall that the Law Commission's 2002 report Defamation and the Internet concluded:

"There is a strong case for reviewing the way that defamation law impacts on internet service providers. While actions against primary publishers are usually decided on their merits, the current law places pressure on secondary publishers to remove material without considering whether it is in the public interest, or whether it is true. These pressures appear to bear particularly harshly on ISPs, which are seen as tactical targets for those wishing to prevent the dissemination of material on the internet. There is a possible conflict between such pressure to remove material, even if true, and the emphasis placed upon freedom of expression under the European Convention of Human Rights. Although it is a legitimate goal of the law to protect the reputation of others, it is important to ask whether this goal can be achieved through other means." (para 2.65).

We agree with their conclusion and consider that the law, unchanged since 2002, remains unfair to ISPs and secondary publishers, and also to authors whose critical or otherwise contentious material may be removed from on-line publication without good reason. As the Law Commission concluded, ISPs who receive an allegation that material is defamatory have no incentive to do anything but remove it.

Q24. 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?

We consider that the law on defamation on-line should seek the same balance between protecting reputation and protecting free speech as does the law on defamation off-line. That balance is undoubtedly hard to achieve, which is why disputes that cannot be resolved directly between the speaker and the alleged victim are normally heard in court where a balanced and legally informed assessment of the two competing rights can be made. It should be noted that even here, the party with greater legal and financial resources will often be able to persuade the other to settle, no matter what the merits of their case, so the legally 'correct' outcome may not always be achieved. It seems highly unlikely that any better position than this can be achieved on-line; however it should, at least, not be any worse.

The current law effectively requires a hosting provider or blog operator, even though they may have no knowledge of the law or the facts of the situation, to guess as soon as they are notified of allegedly defamatory material which way a court may in future decide the complex question of balancing the claims. It is hardly surprising that in most cases the host chooses the option that allows them to be sure of avoiding legal liability – to remove the article complained of – even in cases where the complaint would quickly be dismissed by a court. On-line law is therefore even less favourable than off-line to those who wish to publish unpopular views or criticise powerful organisations or individuals.

We consider that the balance of the law should be adjusted by providing an alternative course of action that a hosting provider can follow while keeping their protection from liability. The simplest approach is that suggested in the third bullet of paragraph 114 – to exempt the host from liability until they receive a court order requiring defamatory material to be removed. This seems likely to produce the closest match to the off-line balance but at some cost to the court system. An alternative might be to create a statutory process for the host to act as intermediary between the two parties, as suggested in the second bullet. For example a system of notice-and-counter-notice has been suggested for copyright complaints. Such a system would require the hosting provider to notify the author that a notice of complaint has been received; the host can then remove the material if they do not receive a formal counter-notice from the author within a set period. Once a counter-notice has been received the hosting provider is exempt from liability until a court has decided on the case between the two parties and made an order on the disposal of the material. This might reduce the number of cases heard by the courts, but must be designed so it is not so onerous that hosting providers simply revert to their current practice and remove all material whenever a complaint is received.

Q25. 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?

Yes. It is very unclear what, if any, proactive measures a network or host may take without losing the protection provided by section 1 of the Act and Articles 12 to 14 of the Directive. For example the Advocate General's opinion in *L'Oreal v eBay (case C-324/09)* is that "actual knowledge" of a copyright infringement (therefore presumably also of a defamatory statement) can be obtained by a web host's "voluntary research" (para 164). A host that examines content on its own site thus risks losing the protection provided by section 1 and Article 14. This creates a strong incentive for sites not to filter or check for inappropriate content but to leave all third party content unread until a complaint is received about a particular item. At that point there is an equally strong incentive to remove the material without considering whether or not the complaint is justified. The current system therefore both reduces the likelihood of inappropriate content being removed before it causes offence and increases the likelihood that legitimate content will be removed thereafter.

We note that the European Courtin the case of *Google v Louis Vuitton (joined cases C-236/08 to C-238/08)* and the Advocate General in *L'Oreal v eBay* disagree in their interpretation of this protection (see para 138 and following in *L'Oreal*), so it appears unlikely that case law will resolve these difficulties of interpretation. We therefore consider that at least clarification is required that it is possible to do some proactive checking without acquiring immediate liability for material that may be incorrectly assessed. If the current law does not, in fact, permit proactive checking without risking liability then an amendment to permit this should

be considered to make it easier for those hosts that wish to act against inappropriate content to do so.

Q26. 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?

Q27. If Lord Lester's approach is not suitable, what alternative provisions would be appropriate, and how could these avoid the difficulties identified above?

Lord Lester's approach is to create a new class of persons known as "facilitators", who would always have a defence to liability for material they store or transmit. If those who provide on-line storage and publication facilities for third parties (e.g. content hosts and blog authors) fall within that class then this would give them a permanent exemption for those activities, like that already provided to "mere conduit" network providers. This would remove the pressure on them created by current law, thereby removing the current bias against freedom of speech, since it would mean that action could only be taken against the author of allegedly defamatory material. However clarification would be needed that the courts would indeed consider that content hosts were only facilitators. Someone who provides facilities to store and publish material inevitably has the ability to decide not to store or publish a particular item: the provision will have no effect if this is sufficient to constitute some "other influence or control over it".

For blog authors, who normally do have the ability to edit the text of third party comments (even if they choose not to use it), there seems to be a greater chance that they would have "other influence and control" over third party comments, and thereby fall outside the class of "facilitators". However they might not have "editorial or equivalent responsibility for the content of the publication [of comments]", thereby avoiding Lord Lester's class of "editors" who have no defence to liability. This would still represent an improvement over the current position, since the case of *Kaschke v Gray & Hilton* [2010] EWHC 690 (QB) suggests that a blogger who edits comments to correct their spelling and grammar might be liable for their content, even without notice that it was allegedly defamatory. A blog author who was neither a facilitator nor an editor of third party content would be in a similar position to a web host under present law – no liability until informed of an infringing comment, but thereafter having a strong incentive to delete whatever material was the subject of the complaint.

Q28. Have any difficulties arisen from the present voluntary notice and takedown arrangements? If so, please provide details.

Q29. 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?

As discussed above, the current one-sided incentive means that any allegation that material is defamatory (or in breach of copyright, etc.) is likely to result in it being removed almost immediately by a commercial Internet host.

The situation for universities and colleges hosting content is more complex as they are required by s.43 of the *Education (No.2) Act 1986* to "take such steps as are reasonably

practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers". Universities and colleges, required to balance two opposing statutory duties, are likely to take longer than a commercial hosting service to consider a complaint of defamatory material and may, on occasion, come to a different conclusion. This can lead to those claiming defamation becoming frustrated; it also means that whatever action a university may take leaves some risk of liability under the conflicting demands of defamation and free speech laws.

A statutory form of notice, such as is contained in Lord Lester's Bill, would at least provide universities with more evidence on which to base their assessment. However it alone would create no incentive for other hosts to behave any differently from the present. Any statutory period to respond to a notice must therefore take account of the different processes required by universities and colleges to also comply with their statutory duty to protect freedom of speech.