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THE JOINT COMMITTEE ON THE
DRAFT DEFAMATION BILL

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Lord Lester of Herne Hill

Evidence heard in Public

Questions 1 - 40

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Members present

Lord Mawhinney (Chairman)
Sir Peter Bottomley MP
Rehman Chisti MP
Stephen Phillips MP
Christopher Evans MP
Dr Julian Huppert MP
David Lammy MP
Lord Bew
Lord Grade of Yarmouth
Baroness Hayter of Kentish Town
Lord Marks of Henley-on-Thames

Examination of Witness

Lord Lester of Herne Hill.

Q1 The Chairman: Lord Lester, we are extremely grateful to you, in a whole variety of ways. First of all, we are grateful to you for coming this morning. We are grateful to you for all the work that you have done in preparation for this morning and the extremely helpful notes that you let us have. Thank you. I think the whole Committee would also want me to thank you for all the work that you have put into drafting your own Bill, from which we have all benefited. It is probably pretty close to a matter of record that had you not taken that initiative, we might or might not be here this morning. In a whole variety of ways, we are extremely indebted to you and we want you to know and understand that.

I have an opening question. You have had a chance to look at the clauses that the Government have drafted. Could you tell us broadly what you think of them? Are they

broadly right? Are they terribly wrong? If they are broadly right, what needs to be tweaked, in your view?

Lord Lester of Herne Hill: Thank you very much, Lord Chairman, for your generous introduction. I wonder if I could say a few general words before coming to the question. I began to work on this because my personal experience as an advocate seeking to help clients with speech and privacy issues led me to believe that in the end, the issues could not be dealt with entirely by common law and Parliament ought to be engaged. Of course, this is a historic occasion. Not only is it the first meeting of this Committee, but more generally it is the first occasion on which Parliament and the Government has the opportunity to look at the whole of the law on defamation and decide whether and how to reform it through legislation.

Although I dabble in libel law, I am not a paid-up and true member of the libel Bar. In preparing my bill, I had the great benefit of Sir Brian Neill, the author of a leading textbook and a former Court of Appeal judge, and Heather Rogers QC, as my experts and I had a much broader group of organisations that I used as a sounding board. In doing that, I made it clear that I would only introduce a Bill if it was the highest common factor of agreement among them, because otherwise we would go off in all kinds of directions. When we looked at my Bill, we looked at loads of options and boiled them down only to what we regarded as quite essential. There were other things that we could have done, but we decided that politics is the art of the possible and therefore we should concentrate on practical matters and not theoretical ones.

Sitting behind me are the leaders of the Ministry of Justice Bill team, Michelle Dyson and Tony Jeeves. I would have said this more easily if they were not here, but I would like to say that I have been enormously impressed by their skill and commitment to the whole project. Lord McNally, the Minister responsible, said in public that what Ministers can do above all is to liberate their civil servants by telling them that they are authorised to make the best job they can. He has been very impressed as well by the work that they have done.

This is a long-winded way of saying that the Draft Defamation Bill consultation paper, which they have drafted, and the Bill that they and Parliamentary Counsel have drafted, represent many months of work after my own Bill was debated in the House of Lords on 9 July. In my view, it is an extraordinarily open and intelligent document.

I am very happy indeed—to answer the question at last—with the content of the Government's Draft Bill in general terms. There are issues raised in the consultation where the Bill could go further. On the whole, where that is suggested, I would be in favour of going further. There are complicated issues that we will come to later when one deals with what that means, but in general terms, I think this is an extremely good Bill. When it is added to in the way that is being envisaged—we know that work will continue on that until the end of the year—I think it will be a Bill that can endure and not need further incremental legislation. That is our ultimate aim.

Q2 The Chairman: Thank you very much. Let us move to the more specifics. I think colleagues will probably want to ask a few questions arising out of the drafted clauses before getting into those areas that are not covered by clauses. Let me start by

asking you to tell us a little bit about what appears to be a difference of emphasis between your Bill and the Government's one on substantial harm.

Lord Lester of Herne Hill: Again, because some Members of the Committee are not lawyers, I am glad to say, it is important to understand—

The Chairman: That does not necessarily make us inferior people.

Lord Lester of Herne Hill: No, that is why I said that I am glad to say.

Lord Grade of Yarmouth: Just impoverished.

Lord Lester of Herne Hill: Before we get into the technicalities, what exactly are we trying to do with the Bill? It is important to get that clear, because otherwise one becomes immersed in tabulated legalism, as it were. One is trying to produce a Bill that will balance reputation, rights and freedom of expression, which will be user-friendly to claimants and defendants, which is not going to give an absolute right to reputation nor an absolute right to free speech, and which is going to ensure access to justice in a way that is not there at the moment because of expense, costs, technicalities and so on.

The reason for the substantial harm test, as the consultation paper makes clear, is that the courts should not be troubled with trivialities, but only with something that really substantially affects reputation. That also has some effect on, if you like, libel tourism, which we will come to later, because if you do not have to demonstrate substantial harm, a publication that is hardly harmful in this country can still give rise at the moment to the courts being involved. That is why the substantial harm test is there. It is already there in the common law, but we are giving it statutory form

because of its importance. You will have seen in the consultation paper it is dealt with starting on page 8. I agree with what is in the consultation paper and I regard the definition in the Bill as satisfactory.

Q3 Baroness Hayter of Kentish Town: I have a paid role as Chair of the Legal Services Consumer Panel. I declare that interest. I really welcome the bits about showing substantial harm, which are really interesting, but most of the Bill assumes that a defamation against an individual, once you have proved any substantial harm, is handled in exactly the same way as any defamation against a corporate body. Another approach could have been to see any defamation against an individual dealt with quite separately from the approach either with all corporates or, as in Australia, with corporates employing more than 10. Could you argue why having one approach to these two quite different things is the appropriate way of tackling this issue?

Lord Lester of Herne Hill: That is a very important question, which goes beyond substantial harm. You are asking why we have not either made it impossible for corporations to sue for defamation, as some have advocated, or handicapped them more severely than in the Bill. I think that is what is behind the question.

Baroness Hayter of Kentish Town: It is partly that and partly whether it is right to have the same process for the two.

Lord Lester of Herne Hill: The wrong that the law of defamation seeks to deal with is harm to reputation. A trading corporation or other body, whether it is a corporation or not, has a reputation. It is different from an individual human being, because a human being has feelings and corporations obviously do not have personal feelings,

but a corporation or other public body, such as a trade union, a university or even a government body, can be severely harmed in their reputation by scurrilous and false allegations against them. Therefore, they need to be able to have effective remedies to vindicate their reputation.

What really troubles us about corporations is not, I think, that they are corporations. A corporation could be A Lester Ltd, a one-man dress company, which could be almost indistinguishable from me. The fact that I put myself into company clothing hardly matters. What really worries us is the big corporation, multinational or national, or the big body of any kind, which has unequal power compared with the ordinary man or woman. It is the inequality of arms. It is what happened in the McLibel case, where McDonald's spent several years with a couple of individuals in person defending themselves in a libel case.

We may have to come back to this later, because it is something that the free speech lobby have been raising a lot, and I do not agree with some of them about this. The words "company" or "corporation" are under-inclusive and over-inclusive. What do I mean? It is under-inclusive in that there are many bodies that are not companies at all, but exercise great public power. Therefore, if you are concerned about relative power between parties, there are non-companies as important as companies. In that sense, the concept is under-inclusive, because it does not cover all of the powerful. It is also over-inclusive because, as I have said, you can have a one-man or woman company that is being treated in law as though it is ICI, Shell or BP.

The word "company" does not give much assistance in tackling the real problems. They all have reputations and they are all entitled, in my view, to have their reputations vindicated if they are harmed, subject to certain safeguards. The real problem is how you strike a better balance to ensure that the little person, whether they are a claimant or a defendant, is able to have access to justice without being deterred by the risk of litigation and costs. That is something that the whole Bill, in a sense, is designed to try to deal with. I hope I have answered your question.

Q4 Dr Huppert: Can I just pick up on that? You said that "company" did not help, but could one not draw a distinction between natural persons and non-natural persons and have a provision for the case of A Lester Ltd, allowing directors of a company to take action if their reputation has been affected by criticism of the company?

Lord Lester of Herne Hill: First, without becoming legalistic, you cannot discriminate, under the European Convention on Human Rights, between natural persons and legal persons. They are equally entitled to vindicate their rights. For example, you cannot discriminate between the BBC, which is not a company but a chartered body, and News International, which is a company. You cannot discriminate between News International, which is a company, and me, in terms of our rights to free speech. All of that is well decided in Strasbourg case law and it would raise great problems of differences of treatment if you simply barred companies from being able to sue altogether.

The kind of thing that you can do, which I succeeded in doing in the Derbyshire case, is to say that where a body is a government body—it does not matter whether it is corporate—like Derbyshire County Council, that body must use a different tort, malicious falsehood, to vindicate its reputation, because it is undemocratic for a government or public authority body, whether it is local or national, to use libel law to suppress or punish criticism of the way that the body exercises public power.

That, in a way, is an echo of the famous *New York Times* and Sullivan approach—a case that was decided many years ago by the United States Supreme Court—which said that a public figure had to prove malice or reckless disregard of truth to bring a libel case. That is the tort of malicious falsehood. We have succeeded in persuading the courts that a political party, a trade union or a public authority, like Derbyshire County Council, cannot use libel law in the ordinary way when it is exercising public power. My own belief is that that needs to be put into the Bill. It is not there yet, but it is one of the issues in the consultation.

That issue, relating to a democratic body, is different from the commercial context. If I say that such and such a car is unsafe at any speed and I am doing it in a way that is entirely scurrilous and reckless and has no legitimacy rather than as a responsible person from a consumer association, the car manufacturer will be severely damaged in what they do and they must be able to vindicate their reputation. The trouble is that in a way all of this feeds into itself, because these different points arise, but I believe that the Reynolds defence, the public interest defence, the fair comment defence, the honest opinion defence and the statutory qualified privilege defences

will all enable the consumer interest, as it were, to be expressed much better in dealing with corporations. But I do not believe in the simple view that merely by penalising the corporation you can solve the problem. Here I differ from our colleague Evan Harris, who is the main proponent of the view—for which he has substantial support and I respect his view, obviously—that one must handicap the corporation. The Australian idea of looking at the amount of share capital and crude numerical tests does not seem to provide the sensitive tests that you need in dealing with this.

Dr Huppert: We may come back to this. Can I move on to libel tourism, unless there are other questions on this topic?

Q5 The Chairman: I would like to ask a question arising out of your last sentence. I have heard it said that if there is to be substantial damage to a corporation, it ought to be measurable in the profit and loss account—the damage should be quantifiable in financial terms. Would you add two more sentences to explain why you think that is not a sustainable argument?

Lord Lester of Herne Hill: I have not said that is not a sustainable argument.

The Chairman: I am sorry, I misunderstood.

Lord Lester of Herne Hill: I quite agree. In my Bill, I said that a company should have to show serious financial harm, or the likelihood of it, which is not very far from the existing common law position. To do that, obviously, you look at harm to the balance sheet. I was trying to deal with the argument that corporations should not be allowed to sue at all or should be allowed to sue only in very rare circumstances.

Q6 Stephen Phillips: I should refer the Committee to my entry in the Register of Members' Financial Interests. Lord Lester, you have twice referred so far to your Bill having restated the common law, yet during your opening remarks you also said that you came to this topic as a result of your experience as an advocate, in that you thought the common law was unable to remedy the defects in the existing law, if indeed there are defects. Therefore I would be interested in two things. First, could you give further detail of the defects that you consider to exist in the present law? Secondly, why is it necessary for Parliament to intervene merely to restate provisions of the common law at all, in so far as they are currently satisfactory, which I infer is the case in so far as your Bill simply restated them, in your opinion?

Lord Lester of Herne Hill: I certainly did not intend to say that my Bill merely restated the common law, and if you so understood me, it must have been because I did not express myself properly. I was trying to say that there are aspects of my Bill that represent a statutory restatement of the common law in clearer terms, but, as the consultation paper makes clear, each of the provisions in the Government's Draft Bill and each of the provisions in my Bill change or explain the common law. Let me give some examples, since you would like chapter and verse. I was responsible for trying to win the Reynolds case on behalf of Times newspapers. Until Albert Reynolds' libel case, the law was in a ludicrous position so far as qualified privilege was concerned. There was no special defence for responsible journalism. We tried to persuade the Law Lords to adopt something close to the Sullivan rule in the United States. Instead of that, the Law Lords settled for German constitutional law ad hoc balancing, to use

the cumbersome phrase that was used. In other words, they adopted a sort of Strasbourg approach, with the public interest involved in weighing a series of incommensurable factors. Lord Nicholls listed 12 of them. There are too many of those factors and they are stated in a way that has made that defence not useful for NGOs and hardly useful for newspapers. This is not my fault, I am glad to say; it is their fault. We warned them at the time that in practice the Reynolds defence would lack legal certainty and that it would not be likely to work well in practice. But, as advocates often do, we failed.

My Bill attempts to make the Reynolds defence user-friendly by limiting the factors and emphasising those that really matter. The Government's Draft Bill does exactly the same. There is a lot of discussion in the consultation paper about whether we have got the factors right and whether the weighting is right, which is another matter, but the short answer to your question—or the long answer to your question—is that, for example, on Reynolds that is a big change. It is a change to make it user-friendly. The same is true of the defence of justification or truth—a change. The same is true of the defence of fair comment and honest opinion and the third factor—a change. The same will be true, and much overlooked, of statutory qualified privilege. We have an entirely out-of-date list of situations where fair and accurate reporting ought to be privileged but is not—a change. We have the situation so far as the jury is concerned—a change in theory if not in practice. We have the same on the internet, where we have a completely out-of-date law that does not take any account of

things. I hope I have explained why it would be wrong to regard my Bill or the Government's Bill as simply restating the common law.

The Chairman: I will call Mr Lammy and then we will ask Dr Huppert to move us on to a different area.

Q7 Mr Lammy: In relation to what you consider to be in line with the common law, can you say a little bit more about the substantial harm test? There is obviously some concern that this might change the balance in relation to claimants in two areas. First, what a politician, a celebrity or someone in public life might consider to be substantial might be different from the view of an ordinary citizen who has never seen their name in the newspapers, who is living in a village somewhere in middle England and who suddenly finds themselves the subject of local gossip and it is incredibly stressful for them as individuals. In making this a statutory definition, it is important to reveal what you see as substantial. The other is the presumption in relation to proving damage. That would potentially be a departure from the current regime in relation to libel and I wonder whether you think that substantial harm has an effect on what is damage, or at least the claimant having to prove some damage before successfully moving on to bringing a claim.

Lord Lester of Herne Hill: I cannot really improve on the way it is put in the consultation paper. The Government explain there that there is merit in removing the scope for trivial and unfounded actions to succeed by making clearer what at the moment is embedded in the common law in the case of Thornton and Telegraph Media, referring to a threshold of seriousness. "Substantial" and "substantial harm"

are words of fact and degree. They are ordinary words in any dictionary. There is no need to define them because they have to be applied in the context of the particular facts of a particular case. In the end, the bodies authorised to do that under our system are the courts in particular cases. I cannot really do more than say that it is a good idea in my view and the Ministry of Justice's view that at the outset of the Bill one should signal to everybody, whether they are ordinary citizens, Members of Parliament or Peers—we, of course have vested interests as Members of Parliament and Peers, since we enjoy our freedom of speech under the cloak of privilege and we are very sensitive sometimes when we are defamed or our privacy is invaded, so we are peculiar animals as politicians when it comes to this issue, but whether we are peculiar animals or ordinary men and women—that there ought to be a minimum threshold of seriousness before this strange tort that we have inherited from the Star Chamber of the Ecclesiastical Courts comes into play. That is all that is being said. It does impinge on the presumption of damage. That has always been there to make it easier for claimants to sue. That will continue. We are not proposing to take away the presumption of damage except that if the damage is so trivial and can be shown not to satisfy the substantial harm test, there were to be a power in the court to decline jurisdiction. But it would be a matter of discretion.

Q8 Mr Lammy: Can I just press one follow-up? The concern is that the threshold may be raised by substantial damage. The second point is that in codifying this we mitigate against the claimant position. I was seeking to expose whether you thought that was the case.

Lord Lester of Herne Hill: First of all, it is not my aim to make it hard to sue for libel. There are some among free speech champions who do not believe in the law of libel at all. There are some who have argued recently that one should change the burden of proof and put it on the claimant. I have strongly resisted that for that reason. You asked me whether I am raising the bar. The courts themselves have talked about the need for a threshold of seriousness. All they are saying is that the threshold should be substantial. In a way I could throw the question back rhetorically. Suppose we did not have a threshold of seriousness. Are we seriously saying that our courts, and the taxpayer who pays for the courts, should find themselves with cases that have no threshold of seriousness? Surely not. There needs to be a threshold of seriousness. The word "substantial" is simply there to distinguish the real from the trivial.

The Chairman: This issue has so many facets that I think we need to explore one or two of the others.

Q9 Dr Huppert: I should like to talk about libel tourism for a bit. Clause 7 of the Draft Bill has a provision that people who are not domiciled here or in a slightly broader Europe cannot have defamation actions against them. That is very welcome, but it would not protect somebody who was British and being sued here for a publication that was principally elsewhere, which has been a concern. Your Bill had a very nice provision in Clause 13, which says that there is no harmful event unless it happened as a result of publication in this jurisdiction. If somebody British published something principally in Russia and there were a few copies in Britain, your Clause 13

would effectively protect them. That is not in the current draft Bill. Do you think it should be?

Lord Lester of Herne Hill: Can I have a moment to remind myself of what I have put in my Bill? I do not think that there is any difference of substance between my Clause 13 and what I think is Clause 7 of the Draft Bill. They are worded differently to try to fit in with EU law and to reach the same result. Sitting in this room, we have the Bill team here. I am not a Minister and they are not responsible for me, nor I to them, but if I get something wrong I am sure the Committee would find it useful, since you are not taking evidence from them, for them to bang me on the shoulder or tell you themselves. My impression, having read Clause 13 again, is that in each case we are dealing with a harmful event that arises because there has been publication both in this country and abroad. The harm within this country is not substantial and the court is then to have discretion, outside the EU problem which we will come to later—

Q10 Dr Huppert: Sorry to interrupt you, Lord Lester, but I think the key issue is that Clause 7 of the Draft Bill does not apply to people who are domiciled in the UK, whereas Clause 13 of your Bill would do. That is quite a significant difference. If you need more time, perhaps you could write to the Committee with a comparison.

Lord Lester of Herne Hill: Can I just have a moment? The reason why we made the adjustment was the EU problem, which requires no discrimination, whether you are domiciled here or elsewhere within the EU, so far as the ability to sue is concerned. My Clause 13 was changed to try to deal with the EU problem. It is as simple as that. We hope that the EU problem has been met by what is in the present Clause 7.

Q11 Dr Huppert: In the case of somebody domiciled in Britain who publishes something that is alleged to be defamatory in Russia and there are a handful of copies in Britain, what protection would there be against a case being brought in Britain, under the current Draft Bill?

Lord Lester of Herne Hill: In the current Draft Bill, if it is Russia there is no EU element. We are talking about, say, a Russian oligarch in Russia who is complaining about a UK publication that is defamatory of him.

Dr Huppert: No, a publication in Russia by somebody domiciled in Britain. It seems to me that Clause 7 does not apply. An action for defamation against a person domiciled in the United Kingdom would not be caught under Clause 7 and there would be no protection there.

The Chairman: If it would be helpful, we would be very happy for you to take time to reflect and then drop us a note on the issue.

Lord Lester of Herne Hill: Yes, I will. That is probably the best way of proceeding. I understand the point.

Q12 Lord Bew: To follow up on this issue of libel tourism, I have two points for you. The House of Lords debate last summer revealed a significant disagreement among senior legal opinion on how serious the problem is. I would like your take on how real is the difficulty that we have to deal with. It surprised me, as somebody who writes for university presses—we have become very sensitive as a result of this—but there clearly is a division in senior legal opinion on that matter of the seriousness of the problem.

On Clause 7 of the Government Bill, I would like your views on the comment that Section 47(2) provides that a court does not have jurisdiction to hear and determine an action 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 place in which to bring an action in respect of the statement. The use of the word "clearly" perhaps needs some unpacking. What do we mean by "clearly the most appropriate place"? It seems to me that there is potential for quite a lot of argument and debate about that. I would like your views on that language.

Lord Lester of Herne Hill: On the first question, about the extent of the problem of libel tourism, paragraph 80 of the consultation paper explains that research was done by the libel working group under the previous Government in the High Court in 2009 and did not show any significant number of actual cases involving foreign litigants or any evidence of the type of libel tourism cases that are of most concern—those where the claimant and defendant come from outside the EU. However, it went on, NGOs have indicated that the a major problem arises from the threat of libel proceedings by wealthy foreigners and public figures, which is used to stifle investigative journalism, regardless of whether actual cases are ultimately brought. Hence the number of cases alone may not accurately reflect the extent of the problem. Certain of the other provisions that are being included in the Bill should assist.

That is my impression as well. I do not think that there are lots of foreign libel tourists cluttering up the courts. The real problem, which Baroness Hayter referred to in her

Second Reading speech in the House of Lords on 9 July, is the threat of libel proceedings against NGOs of all kinds, which causes self-censorship by them for fear of having to face the libel action. The fear of self-censorship and its existence is a greater threat than occurs by simply counting up the number of cases in court. It is a serious problem of that kind. The word "clearly" has been put in for emphasis, to make it clear that England and Wales must be the appropriate place. Without usurping the judge's role, it is a way of Parliament giving a push to judges to make it absolutely clear that only in such cases should the courts entertain the case.

Q13 Chris Evans: The difficulty that I see with that is how you can stop the claimant from framing the claims to focus the damage within the jurisdiction of the court only. There still seems to be a tension there. You can frame a claim to say that I was defamed in England and Wales rather than elsewhere. I have done a lot of work on this over the last week and the case that jumps to my mind is the Roman Polanski case. Polanski was sued in a London court, but was allowed to give videolink evidence from France because he was fearful of being extradited to the States for the alleged crime he committed in 1977. I am still not clear about how that clause can stop claimants from framing the case to say that they were defamed specifically in England and Wales.

Lord Lester of Herne Hill: It is not about how the claimant frames the case; it is what the actual facts are. The defendant to such a claim would say that the amount of harm in this country was trivial, quite apart from substantial harm in Clause 1. The copies have been mainly published in Ruritania, not in this country, and Ruritania is

the place where the reputation really matters. The harm to reputation here is so slight and it is so much more substantial in Ruritania that the court should decline jurisdiction here and it should be decided in Ruritania. That seems to me a matter of fact. A claimant's lawyer may try to get round it by saying that he is only complaining about damage here, but the court will not have its eyes shut to the real world in which publication can be shown to be much more substantial in Ruritania than in this country.

Q14 Lord Marks of Henley-on-Thames: One of my questions was on Dr Huppert's issue, which you are going to reply to in writing. As I saw it, Clause 13 provided that only the extra harm in this jurisdiction would count towards the substantial harm test, whereas under the Government's proposed Bill, that test does not have to be met except in relation to cases where the defendant is domiciled here or in the EU. The lack of that extra harm test seems to be quite serious in relation to the substantial harm test.

I have two further related questions. The first is in relation to substantial harm. Your Bill provided for a strikeout mechanism in Clause 12. The Government's Bill does not do that. The consultation paper said that we had to rely on the existing procedures. I wonder whether that is an undesirable weakening of your Bill. If we are trying to simplify the law and make it more user-friendly and you are inputting a substantial harm test into the threshold, the procedural strikeout seems to me to be a very helpful adjunct to that and it is a shame that it has gone. I wonder whether you agree with that. It is Clause 12 of your Bill.

Lord Lester of Herne Hill: I certainly would not strongly disagree with what you have said.

Q15 Lord Marks of Henley-on-Thames: The second point is related but much wider. You talked in your opening remarks about improving access to justice and dealing with questions of costs and so forth. One view of the Government's Bill could be that it is very effective in achieving that in relation to the defences that are available—clarified, simplified and made more substantial. But it could be seen that this Bill does not do a great deal to make access to justice easier for claimants in smaller cases. I wonder whether one of the areas that this Committee might consider is the establishment of a new, simplified lower-tier procedure for claimants in smaller cases to get cases quickly before the courts in order to achieve resolution at lower cost.

Lord Lester of Herne Hill: That is a very important question. One of the questions in the minds of this Committee is whether there should be some special libel tribunal to deal with cases. The issue has been raised in a number of contexts. For example, Sense About Science, which may be giving evidence to you, is keen on using County Courts and downsizing the litigation so that instead of it being High Court and posh, it becomes County Court and ordinary, so the cost scales might be reduced and so on.

I think the provisional conclusion reached, with which I agree, is that what really matters is early effective case management, which will involve procedural shifts and educational changes on the part of the judiciary. In other words, the problem at the

moment has been ineffective case management at an early stage, with the result that cases are not settled promptly and the ordinary person without huge means never gets to court. The way of tackling that is to have a new procedure agreed with the judiciary. It does not have to be in detail on the face of the Bill, but it needs to be clear that it is going to happen. The judge gets hold of the case at a very early stage, almost invariably without a jury, and can rule on the meaning of words at a very early stage, which is often at the heart of the dispute. They can ensure at the outset that the costs are to be severely capped and can seek to achieve equality of arms between David and Goliath, as I call them, in the course of doing that. That can be done in the High Court or the County Court. I would be strongly against setting up a special tribunal to deal with this, not only because it is expensive, but also because it seems completely unnecessary. We should be able to do it within our system.

Q16 The Chairman: Following on, given your wide experience of the judiciary and new procedures and educating the judiciary, on a scale of 1 to 10, how likely is that to happen and what do you think might be the timeframe, were it to happen?

Lord Lester of Herne Hill: I was once, for my sins, a recorder. I sat for 10 years in one way or another and I went to a good deal of judicial training and had to be retrained all the time, with this incontinent flow of criminal statutes that we were meant to learn about and apply very fast. We worked very hard at that and we were trained. I hope I did not make too many stupid mistakes. We were diligent. When the Human Rights Act came in, you may remember, there was a two-year period when every judge and every tribunal chair was trained by the judicial studies board in what it

would mean, because of its huge cultural change. Almost £6 million was spent and it was very effective. Whatever one thinks about the Human Rights Act, no one can say that the British judiciary, right down to magistrates, were not well prepared when it came into force. This is a much easier thing to be thinking of than a huge change like the Human Rights Act. I am confident that the senior judges, including the libel judges, who I am sure are being consulted about this, will realise that we, Parliament, will expect them to give leadership, because that is where it has to happen. There has to be a partnership between Government, Parliament and the courts in this, and the courts have to play their role. One of the problems that one or two senior judges have said to me, as an aside, is that there have been very few cases going right up the system to enable them to give leadership in some of these cases. That is another reason why Parliament needs to intervene.

Q17 Lord Grade of Yarmouth: Many publishers, looking at the existing legislation, raise the accusation that it provides a means by which the rich and powerful can prevent publication. They can just use the defamation legislation. Do you think that is a fair criticism of the current legislation? Leading on from that, however you answer it, how do you think those same critics would view your proposals and the Government's? There is always the great fear that the existing law and any changes might be used.

Lord Lester of Herne Hill: Outside the field of personal privacy, dealing with libel, the age of the Bob Maxwell gagging writ is more or less over in terms of a formal injunction of prior restraint to prevent publication where there is a libel. That is

extremely rare and hardly arises. On the other hand, threats by the rich and powerful and their rich and powerful lawyers to use libel law operate as a very powerful restraint. I can think of loads of examples, some of which are very surprising. There is a Muslim organisation that exists now to expose radical Islamic terrorism and its evil offshoots. They are being threatened with being sued for libel by Muslim organisations. That is an extreme example of the problem. That threat of libel proceedings and the costs involved is real. It is ludicrous that, say, a regional newspaper—to weight it a bit more evenly—can be faced with a damages liability of £10,000 or £20,000 and a cost liability of £250,000. The risk of costs is so great that that has an enormous chilling effect. It is the combination of the outdated and archaic law of libel, plus the abuses of the costs regime that has that result. The costs regime is being dealt with separately by the Government in their response to Lord Jackson's cost proposals.

Q18 Stephen Phillips: In a sense this flows on from the cost position, but also from your earlier evidence. One of the things that you think is desirable is for judges to get hold of libel cases earlier and actively manage them. I wanted to ask a short question to which I do not know the answer. Is the case management conference in a libel case conducted before a libel judge or a Master of the Queen's Bench Division?

Lord Lester of Herne Hill: I think it is normally before the libel judge in charge of the libel list, but I am not certain and I would need to check.

Stephen Phillips: I would be grateful if you could clarify that at some point.

Lord Lester of Herne Hill: I believe that to be the case. Certainly, in my time it was but I have not done a libel case recently enough to be sure.

Q19 Rehman Chishti: With regard to the point about reducing cost in the whole process, some bodies and authorities outside, such as Inform, have said that applying the substantial harm threshold that you are proposing would create greater costs and would lead to uncertainty. What do you have to say about that?

Lord Lester of Herne Hill: Obviously, every time one produces any change, lawyers may decide to use it on behalf of their clients as they think fit. It is perfectly possible—the consultation paper recognises this—that some will seek to challenge the substantial harm test as applied because it will threaten the whole of their strategy if they are prevented from having access to justice. But that is swings and roundabouts. You cannot reduce the risk of trivial cases cluttering up the courts without having some kind of threshold, and if you have some kind of threshold, that may lead to some legal challenge. That is life.

Q20 Rehman Chishti: What is the difference between the substantial harm test and the real and substantial tort in the case of Jameel and Dow?

Lord Lester of Herne Hill: There is very little difference between them, except that it is being put into a statutory form as a threshold test. That is all.

Q21 Sir Peter Bottomley: I have taken five defamation or libel actions, one against a television company and four against newspapers. I also would have said last month that my son is the publisher of LexisNexis and Butterworth and has probably made as much money for corporates out of defamation as anybody. I have given expert

evidence in a corporate case of reputation. I once had a third of the British press holed up in Basingstoke waiting for me to offer drugs for money, which was gently reported in *Private Eye*. Can I take you through four issues: privilege, blackmail, privacy and defamation? Do you think they all ought to be subject to statutory legislation or do you think the common law is good enough in most of them?

Lord Lester of Herne Hill: Can you say what the four are again?

Sir Peter Bottomley: Privilege.

Lord Lester of Herne Hill: Do you mean parliamentary privilege?

Q22 Sir Peter Bottomley: Privilege goes beyond Parliament. Reporting a court case is privileged—qualified privilege. The second is blackmail, which I link also to privacy. At the moment, if someone came to me and said, “Unless you give me £50,000 I will report your affair to the newspapers” I can go and get anonymity. If they go straight to the newspapers, I cannot. So I put blackmail and privacy together. And then there is defamation.

Lord Lester of Herne Hill: Obviously, one cannot treat all four as the same because they all raise different issues. We have got rid of criminal defamation, thank goodness, a couple of years ago. We are talking about civil defamation. That needs to be dealt with by its own regime, which is partly statutory and partly 300 years of common law. The problem is how to stick them together in a way that is going to produce a better result, not a worse one. That is defamation.

Blackmail is obviously a criminal matter to be dealt with by the criminal law, but to the extent that it is a motive for seeking an injunction, that would normally be in the

privacy context, because privacy is dealing with facts that are true but are considered to be against the public interest to publish. Blackmail is mainly criminal, but has a civil law impact.

If one is talking about absolute privilege, we are in courts and Parliament, but you do not mean that. On qualified privilege, it is very important that Parliament lays down in detail, as it has in the existing law, a series of situations where a fair and accurate report of a scientific conference, a meeting of a company or a press conference are all permissible, provided that there is a fair and accurate report of what has happened and a right of reply. All of that is in the existing law, but the schedules are completely out of date and the consultation paper proposes that they be increased.

The big question is privacy, where I put in a note for you that, in my sad way, I wrote on holiday. I have read all the newspapers today and I have seen Mr Cameron's remarks and so on. I never know how much history people remember. I am old enough to remember Harold Wilson's time. Harold Wilson, as Prime Minister, longed for a statutory law of privacy. It was the famous brown paper package, if you remember. He wanted to wrap together privacy, official secrecy, freedom of information and this, that and the other, with Arnold Goodman's help. He did not do it because he wanted more free speech; he did it because he wanted more privacy. Most of the advocates, like Alex Lyon, who was Roy Jenkins' junior Minister, who was passionate on the subject, wanted a privacy law because they wanted less free speech and more privacy, and so they campaigned. Now we have had the Younger report, which I was re-reading yesterday evening, we have had the Calcutt Committee report

and we have had the Whittingdale Committee report, all of which have explained why they do not think that legislation on privacy is a very sensible way forward.

It is an issue that the United States has had to grapple with at state level as well. My own view is that in the end, it would not make a ha'porth of difference whether we had a privacy statute, or not so far as the courts are concerned, because in the end somebody has to weigh and balance the public interest in particular cases. If you are trying to decide whether private information should be disclosed in the public interest, all you can have in a statute is a public interest test. It is a bit like the Reynolds test in the libel context. Obviously, no one, even among the tabloid newspapers, would say that it was right to photograph Gordon Kaye lying in hospital when he had had a brain operation and to publish the photographs taken by a paparazzi person. I hope everyone would agree that that would be an unthinkable invasion of privacy. Similarly, if I were gay and had not come out—unless it bore upon my campaign for civil partnership, where it would be relevant, but if it were purely my personal, private sexuality—few people would say that my sexuality should be publicised.

On the other hand, if it is about misconduct relating to public office, the Trafigura case is a really good example of an injunction that should never have been granted. I am trying to say that in the end, although one can push judges, they have to decide. As I tried to point out in my note, what happened with the Human Rights Act is that newspapers lobbied Tony Blair really hard to be given a complete exemption. Most people do not know that. I think he was quite tempted to give them what they

wanted. In the end, Lord Irvine of Lairg, as Lord Chancellor, produced the compromise, which is Section 12 of the Human Rights Act. Section 12 makes it quite clear that the courts are to give priority to free speech over privacy where there is a conflict and where it is appropriate. The problem has been that although Section 12 is perfectly clear on its face, it has not been interpreted and applied by the courts as Jack Straw, who was Home Secretary at the time, indicated in the House of Commons debate.

I hope I have answered your question. I am not enthusiastic about privacy law. The one thing I would say to this Committee is that if you want to kill defamation law reform, you should start going into privacy and say that it needs to be tackled in the same Bill. I promise you that the plan to have an actual Bill come out next May and be enacted next year will not happen if you get involved in the thickets of privacy at the same time.

Q23 Sir Peter Bottomley: That is very helpful and I am grateful for that. The people who have to make a judgment about what should be published and what is in the public interest are writers, producers and editors. Judges come afterwards, if they come in at all. Day by day, it is those others who have to do it. We can accept, I think, that there is no problem with satire, vulgar abuse and honest opinion—at least, there should not normally be, and if there is you perhaps ought to tell us. If we accept that the task of the media is to make available to all what is known to a few—is it true, does it matter and is it news?—should we be looking at what is allowed or concentrating on what should be prohibited? Should we be thinking about what is

actionable or trying to find what is not actionable, even before we come on to the questions of how you resolve disputes about these issues?

Lord Lester of Herne Hill: I strongly believe that journalism ought to be a profession and I strongly believe in self-regulation. That is why, notwithstanding the Ministry of Justice's draft, I continue to believe that having regard to adherence to professional codes needs to be written into the responsible journalism defence, to emphasise the fact that the judgments that Sir Peter is referring to are primarily for the editor and reporter, not for the court. I want to keep the courts away, as far as one can, from those judgments. Judges are not editors or reporters and they are not competent to act in their place. The law therefore needs to encourage self-regulation. The Press Complaints Commission needs to be able to give effective remedies to keep the courts away. Alternative dispute resolution is another way of doing that.

Ultimately, I think that a free press is essential to a democracy and the judgments have to be made by the professionals. You will notice that all the fuss about super-injunctions and privacy is very often made by newspapers that earn a living by trading in publishing private information to the public. Good luck to them, but if you take a newspaper that does serious investigative reporting, of which the most successful one that I know is *Le Canard Enchaîné* in France—600,000 copies and it never has problems about privacy or defamation because it just uses investigative journalism in a highly professional way—if you are responsible and you act as a professional and you then take advantage, for example, of the Reynolds defence, you will be able to tackle that. I have been rather wittering on. I apologise.

Q24 Sir Peter Bottomley: It is very helpful. I have one more question, if I may. Incidentally, I think that journalism, like politics, is a trade, not a profession, but that is a side-issue. On science, in 1950 Richard Doll and Bradford Hill, having looked to see whether tarmac and motor fuels caused cancer, declared that you were 50 times more likely to get lung cancer and have heart disease if you smoked. For about 10 years, tobacco companies disputed that. If you look at some of the more recent commercial libel cases and compare them with what the tobacco companies might have done in 1950, or when the same people produced the evidence about asbestos and lung diseases, what level of proof do you think a court would want to require from those making the claim, or is it better to leave it with a commercial organisation having to prove without doubt that the speculation being brought forward could not be true?

Lord Lester of Herne Hill: If one truly wants to balance reputation and free speech, as I do, I do not believe that you can simply put the burden of proof on the claimant, as Geoff Robertson was advocating in last week's *New Statesman*, for example, and still talk about a fair balance under our system of law. However, to take the example you have given, the public interest defence and the honest opinion defence and the statutory qualified privilege defence in scientific matters would all change the balance in your kind of case and make it very hard for the tobacco companies to have any reasonable chance of succeeding if they were faced with good faith scientific evidence indicating a strong link between smoking and cancer, for example.

Q25 Sir Peter Bottomley: Would the court accept the action or would the court strike it out on those grounds? Does the writer or researcher have to spend £300,000 first or can you have a court say that it will not accept the action because of Clause 1 or 2?

Lord Lester of Herne Hill: I do not think the court could simply strike it out without looking at the merits at all. There would have to be a fair hearing on the matter. If it was a matter of honest opinion, if you look at the way in which that defence is drafted, which we have not discussed, it would substantially handicap the tobacco company. If they were properly advised, they would be told that they might well be liable for massive costs if they bring proceedings. The judge would have to make a costs capping order under our regime at the very beginning of the case. If it was two scientists against some big drug company, the drug company would be severely handicapped in the way in which costs were dealt with. I do not think it should be dealt with simply by saying that the scientists must win, because a court could hardly decide that, but what you are saying would fall within honest opinion in Clause 4 of the Government's Draft Bill. There would be a statement of opinion, that smoking causes cancer. The opinion would be on a matter of public interest, certainly. An honest opinion could be held on the basis of the facts that existed at the time that the statement was made or there was a privileged statement made by some other learned scientific body, or whatever. Therefore, the honest opinion defence would succeed. Likewise if it fell within the public interest defence. Therefore, the judge would look at the pleaded case and would have to make a determination at the

beginning on how the trial could fairly be conducted in a way that secured equality of arms.

There is no silver bullet about any of this. Obviously there has to be a hearing and the tobacco companies would be entitled to their day in court, but they would be handicapped to bring them down to the same level as the scientists. The qualified privilege on scientific conferences would also be in play. If cancer and smoking had been thoroughly debated by academics and scientists in conferences, then reports on those conferences would be covered by qualified privilege. We also have provision for what is called mere rapportage, where there is a dispute between A and B and a newspaper or broadcaster fairly reports that dispute. Again, that would all be out in the open on the rapportage part as well. It is complicated in a way, but I hope you can see that we are trying not to have absolute free speech any more than absolute reputation, but to strike a balance.

Q26 The Chairman: Just before I call Lord Grade, can I ask you to clarify something you said a few minutes ago? Without any caveats, you were encouraging us to accept that if there was any element of privacy in our report, as opposed to defamation, it would all hit the rocks, as Sir Peter has just said. In your view, is there any overlap between privacy and defamation, and if so what is it?

Lord Lester of Herne Hill: May I clarify what I said before? Of course this Committee will wish to say what it wishes to say. That is very important. I am not suggesting that it should censor itself on privacy any more than anything else. If the Committee wishes to express a view about privacy, I am sure that will be important. It is only if

the Committee were to express the view that the Defamation Bill would be grossly defective unless it also tackled privacy at the same time that we would be on the rocks, because that would make it impossible in practice, with all the time for consultation and everything else.

There is clearly a relationship between privacy and defamation. Indeed, in the Second Reading debate on my own Bill I said that I was not dealing with privacy and the reason was that I realised I would not have any hope of getting legislation through if it dealt with both. At the end of the note that I put in to the Committee I suggest that one could suggest that courts would adopt the New Zealand test about "highly offensive to a reasonable person". There are two reasons for pausing before we go further. One is Neuberger. We think that Lord Neuberger's Committee's report is due next month.

The other, which we have not mentioned, is Max Mosley. The decision in the Max Mosley case is likely to be on 10 May by the Chamber of the Strasbourg Court. I have already declared my own interest in that I drafted the *Guardian* newspaper third-party intervention in that case against Mr Mosley's claim. Having got a lot of damages and costs, Mr Mosley is saying that anyone wishing to invade someone's privacy by disclosing private information must tell the person in order that that person can seek an injunction. That law obtains at the moment in only six European states, most of which are former Soviet Union states, although the laws are post-Soviet. In no common law country throughout the world does any such rule obtain.

If the Chamber were so to decide, the prisoners' voting rights issue would seem like a sideshow compared with the outrage that there would be in this country, because it would suddenly mean prior restraint in privacy cases on a massive scale and it would mean that we would have to comply with that judgment unless it went to the Grand Chamber, which I expect it would—perhaps it will anyway. Therefore, I am saying that the Committee will want to wait for Neuberger, but it will also want to wait for Mosley, and it may need to take further evidence in the light of Mosley anyway.

Q27 The Chairman: Thank you. I was seeking clarification. That is very helpful. If it is an encouragement to you, this Committee is quite clear that it is looking at a possible Defamation Bill.

Lord Lester of Herne Hill: I did not answer your question, however, about the relationship between the two subjects. One relationship is injunctions. Clearly, in both cases there is a restriction on free speech. In both cases you can get injunctions. It is easier to get a privacy injunction than a defamation injunction because in the case of a privacy injunction, you are dealing with the publication of true information that ought not to be disclosed. When you are dealing with defamation, you are dealing with false information. If you are going to justify the publication, it is easier to resist an injunction than otherwise.

Q28 Lord Grade of Yarmouth: I should have drawn the Committee's attention to my interests, and my recent appointment as a Press Complaints Commissioner. Can I ask about the jury issue? There seems to be common ground between you and the Government on the removal of the presumption in favour of trial by jury. Could you

give us a sense of why you think that is a good thing and then set out the practicalities and principles that would decide whether a case was to be heard by a jury?

Lord Lester of Herne Hill: I believe that there has been no jury trial in a libel case in the last 18 months. We are talking about something that is, at the moment, largely theoretical. Professor Dicey used to argue, at the end of the 19th century, that the jury was the greatest protector of free speech and was much better than all these American and continental written constitutional guarantees of free speech. In practice, the jury was the robust defence. That is not how it has been perceived in practice by the media. When I was preparing my Bill, I had the benefit of the in-house lawyers of the BBC, Channel 4, the *Times* and the *Guardian*. All of them said that they regard the jury as a disaster. They did not want the unreasoned judgment of a jury; they wanted the reasoned judgment of a judge alone. They found that a jury acts in an arbitrary way and did not wish to have it. The lawyers also made it clear that if you want to settle cases and if you want the whole of the Bill designed to avoid litigation and to cut libel practice down to a proper level, you cannot do it if either party is manoeuvring for a jury. It is the same with alternative dispute resolution or anything like it.

I imagine that everyone would agree that serious criminal cases must be decided by juries, but in civil cases the only cases where juries have been retained since 1933 are quasi-criminal cases, such as false imprisonment and assault, and libel. Since there have been no libel cases with juries that I am aware of in the last 18 months, quite

apart from cost-cutting, which matters these days in a period of austerity—jury trials are obviously much more expensive—for all those reasons there is an overwhelming case to change the presumption about juries.

Q29 Lord Grade of Yarmouth: The supporting evidence that you provided for that line of argument were all publishers and broadcasters. What about claimants?

Lord Lester of Herne Hill: Claimants' lawyers have a livelihood. They have to earn a living—it is a very good one, too. I expect there will be some claimants' lawyers who would like to retain the jury and make it as difficult as possible to settle cases and run up their legal costs. We are not concerned with that kind of abuse. The only body that I know that has said something to the contrary in all the consultations that I carried out was Liberty. Shami Chakrabarti said that Liberty would like to retain juries in libel cases. Justice did not take that view and nor did any of the other NGOs that I have consulted in the eight months running up to my Bill.

Q30 Lord Grade of Yarmouth: In what circumstances could you foresee a jury in a defamation case?

Lord Lester of Herne Hill: I have not yet answered the nasty question that you ask about what criteria there are for having a jury. We have found it very difficult to articulate any criteria because it is very hard to think of any sensible way of doing it. I tried in Clause 15(3) to set out what the circumstances might be. That was our best way of doing it. When it came to the Government Bill, I think I am right in saying that we gave up on it.

Q31 Lord Grade of Yarmouth: You are essentially saying that there should never be juries.

Lord Lester of Herne Hill: My own view is that it would be a very, very rare case indeed where one would do so in a civil case. One of the high degrees of irrationality, before anybody asks me more questions about it, is that we do not have juries in privacy cases. If you were trying to be consistent, you would say that Andrew Marr's injunction and all that should have been debated by a jury. Well, heaven forbid in privacy cases, and it seems to me that the same applies in defamation. I cannot see any good reason for retaining the jury in a defamation case. The United States does, of course, but it is almost impossible for a public figure to sue for defamation in the United States, and if they do there is no cap on damages. The American system does not have any right of privacy under the constitution.

Q32 Lord Grade of Yarmouth: But you have to show malice, don't you?

Lord Lester of Herne Hill: Yes. And the demonstration of malice might be a reason for retaining the jury in the American system, I do not know.

Q33 Mr Lammy: Do you accept that this is a substantial change? In a sense, the jury is the arbiter of reputation. That is why we have the system. There is a danger when you effectively say that in this area we should leave it to the experts—to the judges and the lawyers. There is an element of the Bill where we ought to be perhaps a little bit suspicious of the Ministry of Justice and others, who always have an incentive to cut costs. In a sense on the question that I asked before on substantial harm and perhaps the incentive here in relation to a jury is in these times always to look to cut

costs. It is probably important that that is on the table. That may be a legitimate exercise, but it is certainly an objective that, as a former Justice Minister, I know lies behind those who administer the courts and justice.

Lord Lester of Herne Hill: First of all, this is not a major change at all. As I said, you hardly ever get jury trials.

Mr Lammy: You said 18 months. That is not long in relation to common law.

Lord Lester of Herne Hill: Well, okay, but there have been very few jury trials in the recent past. It is not a major change because we are not abolishing jury trials in either draft; we are simply changing the presumption, which at the moment is in favour, to a presumption against. We are not saying there can never be a jury trial, so it is not a major change in that sense either. The argument that the people's jury is the arbiter does not apply in privacy cases and has not applied in any other cases since 1933, other than assault and false imprisonment—quasi-criminal matters. It is a pure anomaly. I do not think that getting rid of an anomaly simply by changing a presumption is a change too far for us to contemplate. I am not the Ministry of Justice and my Bill was not fashioned with the Ministry of Justice. I am concerned as a citizen with reducing the costs of libel proceedings in the interests of the common man and woman. The whole point about this is to make the legal system capable of being used by the poor and the not-so-rich. At the moment it is only used by the rich. It is not just a budgetary thing for the taxpayer; I am concerned about the people who use the courts. It seems to me ludicrous to have a system where the only people who can use the courts, in the main, are the rich and lawyers who become rich

by acting for them. That is not something that Labour, Liberal Democrats, Conservatives or people who are not politicians at all would want to contemplate. It is exactly that which brings our system into such bad repute. I talked to American media lawyers only four weeks ago about these issues. They look with amazement at the fact that our legal system is as it is now. It is a disgrace. This is not a theoretical point. It is a complete disgrace. We want to make the legal system able to serve NGOs and the public, who it is meant to be designed to serve. If we keep the jury as a theoretical possibility, as it is, I promise you that lawyers will manoeuvre. They are not bad people; they are just selfish and greedy.

The Chairman: There are two or three follow-up questions. I ask colleagues to ask them as briefly as possible, please.

Q34 Lord Marks of Henley-on-Thames: That is a bad point to come in mentioning that I am a practising barrister and that, like Lord Lester, I dabble in libel law from time to time without in any way being a specialist. I wanted to ask you about the single publication provision, which is in your Bill and the Government's Bill in different forms. In both cases, the rule is to apply to subsequent publications by the same person. I slightly wonder why it is not extended to subsequent publication by another publisher, where the circumstances are roughly similar, given that the subsequent publication is of material that has already been made public in the first publication. I am not sure that there is a justification for insisting that the rule, if justifiable—I agree that it is—should not apply to subsequent publication by a different publisher.

Lord Lester of Herne Hill: May I reply in writing on that? It seems to me to be exactly the sort of issue that one wants to think a bit more about. I say that also because I have not been asked any questions on the related issue of the internet, which I think will need to be addressed as well. On that point, may I reply in writing rather than right now? I understand the point.

Q35 Dr Huppert: In some ways my question is related. I forgot earlier to declare various interests, including being secretary of the All-Party Parliamentary Group on Libel Reform. I am also involved with Sense about Science and with the Libel Reform Campaign. I have seen various comments from ISPs and organisations such as Facebook or Mumsnet and a whole range of others about the liability that they have, as people who, in the case of an ISP, are essentially just passing information from one place to another as a neutral carrier. In the case of someone like Facebook or Mumsnet, it is unrealistic to expect them to monitor all the things that are published on their site. It would simply be impractical. Clause 9 of your Bill dealt with this in some detail. It is a fairly complex area. I cannot see anything even attempting to do the same in the Draft Bill as it stands, although it is in the consultation. Where do you stand on what ought to be done about this and how do we ensure the right amount of protection for people who could not realistically have been expected to take action to prevent whatever the material may be?

Lord Lester of Herne Hill: This is a really important and very difficult issue and you will certainly need to take evidence on it from experts. We have a thing called the EU E-commerce Directive, which has been implemented by regulations in this country. It

requires that the internet service provider, when informed and given notice that there is something defamatory on its website, must act reasonably quickly to take it down, or else defend the publication itself as though it was the original publisher. That is a crude summary of the current position. It leaves vague what is meant by notice and what is meant by reasonable time.

The situation in the United States is in complete contrast with the situation in Europe. Internet service providers such as Amazon US, Yahoo or Google would like to have the American position, which broadly gives absolute immunity to internet service providers from anything that is on the internet. That is because there is, of course, multiple liability otherwise in 190 countries of the world, all with different defamation and privacy laws. Therefore they seek to immunise the internet service provider from any liability.

That is not the way in which it is done in Europe, on the basis that, just as there can be multiple liability, there can be multiple damage. If your privacy or reputation are unjustifiably harmed in 190 countries through the net, that is much worse than just in one country. Therefore, there must be some form of remedy.

The difficulty is that it is impossible for one country to solve this problem on its own. The United States has done its best as far as its providers are concerned. In theory there ought to be some great international world treaty that sorts it out. We are trying to find some fair balance that is workable. What I put into my Bill was really what I got from the newspapers and broadcasters on what they thought was liveable with—not from Yahoo or Google, but from the *Guardian*, the *Times*, the BBC and, I

think, Channel 4. Mine is quite conservative. You could say that it is not enough merely to get notice; you need to get a concluded judgment by a court or a settlement before you are required to take down. That was my original inclination, but in the end it seemed to me to be too strict. The position that the MoJ team have taken is that they will consult on my stuff and not put forward anything of their own at this stage, because we do not know the answer. That is a very good thing. It is excellent to have a consultation where you do not know all the answers, because it means that it is a genuine consultation. That is the position right now. I have done the best that I could, but you will need to hear from Yahoo, Google and the rest of them and perhaps to see what has happened in Europe and then come to your own recommendation about it, which I think will be one of the most important and difficult.

Q36 Dr Huppert: So it would be your strong expectation that there will be a clause in the final Bill that will deal with this area?

Lord Lester of Herne Hill: Without betraying too many confidences, I think this is an area that Ministers have made it clear that they want to be in the Bill. They do not want it to be ducked and left out of the Bill, and they are quite right, in my view.

Q37 Lord Grade of Yarmouth: The internet is a huge term. I do not think it is helpful to lump Amazon, Wikipedia, Google and Facebook together. Some are publishers and some are distributors. You have to break these down into categories. Essentially, we are looking to catch the publishers, aren't we? That would be consistent.

Lord Lester of Herne Hill: Yes, that is true. I should declare an interest in that I have advised Amazon in the past. One does not normally think of them as caught by this, but they are, as publishers.

Q38 Lord Grade of Yarmouth: They are not publishers; they are distributors. If I am Tom Bower and I write a book about somebody rich and famous and there is an alleged defamation in the book, all that Amazon are doing is distributing it, like WH Smith.

Lord Lester of Herne Hill: Yes, I agree with you, but there is a reason why it is not quite so straightforward. I will give you the example that I advised on once. Amazon US published a book accusing members of the Royal Ulster Constabulary of killing Catholics.

Lord Grade of Yarmouth: They did not publish it.

Lord Lester of Herne Hill: Sorry, they distributed it. They sold the book on the internet and there were reviews on the internet about the book, commenting on their website. So every time you clicked on the book, it was a fresh act of publication so far as libel was concerned.

Q39 Lord Grade of Yarmouth: They became publishers at that point?

Lord Lester of Herne Hill: They became publishers by the click. The RUC police officers bankrupted the author—it was a highly defamatory book—made the immediate publisher, Roberts Rinehart, insolvent and then went against Amazon on the basis that Amazon were the ultimate publisher and therefore should be liable. There was going to be a case in Belfast on the whole business. The question was

whether Section 1 of the Defamation Act on innocent publication gave them a defence. In the end, the case settled, but the very fact that Amazon could be potentially liable under the existing law showed that even they are caught within the same problem. We came to the conclusion that Section 1, on innocent dissemination, is not good enough. That is why we are grappling with a better way of dealing with publishers, in the broad sense, on the internet.

Q40 The Chairman: Lord Lester, you have been extremely patient with us. There is one other question I need to ask, just to get your views on the record. Wrapping this up, I am encouraged that you are, I think, hinting that you think the final Bill might include a clause on the internet. We will obviously do our best to play a part in that. You said earlier in answer to one of my colleagues that you would write to us in more detail. We would obviously benefit from your experience and wisdom in terms of the complexity of the issue, but I think we would also benefit if you could be persuaded, in your writing, to tell us essentially what you think might make a positive difference in a world of 190 countries, as you have explained it. Is it the clause in your Bill or, on reflection, could you go further in either direction? If so, what would you like to see? It is a matter for you, but it would be very helpful to the Committee if, on reflection, you felt that you could give us at least the benefit of your experience in terms of a solution as well as an understanding of the complexity.

I do have one other fairly simple question, before you go with our thanks. Do you think that Clause 2 of the Government Bill has identified the correct factors for determining whether a publication was responsibly made?

Lord Lester of Herne Hill: I think so. One could shorten the factors, but I am sure that the nature of the publication and its context are very important. We put them at the top of the list because they are very important, especially in the scientific world. In law, as elsewhere, context is everything and it is important to spell that out. The gravity of the implication is obviously relevant. The extent of the public interest is obviously crucial. The other matters are to do with the responsible nature of the editorial and news-gathering judgments. They are also important as long as none of them is treated as an absolute. First, it is important that they are only inclusive factors, so it is not meant to be an exhaustive list. Secondly, there will be circumstances, for example, where the defendant did not take other steps to verify accuracy and yet it was still responsible to publish. The same goes for timing. I am a bit worried about tone, but that is there to show that the way in which you do the reporting is obviously important as well.

These are all relevant factors. My worry would be if they were treated as being rigid and exclusive or written in tablets of stone. That is not the intention. I am broadly happy with them and I would not add to them, because we get back otherwise to Lord Nicholls of Birkenhead's list, with too many factors and they are not really commensurable. You finish up with a mess.

As the person who lost the Reynolds case, in substance, I should tell you an interesting part of that. Lord Steyn was the judge who said to me in argument, "Lord Lester, what about German constitutional law?" My heart sank, because I knew nothing about it. I did by the next morning. German constitutional law does what is

called ad hoc balancing, much like Strasbourg does. The next morning I said that the trouble was legal uncertainty. He said, "Well, it still seems to us a good approach". I am very rarely right as a prophet, but my goodness, legal uncertainty from the way Reynolds has been interpreted is correct. I then consulted a senior German former judge, who said to me that ad hoc balancing is just a cop out. There are no criteria at all. The public interest test cannot just be standardless; there have to be criteria, but they have to be the minimum criteria, not the maximum, it seems to me, otherwise you finish up with the problem that we have at the moment with Reynolds, which is that it is virtually useless to NGOs in particular.

As for your interesting attempt to persuade me to write to you with a solution about the internet, perhaps it explains why I got a 2:1 and not a first in my degree in Cambridge, but I am not sure that I am capable of doing what you imply. I will try, and probably fail.

The Chairman: I would encourage you to consider my suggestion as one of the larger compliments that you will be paid this week. On behalf of the Committee, I thank you very much indeed. Reverting to what I said at the start, I think the country and Parliament are in your debt for the work that you have done. Thank you for your patience in explaining it to us today. We are very grateful. Thank you.